

THE SUBTLE POWER OF INTANGIBLE HERITAGE

LEGAL AND FINANCIAL INSTRUMENTS FOR
SAFEGUARDING INTANGIBLE HERITAGE

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EXECUTIVE SUMMARY



Cultural policy can contribute to social and economic development by growing our cultural capital, promoting local identity and promoting global cultural diversity. Tangible and intangible heritage forms a crucial part of this cultural capital and needs to be safeguarded. At the International Network on Cultural Policy (INCP-RIPC) meeting in Cape Town in October 2002, member states decided to adopt and to implement national policies to protect and promote cultural heritage. South Africa and Senegal agreed to write a research report analysing the legal and financial instruments currently employed by countries and regions to safeguard their intangible heritage.

In drafting this research report, we began by discussing the definition of intangible heritage. We looked at various legal and financial instruments employed by countries and regions to safeguard their intangible heritage. We also identified international instruments for this purpose. We then outlined and analysed various elements within existing legal and financial instruments which are needed to safeguard intangible heritage. Finally, we made recommendations for cultural policy-makers which could help to safeguard intangible heritage.

Intangible heritage consists of the oral traditions, memories, languages, traditional performing arts or rituals, knowledge systems, values and know-how that we want to safeguard and pass on to future generations. Intangible heritage can be found all over the world. It includes meanings associated with places and objects, making it an essential component of all heritage. Because cultural activity plays an essential part in identity formation, it is essential not to lose our ancient knowledge, especially the traditional and indigenous knowledge that has been marginalised for so long. However, not all intangible heritage is old, rural or indigenous to a particular area or to a specific, ethnically defined community. We need to remember and value diffuse and modern heritage forms like the oral histories of people who suffered under apartheid or other forms of colonialism.

A number of countries have developed laws and policies to manage intangible heritage. Each country or region tends to focus on specific issues. One of the leading voices has been Japan, which has an integrated approach to tangible and intangible heritage. For over 50 years, Japan has recognised the importance of the intangible heritage in Japanese building techniques, crafts and performing arts. Australia and New Zealand have been particularly rigorous in developing the relationship between government and indigenous communities, both in assessing significance and deciding on the management of heritage such as cultural landscapes with spiritual significance. In Canada, the key issue has been the use of indigenous frameworks to assess landscape significance in national parks. Although not much legislation developed by countries in Africa directly mentions intangible heritage, postcolonial Africanisation policies have encouraged local traditions and languages for some time. In South Africa, heritage legislation explicitly covers intangible values associated with places and mentions the importance of popular memory as a form of 'living heritage'. The emphasis in most national legislation remains on heritage places, however, rather than on intangible heritage or even heritage objects.

Most of the work on specific instruments for safeguarding intangible heritage has been done at an international level by organisations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO). Instruments like UNESCO's new Intangible Heritage Convention have helped us to expand the concept of heritage beyond buildings, places and objects

and to correct an earlier bias towards Western buildings in heritage lists. There is no technical need to have separate international instruments for the safeguarding of tangible and intangible heritage, although having two separate heritage registers may assist in redressing past inequalities.

The separation between the World Heritage Convention and the new Intangible Heritage Convention may, however, perpetuate the idea that the heritage of the West is tangible, 'civilised' and separable from the 'intangible' heritage of the developing world. It is important to ensure that the existence of two World Heritage Conventions does not perpetuate existing dichotomies and inequalities between North and South or East and West. It is therefore critical that close relationships between these two instruments are set up, particularly regarding administration and the development of operational guidelines.

WIPO's work on the protection of intellectual property rights has suggested that community rights over intangible heritage can only partly be protected by existing international intellectual property law. Specific protection may be provided by a *sui generis* regime, but intellectual property protection is only one element in a whole range of possible ways to ensure that communities can continue to benefit from, and practise, their intangible heritage. It is not the only way of safeguarding the intangible heritage and protecting community rights.

Governments will have to develop ways of supporting communities in their quest to safeguard their intangible heritage. One of these ways may be the development of databases or registers of intangible heritage. The format for the listing of intangible heritage on national or international registers will need to be different from that used to create lists of tangible resources. On seeking listing on national or international heritage registers, practising communities would need to provide information to confirm the provenance, significance and ownership of such resources. There would have to be a variation in this documentation process for resources that do not have a cohesive, well-defined or extant practising community, or whose practising community is willing but unable to be involved in listing the resource. In creating such registers or databases, due attention should be given to the protection of intellectual property and to the recognition of community control over and ownership of their heritage resources.

Heritage should not always be celebrated uncritically. Recording what we know of the past (whatever its moral status) and using it to inform the present is helpful and valuable, but uncritically accepting utopian versions of the past or perpetuating damaging aspects of the past is not. We cannot, for example, condone the physical abuse of women because it is 'traditional'. The notion of human rights is often presented as a universal aim of all societies, but in reality many societies continue to function in ways incompatible with human rights discourse. If we restrict intangible heritage listings to forms of heritage that correspond with human rights principles, this will affect not only what can be considered heritage but it may also mean that the form and/or modes of transmission of some forms of heritage would have to be encouraged to change.

It is difficult to 'manage' intangible heritage forms in the same way that built heritage has been managed because intangible heritage forms change so frequently. Intangible heritage is often not expressed in a permanent physical form. Every performance or expression of intangible heritage is different. Changes can, however, be documented and

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communities can be encouraged to continue practising and passing on the traditions. Heritage only retains its significance through performance or use. Governments therefore need to devolve greater responsibility for heritage management to the communities who use, practise or own this heritage. This highlights the need for heritage experts to work with communities too. We also need sustainable ways of protecting the rights of communities over their knowledge and skills, and of linking the safeguarding of heritage with community development. The best way of safeguarding intangible heritage is by supporting cultural activity at the local level.

It is often difficult to define who owns a specific cultural form and who constitutes a community. We therefore need to think carefully about what we mean by 'community' and 'ownership' so that the rights of communities to benefit from profits associated with the commercial exploitation of intangible heritage are maximised. These rights should not depend on models of inheritance that are more appropriate to family jewels than to cultural practices. Development needs to be closely linked to heritage management strategies, but funding should not be contingent on the identification of heritage forms. The solution is not to ring-fence budgets and instruments for safeguarding intangible heritage, but to integrate issues around heritage conservation into all development work and to write national instruments with this in mind. Safeguarding intangible heritage should be one of the ways in which general development funding finds appropriate and sustainable channels for use rather than a means by which development funding is obtained.

Economic incentives to safeguard intangible heritage will probably play the largest role of all in encouraging transmission and re-enactment of intangible heritage. Simply creating a heritage product for sale to outsiders, however, will not necessarily safeguard intangible heritage or be sustainable. New reasons for cultural production will change traditional craft techniques, performances and other forms of expression, and may (or may not) have a negative impact on the meaning of the heritage resource for the community. Models of successful interventions and innovative instruments need to be developed and shared more broadly. The most successful incentives and safeguarding strategies will involve the use of intangible heritage forms as springboards for new cultural expressions that have relevance and meaning in the modern world. An excellent example can be found in broadcasting initiatives that use local vernaculars to tell current news and provide cultural commentaries while collecting advertising revenue.

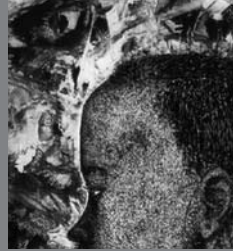
This study can form the basis for lobbying for changes in existing international instruments such as UNESCO's Intangible Heritage Convention, the World Heritage Convention or WIPO's model legislation. Any international instrument for the safeguarding of intangible heritage should address the historical imbalance in international heritage listings which has resulted in the under representation of the heritage of developing nations. It should, however, promote an integrated approach to the safeguarding of both tangible and intangible heritage. In providing guidelines for the safeguarding of intangible heritage, it should also make sufficient provision for the involvement of communities who practise or own that heritage.

Perhaps most important, this study can also inform national policy-making. National heritage legislation can provide for the safeguarding of intangible and tangible heritage under one legislative umbrella. Separate heritage registers for intangible heritage can be

created where necessary to redress the historical focus on heritage places. It may also be necessary to develop special guidelines for the safeguarding of intangible heritage. This will improve and expand on traditional approaches to the safeguarding of tangible heritage by making us more sensitive to the role of communities, intellectual property and the need to maintain the vitality of heritage through use.

One of the biggest challenges for the safeguarding of heritage, particularly the intangible elements, is not just the development of national cultural policy and legislation but also the better integration of the functions of government departments responsible for culture, heritage and social development. The discussion on intangible heritage challenges the neat compartmentalisation of government policies on heritage, culture and development. We need to consider the integrated administrative and financial context within which heritage legislation is implemented. Heritage administrations should be neither ghettos for uneconomical cultural artefacts nor platforms for selling off the nation's cultural capital to tourism. They should be focused on identifying and improving the connections between communities and their cultural capital, and integrating this work with social and economic development activities in the most appropriate and sustainable manner. Safeguarding intangible heritage should not be a cheap ticket to development funding so much as one of the ways in which development funding finds appropriate and sustainable channels for use.

INTRODUCTION



At the International Network on Cultural Policy (INCP-RIPC) meeting in Cape Town in October 2002, member states decided to adopt and implement national policies to protect and promote cultural heritage. Mexico submitted a report at the Cape Town meeting on five national experiences in promoting and safeguarding¹ tangible and intangible cultural heritage. The South African Minister of Arts and Culture, Dr Ben Ngubane, and Minister Amadou Tidiane Wone of Senegal agreed to present a joint research report at the INCP-RIPC Conference in Croatia in 2003 on the legal and financial instruments for safeguarding¹ intangible heritage. It is this research report that has now been published by the HSRC to allow for wider discussion of the issue within the African context.

The aim of the INCP-RIPC is to develop an inventory of the financial and legal instruments that exist internationally to underpin the development, promotion and preservation of intangible heritage. They wish to use this inventory to engage with other organisations such as UNESCO and WIPO to ensure the appropriate safeguarding of intangible heritage, especially in the developing world and non-Anglophone countries. INCP-RIPC member states will use the resource to help draft appropriate instruments at a national level.

In writing this research report for the INCP, we found that most of the work on specific instruments for safeguarding intangible heritage has been done at an international level by organisations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO).² Most countries do not yet have specific national instruments for safeguarding intangible heritage. Many have more general instruments for financing arts and culture, safeguarding heritage places and objects, and for protecting community rights over intangible heritage through constitutional provisions, copyright laws, and so on. Some of these instruments have not been specifically designed to safeguard intangible heritage but could still play an important role in doing so, and where possible they have been discussed. A few countries, especially in East Asia and Oceania, have been at the forefront of developing instruments specifically designed to safeguard intangible heritage. This study focused on the assessment of instruments already written in, or translated into, English, because of time and budget constraints. A limited amount of work was done on French instruments.

In this research report, we have therefore concentrated on providing an insight into some of the debates around the definition and management of intangible heritage, and on discussing elements within existing legal and financial instruments that could help to safeguard it rather than listing all instruments and doing a comprehensive review of each instrument.

Future work should couple a multilingual analysis of the global heritage legislation not covered in this research report with an in-depth series of national studies that examine the way in which the historical, cultural and economic situation of a country, as well as its current legislative environment, affects the identification and safeguarding of its intangible heritage in a specific place.

¹ As in the UNESCO Draft Convention on Intangible Heritage (2002b; and 2003e, 2(3)) 'safeguarding' has been used in this research report to mean 'adopting measures to ensure the viability of the intangible cultural heritage, including the identification, documentation, protection, promotion, transmission and revitalization of aspects of such heritage'.

² UNESCO currently has 186 Member States. The main objective of UNESCO is to contribute to peace and security in the world by promoting collaboration among nations. It uses education, science, culture and communication to further universal respect for justice, the rule of law and for human rights and fundamental freedoms. These are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.

Only through such an in-depth study can the impact on the safeguarding of intangible heritage of a variety of legal and financial instruments (not just those specifically designed to safeguard intangible heritage) be properly assessed. Particular emphasis should be placed on identifying financial incentives for safeguarding intangible heritage. More detailed recommendations can then be made for the improvement of international or regional instruments and the development of an appropriate approach to the safeguarding of intangible heritage at a national level.

Key questions for the project

- What is intangible heritage?
- Which countries or international bodies have developed legal and financial instruments to manage intangible heritage?
- How can these instruments help to safeguard intangible heritage?
- How can we develop better instruments to safeguard intangible heritage?

Key findings of the project

- Intangible heritage consists of the oral traditions, memories, languages, traditional performing arts or rituals, knowledge systems, values and know-how that we want to safeguard and pass on to future generations. It is essential not to lose our ancient knowledge, especially the traditional and indigenous knowledge that has been marginalised for so long; we need to remember and value more recent heritage too, such as the oral histories of people who lived under apartheid.
- There is no need to have separate legal instruments for the safeguarding of tangible and intangible heritage, although having two separate heritage registers may assist in redressing past inequalities. It is important to ensure that separate instruments or registers, where they exist, do not perpetuate existing dichotomies and inequalities between North and South or East and West.
- Communities are the mode of creation and transmission of intangible heritage and thus are critical to its survival. Governments will have to develop ways of supporting communities in safeguarding their intangible heritage. Communities cannot protect their intangible heritage unless they can protect their intellectual property rights over these resources as well as improve or retain their socio-economic status. Government arts, heritage and development functions should accordingly be closely linked.
- Economic incentives to safeguard intangible heritage will probably play the largest role of all in encouraging transmission and re-enactment of intangible heritage. Simply creating a heritage product for sale to outsiders, however, will not necessarily safeguard intangible heritage or be economically sustainable.

WHAT IS INTANGIBLE HERITAGE?



Heritage is often defined as 'what we value', or 'what we wish to pass on to future generations'. Heritage resources provide living communities with a sense of continuity with previous generations. They are important to cultural identity as well as to the conservation of the cultural diversity and creativity of humanity. Intangible heritage has been defined as those aspects of heritage that, unlike places or objects, are ephemeral: these include oral traditions, languages, traditional performing arts, knowledge systems, values and know-how.

Cultural identities relate to the present and future as well as to the past and are always changing. Thus, UNESCO Director-General Koichiro Matsuura suggests that 'intangible cultural heritage is not just the memory of past cultures, but is also a laboratory for inventing the future' (UNESCO 2002a). As the Cultural Policy for Botswana states,

Cultural development must encompass the preservation of traditions, of history and of the moral, spiritual values and norms handed down by past generations, as well as address issues related to the present, contemporary creativity and the ultimate purposes and values suggested by the future. (Botswana 2001: 5)

During the twentieth century, built heritage (especially in Europe) dominated international heritage lists as an icon of civilisation, permanence and modernity. Traditional Western assessments of heritage value have emphasised high culture and monumental forms (eg. cathedrals) over other heritage forms. The current interest in intangible heritage is rooted in a late-twentieth century tendency to re-evaluate the benefits of modernity, express a fear of the effects of globalisation and search for smaller-scale local identities. Globalisation is feared as a cultural bulldozer capable of flattening marginal cultural forms in the same way that Hollywood or Bollywood floods the local film market. The Stockholm 'Power of Culture' Conference of 1998 summarised this view:

Even more markedly than for the built heritage, the immaterial rural-based heritage of yesterday has become, for the mass of urban dwellers that the world population is increasingly becoming, a kind of puzzle that needs to be reconstituted, a mass of fragmented knowledge whose strands need to be brought together. The weaving together of a new fabric of meaning for the cultural heritage is itself a challenge to our creativity. (Stockholm 1998: point 28)

The growing concern to explore a pre-modern or rural heritage was coupled with postcolonial political emphases on democracy and cultural diversity (UNESCO 2001a; López 2002). Traditional, often marginalised, rural communities thus became a new focus of attention both politically and culturally in a search for new identities. The Stockholm Conference also underlined the relationship between culture and development. Developing nations in East Asia and in Africa gained more of a voice on international bodies like UNESCO, and there was an attempt to broaden the definition of heritage. Non-monumental, or intangible, heritage forms that often dominate in developing countries became a focus of attention (UNESCO 1999).

The way in which intangible heritage relates to national cultural identity and politics can be illustrated by giving examples of how different forms of intangible heritage are celebrated and identified in different parts of the world. In East Asia, traditional building, craft techniques and performance are the foci of intangible heritage listings.

As of April 1, 2000, there were 104 individuals and 24 groups designated as 'Living National Treasures' in Japan, that included eight performing arts (Kabuki, Noh, Music, Dance, etc.) and eight applied arts (ceramic, textile weaving, stencilling, dyeing, lacquerwork, metalwork, wood and bamboo work, doll making, stained ivory engraving and paper making). In countries such as Japan, where almost all the traditional building materials are organic, built heritage requires constant maintenance including regular replacement of rotten wood. The preservation of authentic carpentry, plastering workmanship, and other traditional building techniques is therefore as important as the preservation of original building materials. (Nishimura in Campean 2001: Japan, pages 5, 8)

In northern Europe, what is identified as intangible heritage includes oral tradition (stories, fairy tales and folklore), wooden vernacular architecture and the skills and knowledge of groups like the Sámi.

The Sámi were traditionally nomads, following the seasonal cycles from reindeer herding areas to specific fishing locations and hunting grounds. The craft of building is another intangible aspect of Scandinavian heritage. For around a thousand years most houses in Scandinavia were wooden constructions using the same horizontal log-house technique or corner timbering (blockbau) because of the abundance of building material available from the forests. This building tradition, based on the skills of corner timbering, was so strong that no one ever worried about its continuing existence. Most of today's buildings were, however, built in the last few decades, and this trend continues. People continue to move from the rural areas to the major cities. The old traditional red-painted log buildings, typical of the Finnish landscape, now often lie empty. In 20 years they may have disappeared altogether. (Nurmi-Nielsen 2000)

In North America, the traditional focus in heritage discourse has been on natural places rather than on buildings. It is therefore not surprising that in discussing intangible heritage many of the issues have related to a reappraisal of landscapes in the light of First Nations' cultural traditions. In Australia, sacred Indigenous³ places and belief systems have been an important focus in work on intangible heritage. The places and oral histories associated with resistance by Indigenous people to colonialism in Australia have also been recognised and celebrated (Truscott 2003). In developing countries, the intangible heritage that tends to be emphasised is the pre-colonial, indigenous and ethnic heritage. In this regard, South Africa is something of an exception in foregrounding the oral history of experiences of oppression under and resistance to apartheid.

Even before the end of apartheid in 1994, a number of oral history projects (including the History Workshop and the Western Cape Oral History project – now the Centre for Popular Memory) were undertaken in an attempt to resist the process by which the state and its collaborators sought to forget the history of oppression. After 1994, South Africans' common experiences under apartheid have become a focus for the

³ In Australia, indigenous communities are referred to as Indigenous communities or as Aboriginal and Torres Strait Islander communities. A distinction is made between 'Indigenous' and 'historic' heritage, the latter referring to heritage related to European settlement. In this research report, this format for the terminology is not used except when referring to Australian examples.

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creation of national unity under the new democratic government. Oral history is central to the telling of the story of resistance to apartheid because of widespread censorship and repression before 1994, existing traditions of orality and a high rate of illiteracy. Oral history has been recognised as a heritage resource in the National Heritage Resources Act (NHRA, South Africa 1999) and the National Archives Act (1996, amended 2000).⁴ The Department of Arts and Culture has spearheaded a National Oral History Programme, in close collaboration with the National Archives. The National Archives also maintains a National Register of Oral Sources and a Directory of Oral History Projects (Harris in Deacon et al. 2003). Museums like the apartheid Museum, District Six Museum and Robben Island Museum have structured whole collections or exhibitions around audiovisual material and oral histories. (Deacon et al. 2003: 13–14)

The value of heritage is something assigned in the present because heritage represents what we have almost lost and what we wish to call on as proof of who we are and where we wish to go in the future. Identifying what constitutes heritage and assigning heritage value is thus a deeply subjective process. It happens in the context of current national and international social trends and politics, and often favours certain groups over others (Lowenthal 1998: ix–x). This does not mean we can or should try to ‘get the politics out’ of heritage policy and practice. But we do have to make sure that in seeking solutions to political and heritage issues, we think clearly about rationales and underlying assumptions.

Definitions of intangible heritage have been deeply influenced by international, national and regional politics, the specific nature of regional histories and cultural forms, and concerns about the threat of globalisation and about the maintenance of cultural diversity. Discussions on intangible heritage have emerged from a critique of the bias towards grand buildings as representatives of world heritage. This bias had its roots in the anthropological dichotomy between ‘primitive’ and ‘civilised’ culture that became popular in the West during the Enlightenment (Foucault in Seleti 2003). We should be careful not to perpetuate this dichotomy in our attempt to redress the monumentalist bias. Cultural heritage cannot be compartmentalised into ‘civilised’ tangibles and ‘primitive’ intangibles, and intangible heritage forms do not exist only in the non-Western world. Concerns about the maintenance of cultural diversity in the face of globalisation (or the expansion of Western multinational companies) are very real. It is important to create the conditions in which people have a choice of various cultural ‘citizenships’ (Chidester et al. 2002) that are given recognition and support by government. However, we should remember that the world has long been a cosmopolitan one, and cultural traditions have not been maintained in isolation from outside influence. Although it has value in promoting the contribution of all cultural forms to a common humanity, the notion of cultural diversity, especially in the developing world, can also deepen perceptions of difference and create new opportunities for conflict (Joffe et al. 2002).

In Stockholm in 1998, the Intergovernmental Conference on Cultural Policies for Development suggested that the world’s intangible heritage was at risk and needed to be properly managed and safeguarded as part of a development agenda. The conference noted that there had been a lag in policy-making for intangible heritage management. The Stockholm Conference suggested that UNESCO’s programmes and the drafting and

⁴ All South African legislation is available on <http://www.polity.org.za/>

implementation of national cultural policies could help safeguard intangible heritage (Stockholm 1998). UNESCO has recently developed a new Convention to safeguard intangible heritage. UNESCO Director-General Mr Matsuura says of the new Convention: 'I hope [it] will lead to a set of principles and measures that are universally acceptable ... with a view not to constraining and immobilizing but rather to facilitating the invention of new forms of national and international solidarity' (UNESCO 2002a).

The definition and management of intangible heritage is a complex matter that needs both careful analysis and the development of appropriate mechanisms. We do not yet have a strong historical understanding of how intangible cultural forms change over time and why they sometimes disappear or show such resilience over time. The loss of intangible knowledge and skills in a community has not been a recent phenomenon, as this example shows:

During a period of total isolation for a few hundred years before 1818, when the polar Inuit met the European explorer John Ross in what is now northern Canada, this group of Inuit had lost three important technologies that were in use throughout the rest of the Inuit world: the bow, the kayak and the pronged fish harpoon. They retained the words for the lost technologies and retained the concepts in their legends but they could no longer make a bow to hunt caribou, hunt sea mammals from a kayak or harpoon fish in the rivers. This made their survival very marginal. Anthropologists suggest that the technologies could have disappeared because of a number of circumstantial events such as the sudden death of a few key toolmakers, the relative scarcity of materials or a period of bad weather that made kayaks impractical. (Turk 1998: 210)

It is not easy to understand the disappearance of survival technologies in marginal environments such as these. It may be even more difficult to understand how other forms of intangible heritage are passed down through communities and changed over time. If we wish to identify and manage our intangible heritage with the help of legal and financial instruments, we will need to ensure that existing mechanisms for its transmission are supported rather than undermined. Intervention by government or other agencies may not be desirable or practical in all cases, and some interventions may be damaging, so instruments for safeguarding intangible heritage need to be carefully designed and assessed.

Why do we categorise some heritage as intangible?

Something intangible is something one cannot touch, something ephemeral. All meanings associated with objects and places are by definition intangible, as are the performing arts, sound, language, know-how and spirituality. Jean-Louis Luxen, then Secretary General of ICOMOS (the International Council on Monuments and Sites),⁵ suggested that 'the distinction between physical heritage and intangible heritage is ... artificial' (UNESCO 2000: 4). Intangible heritage gives meaning to the tangible: to places, musical instruments, ritual objects, and so on. Dawson Munjeri argues that tangibility is thus secondary: 'the tangible can only be interpreted through the intangible' (Munjeri 2000). The tangible acts

5 The International Council on Monuments and Sites (ICOMOS) is an international non-governmental organization of professionals dedicated to the conservation of the world's historic monuments and sites. It evaluates cultural properties and makes recommendations to the World Heritage Committee for inscription.

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as a mnemonic of memory (Beazley 2002), although the relationship between place or object and the meanings associated with it is, of course, very complex (Truscott 2003).

All tangible heritages therefore have intangible values associated with them, but not all intangible heritages have a tangible form (Prosalendis 2003). Most heritage carries meaning in a number of different media (eg. in the musical instruments, dialect, written words, symbols and dress of a particular ritual form) (Hofmeyr 2003). If the medium carrying most of the significance of the heritage is not primarily expressed in a material form (eg. oral poetry), the heritage resource is designated as 'intangible'. The heritage landscape thus produces a continuum of portability, with intangible heritage with few tangible traces at one end (eg. nursery rhymes, which are not associated with specific places or instruments), and heritage in which much of the significance lies in an immovable tangible form (eg. a specific building significant for its architecture) at the other (Morris 2003). Most of the mechanisms for managing intangible heritage will also therefore apply to the management of tangible heritage and may be of great benefit in revising our approach to managing places and objects (as has been seen in the revision of the Australian Burra Charter of 1999: Truscott 2003).

So, if most heritages have both tangible and intangible traces and there is a continuum of tangibility within heritage, why do we wish to work with a category of heritage that we term 'intangible'?

- *The category of intangible heritage encourages the recognition of formerly marginalised forms of heritage.* In the heritage field, 'monumentalism', or a focus on Western buildings and great men, has traditionally dominated the field. The idea of intangible heritage has provided an opportunity to include new forms of heritage and democratise the process by which value is assigned to heritage – local people, often in the developing world, begin to play a larger role. This will be a positive influence on heritage listings in the West and create opportunities for more non-Western heritage listings. Much of the heritage in East Asia, Africa and Oceania has been inscribed on the World Heritage List as heritage sites with intangible values, or is recognised under UNESCO's intangible heritage projects (Masterpieces of the Oral and Intangible Heritage and Living Human Treasures: UNESCO 1999). In 1999, the special role of women in transmitting intangible heritage was also acknowledged (UNESCO 2001b).
- *Investigating intangible heritage as a concept helps us to review and expand the notion of heritage as a whole.* Intangible heritage (and its tangible forms) need not be tied to a specific place. This can allow the recognition of routes, practices, ideas, knowledge and other forms of heritage that can and do cross national boundaries. Discussion about intangible heritage also raises the question of whether cultural products or practices need to be generally highly valued outside the community where they are practised or produced, in order to be defined as heritage. Also, it raises the question of whether our understanding of 'heritage' should be restricted to what is old, traditional, indigenous, tied to ethnic identities, and so on.
- *We need to develop new ways of safeguarding intangible resources, which may improve existing management practices for tangible heritage.* Intangible heritage is transmitted largely by crafts of memory such as mnemonic devices in poetry or ritual, or institutionalised systems like apprenticeship (Hofmeyr 2003). Management of intangible heritage accordingly needs to include ways of making the heritage tangible (through documentation, in writing, by video, etc.) as well as encouraging

its reproduction in the traditional form (through performance, apprenticeship, etc.) (Blake 2001: vi–vii). Communities' rights over intangible heritage (especially knowledge, secret rituals, etc.) also need to be established and protected.

As we noted above, UNESCO developed a new Convention (UNESCO 2002b; UNESCO 2003e) to safeguard intangible heritage along the lines of the World Heritage Convention for places (WHC (1972); see World Heritage Centre 2003). They chose to develop a separate Convention for various legal and historical reasons. These include the difficulty of redrafting the narrow definition of cultural heritage in the WHC, which refers only to monuments, buildings and places, and of revising the criterion of outstanding universal value for inscription on the World Heritage List (Blake 2001: 72–73). Other international organisations, including the World Intellectual Property Organization (WIPO), are working to give communities certain rights associated with intangible heritage. A number of countries have already drafted, or are engaged in drafting, legislation to identify and safeguard intangible heritage. These instruments will be discussed in greater detail below.

The drafting of these legal and financial instruments to safeguard intangible heritage can pose certain challenges, however:

- *We need to move beyond the old dichotomy between 'civilised' Western (tangible) heritage and 'primitive' non-Western (intangible) heritage.* The built heritage of 'the West' (covered by the WHC) and the heritage of 'the rest' (covered by the Intangible Heritage Convention) could parallel older distinctions made in the anthropological tradition between civilised and primitive cultures (Seleti 2003; Mbembe 2003). This could mean that (a) the intangible cultural forms of the Western world or dominant groups are not fully recognised and (b) the tangible cultural forms of the developing world (however rare) are not sufficiently protected and valued. Many dominant or mainstream Western knowledge forms, for example, would be classed as science rather than culture, a definition that loses sight of their historical development and social construction. Traditional medical knowledge about the use of a specific plant would be classed as 'intangible heritage', while Western medical knowledge systems that use commercially prepared pills from the same plant would be classed as 'science' (Mndende 2003).
- *All heritage of value to communities should be respected.* Using 'exceptional universal value' as a criterion for listing intangible heritage on national or international registers can be subjective and elitist. Much intangible heritage is important at a community level, and all of this heritage, not just that with broader appeal, should be appropriately safeguarded (Grenada et al. 2003).
- *Intangible heritage listings should be as inclusive and diverse as possible.* The definition of intangible heritage as relating only to indigenous or traditional forms is dangerous in that it encourages a tendency:
 - a. to acknowledge resources relating to certain ethnic identities and not to others. Listing of resources by national governments will limit and influence the kinds of resources deemed valuable; minority groups not identified by national government as 'indigenous' will not receive priority;
 - b. not to list resources that do not relate to ethnic or national identities. South Africa, for example, has just emerged from a history of apartheid segregation based on 'ethnic' categories and the dominance of 'white' cultural forms on national heritage listings. Attempts to redress this situation must result in the declaration of more heritages relating to other communities (Mndende 2003), but they should

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also encourage the listing of heritage that speaks to other identities and across ethnic boundaries (Kolbe, Hofmeyr & Witz 2003).

- *Intangible heritage consists of vibrant cultural practices that will require creative approaches to safeguarding that are driven by the practising community.* The concept of intangible heritage presupposes what we have called in this research report a 'practising community' – a community that has created and/or practised an intangible cultural form. This could be a community of gay men, chess players, Sami people, scientists, trained African herbalists, etc. Practising communities need to ensure the use, enjoyment and continued transmission of intangible heritage. Careful attention should therefore be given to developing appropriate legal and financial mechanisms for identifying intangible heritage and assisting practising communities in its management.
- *Techniques for safeguarding intangible heritage should be applied to the intangible values associated with places and objects, and heritage should be understood as holistically as possible.* The conservation of objects and places does not always preserve their significance if it does not take account of intangible values. Should there be, for example, an important ritual associated with a boat, it is no good just putting the boat in a museum in order to protect the significance of that ritual. Guidelines on managing intangible heritage should therefore form part of the WHC guidelines as well as national place and collections management guidelines (Smith 2002).
- *Communities can and should benefit from profits generated from the use of intangible heritage.* However, it can be difficult and sometimes unfair to assign rights to benefits on the basis of community ownership of intangible heritage. Ownership of an intangible heritage resource is not the same as ownership of a thing or a place. Sometimes it is a series of individuals who pass down the skills, rather than the community as a whole (Truscott 2003), and it is often difficult to define the community or prove their ownership (Handler in press). This means that the concept of community ownership and the relationship between development and heritage should be carefully considered in the drafting of legal and financial instruments to manage intangible heritage.



INSTRUMENTS FOR SAFEGUARDING INTANGIBLE HERITAGE

Instruments that specifically aim to safeguard intangible heritage have been developed within the context of a growing number of national and international instruments affirming the importance of cultural life for the well being and development of humanity. UNESCO, for example, was established to promote education, science, culture and communication in the quest for universal respect for justice, the rule of law, human rights and fundamental freedoms. Cultural policies at a regional and national level have also emphasised the importance of culture, sometimes emphasising the need to acknowledge different cultural identities and sometimes emphasising the recognition of cultural similarities within countries, regions and humanity as a whole. The cultural agreement of the Economic Community of West African States (ECOWAS), drawn up on 9 July 1987, for example, is designed to affirm, protect and promote specific cultural identities of member states (Tambadou 2003).

In this section, we will provide an overview of organisations and countries that have been working on specific instruments for safeguarding intangible heritage. Because of the way in which these instruments have been developed, we have distinguished below between (a) instruments to safeguard intangible heritage values associated with places and objects, and (b) instruments to safeguard intangible heritage that does not have a strong material form.

Intangible values (aesthetic and social) associated with places have been explicitly accommodated within the WHC since the 1970s, and in some national legislation. Heritage objects, especially the intangible values associated with them, have often been neglected in both national and international instruments for safeguarding heritage. Approaches to the safeguarding of intangible heritage without strong material forms have focused on two main areas: (a) the protection of the rights of communities owning intangible heritage forms and (b) the development of a policy for the identification and safeguarding of intangible heritage. This section reviews the work that has been done on these issues in the last 30 years. Due to limitations of space, it is a brief summary – for further information see Blake (2001).

International instruments safeguarding intangible values associated with places and objects

Intangible values associated with places and objects have received the most attention in international and national instruments (the latter will be discussed in a separate section below). The World Heritage Committee is a UNESCO body that manages the World Heritage Convention (WHC), designed to safeguard heritage places of international significance. The World Heritage List currently includes 730 places in 125 member countries. Intangible values like social and aesthetic value have been in the WHC's Operational Guidelines for some time, but these values have not traditionally been used to identify places for inscription. The Guidelines, first finalised in 1977, were modified during the 1990s to make greater provision for intangible values associated with places.

With respect to intangible heritage, perhaps the most significant shift in the Guidelines happened in 1992 when changes were made to allow for the inscription of 'cultural landscapes'. Changes were made to cultural criterion (vi) that permitted the listing of places 'directly or tangibly associated with events or *living traditions*, with ideas, or with beliefs, with *artistic and literary works* of outstanding universal significance'. Changes

were also made to criterion (v) permitting inscription of places that represented ‘an outstanding example of ... *land use*’ rather than just ‘human settlement’ (Truscott 2003). This allowed for the recognition that cultural meanings associated with natural phenomena, such as the spiritual Indigenous landscapes in Australia, are worthy of world heritage status.

Uluru Kata-Tjuta in Australia is a prime example of how intangible values have been recognised later than other values in heritage identification. Of iconic significance to all Australians as a key element of the Red Heart of Australia, this monolith is also of great sacred significance to the Anangu people of Central Australia. Despite this, it was initially only included for its natural heritage values on the World Heritage List, as associative values were not originally recognised as a world heritage criterion. A spiritual landscape, with many separate Dreaming Tracks formed by ancestral creation figures that pass through this area, Uluru Kata-Tjuta was finally listed for its indigenous core significance in 1994, only the second spiritual cultural landscape to be so listed (the first being Mount Tongariro, New Zealand). The Management Plan (Uluru Kata-Tjuta 2000) explains the centrality of the traditional belief system for this place. (Truscott 2000)

There has, however, been some resistance to the inclusion of intangible values in the Guidelines. Cultural criterion (vi), perhaps the criterion most easily accommodating of the intangible values of places, was originally intended to allow the inscription of places like the Church of Nativity at Bethlehem or Cape Kennedy but was soon employed to list places associated with conflict and places whose main significance lay in their intangible values (for a historical review of the changes to this criterion see Beazley 2002). Because most of the World Heritage Sites have positive associations, the application to list Auschwitz in 1979 as a ‘symbol of the cruelty of man to his fellow-men in the 20th century’, surprised the World Heritage Committee (Beazley 2003). It was listed as a ‘unique’ site and by 1980 listings under criterion (vi) were limited to exceptional cases (Beazley 2002). The use of symbolic meaning as a criterion for inclusion of places of conflict on the list has caused political dissent among the member states, and, after the fraught declaration of the Hiroshima Memorial (1996), criterion (vi) was altered so that it could no longer be used as the sole justification for inscription. There has been a growing challenge to this view, however, because many delegates wanted criterion (vi) to be used to list places that have important intangible associations ‘of outstanding universal significance’ but do not fulfil any of the other cultural or natural criteria.

There are four categories in which places associated with intangible heritage values have been inscribed onto the World Heritage List to date:

- *Cultural routes or itineraries* whose tangible traces and constructed signs bear the mark of cultural and artistic interchanges across frontiers and across the centuries: pilgrim routes such as the road to Santiago de Compostela; trade routes such as the Silk Road; migration or exploration routes such as the Salt Road and the slave roads, including the slave holding station on Goree off Senegal (it was inscribed as a World Heritage Site in 1978). In each instance, the route identification is based on ‘serial inscriptions’ of physical evidence: however, it is the route as such that is identified as a cultural property.
- *Cultural landscapes* that bear the mark of systems of agriculture or husbandry, such as terraced rice paddies, vineyards or the wooded countryside of the bocages in

- northern France; or of traditions of human inhabitation or forms of community, such as the troglodyte dwellings of Cappadocia, the site of Sugur in Nigeria or the cliffs of Bandiagara in the Dogon territory.
- *Associative sites* that evoke a legend or myth, such as the sites of Tongariro in New Zealand or Uluru Kata-Tjuta in Australia, where there is no visible human construction but which nonetheless represent significant cultural heritage value to the local population. Australian Indigenous people believe that Uluru Kata-Tjuta was actually built by two ancestor figures, so the notion of construction is relative (Truscott 2003).
 - *Commemorative sites*, marked by a dramatic moment in human history, such as the Auschwitz concentration camp, Robben Island or the Genbaku Dome, the Memorial to Peace in Hiroshima (Luxen 2000).

A Global Strategy for a balanced and representative World Heritage List was adopted by UNESCO's World Heritage Centre and ICOMOS in 1994. At the time, African cultural heritage was 'especially under-represented on the World Heritage List, in spite of its tremendous archaeological, technological, architectural and spiritual wealth, its ways of organizing and using land and space, its network system for trade and the exchange of ideas and goods, etc' (World Heritage Centre 1997). The aim of the WHC is to ensure that the List reflects the world's cultural and natural diversity of outstanding universal value. Conferences and studies aimed at implementing the Global Strategy have been held in or are planned for Africa, the Pacific region, the Arab region, the Andean region, the Caribbean, central Asia and south-east Asia (World Heritage Centre 2003; UNESCO 1999). In 1995 and 2000, two meetings were held in Zimbabwe to identify ways of implementing the Global Strategy and to identify heritage places in a more inclusive way. Work on the Nara Document on Authenticity (Nara 1994) highlighted the need to move away from purely Western expert testimony in determining authenticity and to recognise the values that a cultural property represents in the eyes of the community concerned. The annual ICOMOS meeting was held in Zimbabwe in October 2003 and focused on intangible heritage.

ICOMOS and UNESCO initiatives on intangible heritage (see below) have stimulated some discussion about intangible values associated with moveable objects as well. The International Council of Museums (ICOM) is a worldwide network for museum professionals of all disciplines and specialisations, dedicated to the development of museums and the museum profession and the preservation of cultural heritage. The theme of the General Assembly of ICOM 2004 in Seoul, Korea, is intangible heritage (see ICOM 2003). Other initiatives include the Asia Pacific Regional Assembly of ICOM for 2002 in Shanghai, China, which dealt with both tangible and intangible heritage in a holistic context and considered museums as key vehicles for documentation, preservation and promotion of these resources. The participants drew up a regional Charter for the Safeguarding of Intangible Heritage: the Shanghai Charter. It affirms the significance of creativity, adaptability and the distinctiveness of peoples, places and communities. It recognises that these provide the framework in which the voices, values, traditions, languages, oral history, folk life, and so on are recognised and promoted in all museological and heritage practices. It recommends actions for museums to take as facilitators of constructive partnerships in the safeguarding of this heritage of humanity (Shanghai Charter 2002).

The International Centre for the Preservation and Restoration of Cultural Property (ICCROM) is an intergovernmental organisation with 100 member states, founded by UNESCO in 1959. Most of the ICCROM projects focus on place and collections management; but although recent meetings have addressed the issue of intangible heritage, it is not an explicit focus. The 'living heritage' sites programme includes two subprogrammes; a regional pilot project based in southeast Asia (Mekong River region subprogramme) and the ICCROM Forum on living religious heritage that took place in 2003 (ICCROM Living Heritage Sites 2003).

International instruments safeguarding intangible heritage without strong material forms

In 1989, the General Conference of UNESCO adopted a 'Recommendation on the Safeguarding of Traditional Culture and Folklore'. Since then, few UN member states have adopted the 1989 Recommendation. Key criticisms of the Recommendation were that it could recommend to but not oblige states to implement protective mechanisms, and that it failed to ensure that control over intangible heritage management and benefits remained with the communities who owned that heritage. There was debate about the way in which folklore had been defined in the Recommendation and about the Recommendation's scope and approach to safeguarding intangible heritage (Blake 2001: v). At a joint UNESCO and Smithsonian Institute Conference in Washington in 1999,⁶ a recommendation was made to investigate a new instrument for the safeguarding of traditional culture and folklore (Blake 2001: viii).

In spite of the criticisms of the instrument, the UNESCO Recommendation of 1989 encouraged within the international community a greater awareness of the need to safeguard intangible heritage. In 1993, Korea proposed a Living Human Treasures programme (UNESCO 1993a) to honour outstanding examples of intangible heritage passed down through generations and make recommendations to member states on the kinds of cultural policies and legislation that could be introduced nationally. A project called UNESCO Red Book of Languages in Danger of Disappearing was launched in 1993 to gather updated information on endangered languages and promote research (UNESCO 2003b). Studies of seriously endangered languages in the south-western Pacific, Siberia, Australia, Indonesia and Thailand were carried out, and an International Clearing House and Data Bank Centre for Endangered Languages was set up at Tokyo University in 1995, hosting a rich database of endangered languages (Tokyo University 1995). The UNESCO *Atlas of the World's Languages in Danger of Disappearing* has highlighted the need to safeguard certain languages (UNESCO 2001c). UNESCO's Memory of the World programme was initiated in 1996 to safeguard endangered documentary heritage (UNESCO 2003c). The programme reflects a concern to safeguard and provide access to the documents, manuscripts, oral traditions, audio-visual and electronic materials, sound recordings, and library and archival holdings of universal value that make up the memory of the world (UNESCO New Zealand 2003). Similarly, UNESCO's collection of *Traditional Music of the World* promotes the traditional musical works of many different cultural groups (UNESCO 2003d). The Intangible Heritage Unit of UNESCO's Cultural Heritage Division 'aims to serve as a link between the safeguarding of the tangible and the preservation of the intangible heritage' (UNESCO 2003a).

⁶ For the full conference proceedings and papers see (<http://www.folklife.si.edu/unesco/>).

In 1998, UNESCO also launched the *Masterpieces of Oral and Intangible Heritage*. Masterpieces proclaimed with the first group in 2001 include centuries-old traditional theatres such as India's *Kutiyattam* and China's *Kunqu* opera, a minority group's traditional chants such as the *Hudbud* chants of the Ifugao people in the Philippines and the Cultural Spaces of the Boysun district in Uzbekistan. One of the African masterpieces is the 'Oral Heritage of Gelede', listed by Benin and supported by Nigeria and Togo (UNESCO 2003h):

For 100 years, the Yoruba-nago, Fon and Mahi communities have practised their rites and dances after the harvest, as well as during droughts and epidemics. The ritual, featuring carved masks, is sung in Yoruba, recalling the history and myths of the Yoruba-nago people. The community is divided into groups which could be led by a man or a woman – the only mask society where women can play that role. Singers accompanied by a drum perform in this night-time ceremony, followed by dancers accompanied by an orchestra. Satirical masks mock certain types of behaviour. The mythical origin of the Gelede is said to reflect the transformation from a matriarchal society into a patriarchal society. It aims to pacify the anger of the mythical mothers and the spirits of the ancestors. Animal figures are often used – the snake, symbol of power, or the bird, messenger of the 'mothers'. (UNESCO 2003i)

Conferences and fact-finding missions were conducted in the late 1990s by UNESCO and WIPO, and a report was drawn up to synthesise all the suggestions for improving the Recommendation (UNESCO 2001a). This report suggested the need for a new standard-setting instrument for managing intangible heritage and protecting the rights associated with it. In 2002, representatives from 110 countries, among them 72 culture ministers, attended the Third Roundtable on Intangible Heritage and Cultural Diversity, held in Istanbul, Turkey. They discussed ways in which sustainable development, cultural diversity and intangible cultural heritage were interlinked. The two-day meeting adopted the 'Istanbul Declaration', in which they recognised the value of intangible cultural heritage and voiced their full support for effective measures at all levels, from international to local, to safeguard intangible cultural heritage. They proposed the adoption of a new international Convention recognising the complex nature of intangible heritage and its need for protection (Istanbul Declaration 2002). UNESCO has now adopted this new Convention, similar to the WHC (1972) for heritage places (UNESCO 2003e). Representatives in different regions have been developing local and regional studies to help inform the new Convention (eg. Campean 2001).

Other international organisations have begun to debate the idea of intangible heritage policy as well. The International Network on Cultural Policy (INCP-RIPC) is an international forum through which culture ministers can exchange views on emerging cultural policy issues. Through it, national ministers responsible for culture explore new and emerging cultural policy issues and consider integrated ways to promote cultural diversity (INCP-RIPC 2003). The INCP-RIPC Working Group on Cultural Heritage has identified intangible heritage as one of its key foci. Some of the questions it considers are:

- How can the important contribution that intangible heritage makes to societies be recognised?
- How can intangible cultural heritage be integrated into larger development programmes as an effective tool for social and economic development?

- How can intangible cultural heritage be used to enable people to gain access to resources and increase their capacity to improve their lives and influence decisions that affect them?
- How could the promotion and protection of intangible cultural heritage be used to encourage cultural tourism?
- How can we protect intangible cultural heritage and the peoples from whom it originates?

A report from several virtual meetings organised by Mexico was presented to the INCP-RIPC meeting in Cape Town in 2002, summarising the position of five member countries on intangible heritage (López 2002). Within the INCP-RIPC, the level of debate on intangible heritage is very general at present and there has not been direct engagement with the UNESCO proposals or with national legislation. The purpose of this research report is to assist INCP-RIPC members to do exactly that.

International instruments protecting the rights associated with intangible heritage

One of the key issues addressed in instruments to safeguard intangible heritage has been the question about community rights. This is both because of the emphasis on addressing the historical marginalisation of many forms of heritage (and the communities who practised these heritages) and the necessity to support people who will maintain intangible heritage forms as part of safeguarding them.

Intellectual property rights have been the focus of most work on the establishment of community rights around intangible heritage. There are a number of international organisations working in this area, led by WIPO. This work built on earlier interventions: in 1967, a revision of the Berne Convention provided some intellectual property protection for expressions of folklore in article 15(4) (WIPO 2001b). In 1973, the Government of Bolivia proposed to UNESCO that a protocol be added to the Universal Copyright Convention in order to protect folklore. During a meeting organised in 1976 with the assistance of UNESCO and WIPO, a committee of governmental experts adopted the Tunis Model Law, which refers to the protection of folklore (Blake 2001: 18). In 1982, UNESCO jointly issued with WIPO 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions'. Few countries adopted the Model Provisions, however.

Based on the Model Provisions, a draft treaty was prepared by the two organisations in 1984, which also did not come into force (UNESCO 2001a: 1). 'This ... would have created an obligation on States to protect folklore and this was rejected by the industrialized States on the basis of: philosophical objections to protecting a communal heritage; their assessment of the low priority of folklore; and the problem of protecting internationally a heritage that may be common to several States' (Blake 2001: 19). The World Forum on the Protection of Folklore organised by UNESCO and WIPO in Phuket, Thailand, in 1997 (WIPO 1997) and four subsequent regional meetings in 1999 (WIPO 1999) were held to review the Model Provisions.

WIPO refers to 'traditional knowledge' and 'expressions of folklore' or 'traditional cultural expressions', which broadly correspond to what UNESCO defines as intangible heritage.⁷ At the WIPO General Assembly in 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was created (UNESCO 2001a). In 2001, this Committee sent out questionnaires to individual countries asking how the Model Provisions (1982) should be adjusted (WIPO 2001a). There is ongoing discussion in WIPO and member states about intellectual property protection for 'expressions of folklore' and 'traditional knowledge'. WIPO has now developed a draft toolkit⁸ and a practical guide on the protection of traditional cultural expressions.⁹ Technical requirements for databases or registers have been drafted, including the need for appropriate security mechanisms¹⁰ and access limitations (WIPO 2003a: 10–11). In the Pacific region, a 'Model Law for the Protection of Traditional Knowledge and Expressions of Culture' has been drafted to aid regional co-operation between Pacific Island countries on intellectual property rights. The African Intellectual Property Organization (OAPI) drafted the Bangui Agreement (latest version 1999) which contains a special annexure dealing with folklore and indigenous knowledge (Blavin 2003). The Arab Copyright Convention also refers to folklore (Blake 2001: 27).

Other organisations have been involved in this area too. The Third World Network developed 'a Conceptual Framework and Essential Elements of a Rights Regime for the Protection of Indigenous Rights and Biodiversity' in 1996 (WIPO 2001b: 14). The World Health Organization (WHO) has been active in relation to the regulation, recording and intellectual property-related aspects of traditional medicinal and botanical knowledge. The Food and Agriculture Organization (FAO) has carried out work on farmers' and breeders' rights, many of whom are indigenous farmers. The United Nations Conference on Trade and Development (UNCTAD) held an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices (in October–November 2000) to identify issues with potential benefits to developing countries and to study ways of protecting traditional knowledge, innovations and practices' (UNESCO 2001a).

The United Nations Convention on Biological Diversity 1992 (CBD) requires each country that is a signatory to the Convention 'subject to its national legislation, [to] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustained use of biological diversity' (article 8(j)). A working group on the implementation of article 8(j) and related provisions has been established by the CBD Secretariat with the assistance of WIPO to assist member countries to develop legislation to implement these provisions. They are also required to define the key concepts in that article and the

7 WIPO distinguishes between traditional knowledge and expressions of folklore for the purposes of some of its work, but considers folklore to be a subset of traditional knowledge (2001b: B). Their definition of traditional knowledge is being refined but for the purposes of the 2001 survey (2001b: article 30 ff.) it was defined as somewhat broader than that of intangible heritage (by including tradition-based scientific discoveries and inventions) and also somewhat narrower in limiting itself to tradition-based innovations and creations in the industrial, scientific, literary or artistic fields. This seems not to include the spiritual aspect of culture. Fundamentally, WIPO is interested in managing the interaction between traditional knowledge and other knowledge systems, such as the use of traditional plant knowledge by pharmaceutical experts to create new medicines.

8 For example, see documents WIPO/GRTKF/IC/4/5; WIPO/GRTKF/IC/5/5 (<http://www.wipo.org/globalissues/igc/documents/index.html>).

9 For example, see document WIPO/GRTKF/IC/3/10, para. 155 (<http://www.wipo.org/globalissues/igc/documents/index.html>).

10 For example, see document WIPO/GRTKF/IC/4/14 (<http://www.wipo.org/globalissues/igc/documents/index.html>).

related provisions that recognise and safeguard the rights of indigenous and local communities over their traditional knowledge. The United Nations Environment Programme (UNEP) is working on the preservation of traditional knowledge, with a particular focus on indigenous knowledge that can assist in preserving the natural environment, subsistence resources and biological diversity. It is also concerned with the preservation of languages threatened with disappearance (UNESCO 2001a).

National initiatives to safeguard intangible heritage

At a national level, much of the policy work has been done in East Asia, Australia and Canada, although a number of countries are currently developing legislation to safeguard intangible heritage (Blake 2001: 43–44). The majority of countries ‘whose legislation protects aspects of intangible heritage do so within the framework of copyright and other intellectual property laws while others employ a mix of intellectual property-type protection with cultural heritage and other laws’ (Blake 2001: 43).

Countries in East Asia have begun the move towards the safeguarding of their intangible heritage. By the 1970s, governments such as those of Japan (1950), Korea (1964), Thailand (1985) and the Philippines (1973) had already adopted legal systems within their own countries for safeguarding intangible cultural resources, specifically in the performing and applied arts (UNESCO 2003a). These examples influenced the formulation of the debates on intangible heritage within UNESCO. In Japan, the *Cultural Properties Protection Act* of 1950, subsequently amended to include conservation areas in 1975 and listed buildings in 1996, now covers both tangible and intangible heritage (Nishimura in Campean 2001). In 1999, after a long interest in promoting folk performance art, Mongolia began to develop legislation to safeguard intangible heritage and its National Center for Intangible Cultural Heritage has established a national database (ACCU 2000b). Vietnam introduced new national heritage legislation in 2001 which will recognise and afford protection to intangible heritage (Beazley 2002).

Most wealthy countries in the West consider intangible heritage to be in the public domain and do not have legislative protection for expressions of folklore. Certain countries, however, including Finland, Sweden, Norway, Canada, Australia, New Zealand and the United States of America, have laws aimed specifically at safeguarding the cultural heritage of their native peoples (Blake 2001: 27). Canada has no specific intangible heritage legislation but seeks to include intangible heritage in existing heritage legislation. Canadian authorities recognise the importance of centralising the administration of intangible heritage, focusing on sustainability and working with local communities (López 2002). The Canadian province of Quebec has been particularly active in developing instruments to manage intangible heritage. Since 1994, the Quebec government has provided tools for making inventories of intangible heritage, focusing on ethnological knowledge and practices (Roy in Campean 2001).¹¹

The Australian government commissioned a Federal inquiry in 1986, published as *Folklife: Our Living Heritage*, which highlighted both the importance of intangible heritage and its neglect in that country until that time. Although the *Folklife* report was never systematically implemented, it raised awareness of the issue (Smith & Marotta in press). The Burra Charter (the Australian ICOMOS Charter for Places of Cultural Significance) was

¹¹ See (<http://www.mcc.gouv.qc.ca/pamu/champs/ethno/tablem.htm>).

reworked in 1999 to make more explicit reference to the critical importance of community contributions to the identification of social value (i.e. intangible values associated with places) and their key role in making decisions on the management of places with such social value (Truscott 2003). Recent national heritage policies on heritage collections and heritage places invoke intangible values in their action plans (Truscott 2000). The *Aboriginal and Torres Strait Islander Heritage Protection Bill* (1998), not yet in force, is a revision of the 1984 Act of the same name. Both the Act and the Bill provide an overarching federal (commonwealth) legal framework for the protection of Indigenous heritage in Australia which can serve as a last resort for communities who find that state or territory-level legislation cannot protect their heritage (Truscott 2003).

In many countries the only protection afforded intangible heritage is through a Constitution that recognises cultural diversity and, in the case of Mexico and other places, the value of indigenous culture. In Africa, cultural policy has been generally neglected. Government approaches to development were initially linked to governance and trade rather than culture. Most African countries created a ministry of culture only ten years after independence from colonial rule. Few cultural policies have been drafted at national level (OAU 2000: section 60). Because of the legacy of colonialism, many African countries (as well as former European colonies elsewhere in the world) have followed European trends and not much of the heritage-related legislation specifically includes intangible heritage. Although many countries deal with heritage objects in museums rather than heritage policy and legislation (Truscott 2003), in Africa, most heritage legislation protects objects as well as places. Non-material heritage forms are not usually protected by heritage legislation.

However, many African countries such as Zambia and Kenya adopted wide-ranging Africanisation policies after independence from the colonial powers, and in South Africa the government has promoted an 'African Renaissance' strategy during the last few years (Seleti 2003). This approach has helped to raise the profile of indigenous African languages and cultural forms in a number of African countries. It has also helped to ensure that folklore is specifically protected in copyright legislation in many developing countries (Blake 2001: 27; Blavin 2003). Community rights to, for example, freedom of religion have been protected in broad government policy or constitutional provisions. These rights are sometimes protected by other legislation too: for example, South Africa recently passed legislation to create a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Act No. 19 of 2002).

In the Southern African Development Community (SADC) region, few countries have cultural policies or recent heritage legislation, and many separate the administration of heritage places and objects from the performing arts. In Zambia, the *National Heritage Conservation Commission Act* of 1989 (administered by the National Heritage Conservation Commission under the Department of Tourism) does not include intangible heritage, although the Department of Cultural Services under the Ministry of Community Development and Social Welfare plays an important role in the preservation and promotion of performing arts such as music and dance, and of sculpture, painting and other cultural forms such as folklore and traditional ceremonies (Sinvula 2001). Zimbabwe's heritage legislation (the *National Museums and Monuments Act*) is even older, dating from 1972, and protects buildings, objects and culturally or scientifically significant natural places. Intangible heritage like sculpture, drama and traditional dance

falls under the Department of Culture (Chauke & Nehowa 2001). Lesotho's *Historical Monuments, Relics, Fauna and Flora Act* (41 of 1967) also deals only with places and objects (Lebeko-Molibeli 2001).

The heritage in Botswana is protected by the *Monument and Relics Act* of 1970 which covers places and objects (Mmutle 2001). It has been revised recently. Botswana's cultural policy (Botswana 2001) subscribes to UNESCO's broad and flexible definition of culture that includes intangible heritage:

Culture ... [is] the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs. (Botswana 2001: section 2.0)

Specific reference is made to intangible heritage (Botswana 2001: section 6.4), and a system of cultural centres is proposed to promote cultural activities. Namibia's draft policy on Arts and Culture also subscribes to the UNESCO definition of culture (Namibia 2001) but no specific reference is made to 'intangible heritage'.

South Africa's *National Heritage Resources Act* (1999) recognises the importance of 'living heritage' values associated with objects and places, but it does not at this stage safeguard intangible heritage that is not associated with objects or places. However, there have been a number of oral history projects in the past, and organisations like the South African Heritage Resources Agency (SAHRA) and the National Archives, under the Department of Arts and Culture (DAC), the South African Development Education Trust (SADET) history project (eg. Ndlovu 2002) and various museums are conducting a number of projects to collect oral testimony, especially that relating to the struggle against apartheid (Deacon et al. 2003).

Non-governmental organisations (NGOs) have played a large role in supporting communities to safeguard their intangible heritage. National legislation needs to play an enabling role for such organisations. In Senegal, for example, several NGOs that were regrouped within the National NGO Council of Support for Development (CONGAD) have helped to revitalise the intangible heritage. These NGOs usually act locally in terms of Act 96-06 of 22 March 1996, which devolves to local organisations with elected assemblies the powers previously held by the state to design and implement cultural development programmes. NGO support helped to develop a project for revitalising traditional trades and know-how at Ndeme in the Diourbel region which led to the creation of several salaried jobs in a rural environment (Tambadou 2003).



ASSESSING LEGAL AND FINANCIAL INSTRUMENTS

The main sources of legal and financial instruments for this study have been English-language instruments (national and international) and analyses of such instruments. An appendix is attached that lists the instruments discussed in the research report. Particular attention was given to instruments that explicitly seek to safeguard intangible heritage. Some of the instruments discussed do not specifically mention 'intangible heritage' but rather deal with 'folklore' or with intangible forms like 'traditional knowledge', language, ritual, and so on. Instruments that may impact on the safeguarding of intangible heritage but do not refer to intangible heritage, or an equivalent term, should be analysed in a separate study.

We were able to access a number of instruments from UNESCO such as the Recommendation (UNESCO 1989) and the discussions about the new Convention (UNESCO 2001a; UNESCO 2003e). WIPO (eg. WIPO 2003a) also provided much material on the development of intellectual property instruments. The Observatory of Cultural Policies in Africa (2003), Bhebe (2002) and various papers on the ICCROM Africa 2009 website (eg. Mmutle 2001) provided some information on African instruments. European cultural policies were accessed (although not extensively discussed) through the Culturelink Cultural Policy Database (2003) and the Compendium Database of European Cultural Policy (2003). The legislation in East Asia and Francophone Africa is not generally translated into English so we were not able to access it in the time available. We consequently relied on overview sources for the East Asian material instead (Campean 2001; ACCU 2000a).

Because of the limited time and large scope of the research report, we made extensive use of papers that provided overviews of instruments for safeguarding intangible heritage. We found very useful the overview of international instruments by Blake (2001) and the work by Beazley (2002) on the WHC. The US-ICOMOS study (Campean 2001) and various papers on Australian approaches to intangible heritage management (Smith 2002; Smith & Marotta in press; Truscott 2000) provided information on instruments in Australia, Canada and Japan. López (2002) provided some useful material on Mexico, Canada and Switzerland.

In this research report, we chose not to discuss the instruments one by one, but to assess how various instruments help to perform the main tasks required for safeguarding intangible heritage. These tasks are (a) defining intangible heritage and (b) managing intangible heritage. We also gave some attention to the structure of government departments and mechanisms for implementing heritage policy. This approach enabled us to focus on the good and bad aspects of a wide variety of instruments for safeguarding intangible heritage and to propose recommendations for revising national instruments for heritage conservation. We began, however, with a general comment on the aims and objectives of some of the instruments.

Aims and objectives of existing instruments

The role of cultural policy at a national level is to establish priorities for and approaches to the promotion and protection of cultural forms within a country. A cultural policy may promote certain cultural practices as national priorities because of their role in forming and promoting national or regional identity. A cultural policy forms the backdrop against which heritage legislation (and other kinds of legislation) can formalise the process of

defining and managing heritage. In South Africa, the White Paper on Arts and Culture (1996) spoke of works of art, literature and music, and oral traditions as part of the heritage of the country. Emerging from the oppressive and separatist history of apartheid, it emphasised the value of cultural diversity and the support of programmes to redress the colonial imbalance in heritage listings. This approach informed the National Heritage Resources Act of 1999, which emphasises the importance of 'living history'. Cultural policies such as those of Botswana (2001) which promote indigenous cultural forms will similarly encourage the formulation of heritage policy and projects for the safeguarding and promotion of intangible heritage. Government can play an important role in validating cultural practices:

If people don't want to continue their traditions, then they won't. But by the wider community recognising and respecting the traditions of others, and offering support should that community want to continue those traditions, we can offer the best opportunity for such tradition[s] to continue. So often, traditions disappear because they have been ridiculed by the wider community or just ignored. Mainstream culture is like a very powerful bulldozer that sweeps aside all in its way. (Johnston in Campean 2001)

At an international level, instruments designed to safeguard intangible heritage, such as UNESCO's new Intangible Heritage Convention (2003e), are drafted to foster international collaboration and creative diversity, to affirm and support intangible heritage by defining it and maintaining international registers and databases, to provide guidelines for national governments to follow, and thus to help manage intangible heritage and benefit practising communities at a national level.

In 2001, UNESCO identified the following basic principles underlying the proposed Intangible Heritage Convention:

- That intangible cultural heritage be fundamentally safeguarded through creativity and enactment by the agents of the communities that produce and maintain it;
- That the loss of intangible cultural heritage can only be prevented by ensuring that the meanings, enabling conditions and skills involved in its creation, enactment and transmission can be reproduced;
- That all instruments dealing with intangible cultural heritage facilitate, encourage and protect the right and capacity of communities to continue to enact, manage and sustain their own intangible cultural heritage;
- That sharing one's culture and having a cultural dialogue fosters greater overall creativity as long as recognition and equitable exchanges are ensured. (UNESCO 2001a: 5–6)

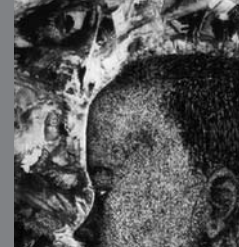
These aims and objectives suggest that UNESCO initially, at least, recognised the importance of practising communities in the transmission and management of intangible heritage, and the need to protect community rights. Other instruments at an international level aim to protect communities' intellectual property rights (eg. WIPO's Model Provisions (1982) and the Pacific Model Law (2002)). In the remainder of the research report, we discuss whether these instruments and others like them can help to safeguard intangible heritage, involve practising communities and protect their rights.

International instruments are faced with specific problems because they have to be generally applicable in a number of different circumstances, and many different countries

need to adopt them. This is less of a problem at a national level but because of the regional nature of many intangible cultural practices, it is important to encourage regional compatibility with regard to definitions and levels of protection. Devising policy to safeguard intangible heritage, whether national or international, should also give due consideration to the unintended consequences of implementation. Drafting and implementing cultural policies for intangible cultural expressions can affect them negatively. As the US-ICOMOS report (Campean 2001: Introduction page 1) argues, 'Even when the relative social value of intangible heritage has been recognized and the desirability of its survival has been established, one still needs to make sure that engaging the intangible heritage is an overall better choice than not engaging it at all.'

We will now assess existing instruments in relation to defining intangible heritage, managing intangible heritage and implementing heritage policy. Particular attention will be paid to the potential benefits and problems associated with the concept and nature of intangible heritage.

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'Cultural heritage' was defined in the WHC simply as 'a monument, group of buildings or site of historical, aesthetic, archaeological, scientific, ethnological or anthropological value' (World Heritage Centre 2003). This is an extremely narrow definition. Expanding the notion of cultural heritage to include intangible heritage requires a definition of what constitutes intangible heritage. Blake provides an interesting discussion of various terms that can be used to describe what we have called intangible heritage – she also points out various problems with the term 'intangible heritage', including its Eurocentrism (relating to the move away from monumental heritage forms) and its abstract nature (2001: 6–9). Although UNESCO has continued to use the term 'intangible heritage', other terms may be adopted at a national level. Most countries do not as yet refer explicitly to 'intangible heritage' in their national legislation.

Most definitions rely on providing examples of possible kinds of intangible heritage to clarify the meaning of the term. The instruments reviewed (including Botswana 2001; South Africa 1999; UNESCO 1989; UNESCO 2003e) and discussions of the issue (Blake 2001; Prott 1999; Smith & Marotta in press) yielded the following in definitions of intangible heritage, folklore or living heritage:

- Oral expressions: language, oral traditions, oral histories, storytelling, literature, mythology.
- Performing arts: music, dance, games, festivals, song.
- Social practices: rituals, festive events.
- Knowledge and practices: customs, cosmology and spiritual beliefs, values, traditional systems of healing and pharmacopoeia, religion, traditional means of conflict resolution.
- Traditional craftsmanship: vernacular architecture, the culinary arts and all kinds of special skills connected with the material aspects of culture, such as tools and habitat.
- Cultural spaces associated with intangible heritage practices (UNESCO 2003f) or intangible values associated with sites (WHC after 1992).

All of these forms could contribute towards an understanding of intangible cultural heritage, although definitions often emphasise only certain aspects of intangible cultural heritage. Early expert definitions in UNESCO focused on artistic creations like performance, but by the late 1990s, emphasis was also being placed on knowledge and values (UNESCO 2001a). Definitions at a national level reflect national cultural and political concerns. Many national instruments do not include oral histories in their definition of intangible heritage – the *South African National Heritage Resources Act* of 1999 is unusual in doing so. The different approaches towards the content of intangible cultural heritage can be illustrated by the following definitions supplied by Kuwait and Croatia:

Kuwait: Intangible Cultural Heritage is the nation's oral heritage, folklore and spiritual culture that consists of proverbs, habits, traditions, beliefs, actions and individual and communal qualities that distinguish [a] society from others. This cultural heritage also includes family, wedding habits, arts, letters, songs, settlement and travelling, marriage and birth, death, food, drinks, medicine and curing, typical Kuwaiti story-telling, crafts and activities of Kuwaitis in the past.

Croatia: Intangible cultural property may cover different forms and phenomena of intellectual creativity being transmitted by tradition or in any other way, and particularly: language, dialects, tongues and toponymics, and traditional literature of all kinds; folk creative works from the fields of music, dance, tradition, games, rituals, customs, as well as other folk traditional values; traditional skills and crafts. (cited in Blake 2001: 43, fn.221–222)

Blake points out that ‘one has to find a balance when defining the subject of protection in such a way that it is sufficiently narrow in scope to avoid too broad a set of legal mechanisms without ignoring important aspects of this heritage’ (2001: 11). Many definitions of intangible culture do not include religion or spirituality. Blake (2001: 80) comments that requests to include spiritual aspects of culture in the definition could be controversial and that spiritual culture should rather be safeguarded by providing religious freedoms at a national level. It is often impossible, however, to separate the spiritual aspects of cultural forms from other features (Mrubata 2003). A similar debate emerged around the inclusion of language as part of the definition in the Intangible Heritage Convention (UNESCO 2003e), although it was eventually included with support from South Africa and Francophone nations (Madiba 2003). It still remains to be clarified, however, whether spiritual culture and language should be listed as separate instances of intangible heritage or only as values associated with intangible heritage (eg. ritual and performance art). The latter would be difficult and unworkable.

Listing kinds of intangible heritage is only part of the process of definition – a general definition statement is usually included as well. Some countries have used the definition of ‘folklore’ given in the 1989 UNESCO Recommendation while others have drafted their own definitions (Blake 2001: 43). Two of the key features usually associated with intangible heritage are their weak material (often oral) form and their mode of transmission (from person to person, from generation to generation). Definitions of intangible heritage thus often exclude any intangible heritage with strong material forms. These two issues will now be discussed more fully: first, the separation of intangible heritage without strong material forms from intangible values associated with heritage objects and places, and second, the extent to which one uses the terms ‘traditional’ or ‘indigenous’ to describe intangible heritage.

Defining intangible heritage to exclude values associated with material heritage

As we have discussed above, the relationship between tangible and intangible heritage is close. ‘The intangible heritage ... informs all products of the cultural heritage – artefacts, monuments, sites and landscapes’ (UNESCO 2003a). Blake comments that the distinction between tangible and intangible heritage ‘is unacceptable to many indigenous and local cultures that are the holders of the cultural traditions that fall into this category of “intangible heritage” since it does not reflect their holistic view of culture and heritage. It also reflects an official or administrative Eurocentric view of cultural heritage that has traditionally valued monuments and sites over the intangible values associated with them’ (Blake 2001: 8–9). For these historical reasons, policy to safeguard intangible heritage has in many cases been dealt with separately from policies to safeguard intangible values associated with objects and places. UNESCO has decided to create a separate Convention for safeguarding intangible heritage. Most countries continue to have separate legislation

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and sometimes separate ministries for heritage places, heritage objects, and for promoting 'arts and culture' or 'performing arts'. This separation will be perpetuated if the definition of intangible heritage continues to exclude intangible values associated with objects and places. We do not feel that there is any good reason for separating heritage policy and legislation into instruments managing objects, places and performing arts separately.

In an illustration of the strange complexities produced by the distinction between heritage places with intangible values and intangible heritage, UNESCO suggests that there is a distinction between tangible 'heritage sites' and intangible 'cultural spaces':

In proclaiming *Masterpieces of the Oral and Intangible Heritage of Humanity*, UNESCO seeks to draw attention to cultural spaces or traditional and popular forms of cultural expression. We have to be quite clear about the difference between a cultural space and a site. From the standpoint of the cultural heritage, a site is a place at which physical remains created by human genius (monuments or ruins) are to be found. A 'cultural space' is an anthropological concept that refers to a place or a series of places at which a form of traditional or popular cultural expression occurs on a regular basis. But the value of such cultural expression is not necessarily dependent on a particular space. For example, when storytellers traditionally play their art either at the same place or at fixed times, we have a cultural space. But other storytellers may by tradition be itinerant performers and their performance a cultural expression. Both cultural spaces and cultural expressions qualify to be regarded as masterpieces of the oral and intangible heritage of humanity. (UNESCO 2003f)

It should be noted, however, that the WHC does allow for the inscription of natural or cultural places that carry intangible heritage values. The difference between these associative sites and cultural spaces is a fine one, but it could be determined by establishing whether the significance of the heritage resource lies primarily in the activities performed on the site or in the history and symbolic associations of the site itself. There may be areas of overlap and dispute regarding which Convention is more appropriate in the listing of such sites. This problem is an artefact of the historical development of the two Conventions and need not be perpetuated in national legislation.

The traditional and the indigenous

Recognition of the need to identify intangible heritage has grown out of a realisation (a) that relying only on older ways of valuing a heritage resource (architecture, historical value, etc.) may miss its core significance to the community and (b) that the identification of what constitutes our heritage has been skewed towards grand buildings. The definition of intangible heritage often refers to the 'traditional' or 'indigenous' nature of the heritage. We suggest that the terms 'indigenous' and 'traditional' are problematic in definitions of intangible heritage because they imply that intangible heritage occupies the same discursive space as 'primitive culture' or its derivative, 'folklore'. This constructs a view of intangible heritage as old, pre-industrial, unchanging or relatively stable over time, related to an ethnic identity (especially a marginalised or non-Western one) and regionally specific. Certain forms of heritage associated with marginalised or minority communities are particularly at risk, both in the West and elsewhere, and much non-Western heritage could be classed as 'intangible'. Nevertheless, it is important to recognise that intangible

heritage can be found in a variety of communities, not always those defined by ethnicity or region, in relatively new cultural forms, in dominant, as well as marginalised, communities and in the West as well as in other regions of the world (Witz 2003; Truscott 2003).

Early discussions of intangible heritage did refer explicitly to the notion of 'traditional culture'. The UNESCO 'Recommendation on the Safeguarding of Traditional Culture and Folklore' (1989) defines folklore (or traditional and popular culture) as 'the totality of *tradition-based* creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity' (emphasis added). After challenges to the narrow definition of 'folklore' at the conference in Washington, held to review the 1989 Recommendation (Smithsonian Conference 1999), intangible heritage has been defined much more broadly by UNESCO (2001a: 6). The revised definition reads as follows: 'peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability'.

In the draft Intangible Heritage Convention (UNESCO 2003e), intangible cultural heritage is defined as 'the practices, representations, expressions, knowledge, skills – as well as instruments, objects, artefacts and cultural spaces associated with them – that communities, groups and, where appropriate, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their historical conditions of existence.' It includes (a) oral traditions and expressions, including language as a vehicle of intangible cultural heritage; (b) the performing arts; (c) social practices, rituals, festive events; (d) knowledge and practices about nature *and the universe*; and (e) traditional craftsmanship (UNESCO 2003e: II 2(2)). The 2003 draft of the Intangible Heritage Convention added 'and the universe' to an earlier draft that referred only to 'knowledge and practices about nature' (UNESCO 2002b: 2(II)(2)). It was probably expanded to allow for 'traditional' cosmologies to be included, but it serves to broaden the definition quite considerably.

In 2001, UNESCO's first list of the Masterpieces of the Oral and Intangible Heritage named 19 intangible Masterpieces predominantly from developing nations and East Asia (2003h). Four were from South America, four from Africa, five from East Asia and five from southern and eastern Europe. Three of the Masterpieces were listed by several countries, illustrating the spread of some cultural forms beyond national boundaries. The 19 Masterpieces are all of some antiquity and the list is dominated by the performing arts (UNESCO 2003h). Not all could be described as indigenous in the sense that they relate to a First Nations group, however. The Garifuna Language, Dance and Music listing (supported by Belize, Honduras and Nicaragua), for example, is a creole cultural form originating during colonialism:

The traditions of the Garifuna people originated from descendants of African slaves rescued from Saint Vincent where they were exiled in the 17th century for fighting English and French domination. Communities in Belize, and on the coasts of Honduras, Guatemala and Nicaragua share a unique Garifuna culture. An estimated population of 11,500 live in 10 communities on the Atlantic coast and continue to speak the language –

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black Carib, which blends elements of the language spoken by the former inhabitants of Saint Vincent with African elements. Music and dance are central and vibrant aspects of the Garifuna communities. Traditional instruments including drums, maracas, guitars and turtle shells are used for religious and secular occasions. (UNESCO 2003j)

These definitions of intangible heritage do not limit intangible heritage to indigenous or traditional forms. UNESCO is now focusing on the medium of transmission or expression as the core of the definition. However, there is still an assumption that these cultural forms are old (transmitted 'from generation to generation'), regionally or ethnically unique and of a pre-industrial nature ('traditional craftsmanship'). In spite of the broader definition promoted by UNESCO, the idea that intangible heritage is traditional, indigenous heritage that defines traditional, indigenous, ethnic cultural identities, remains strong. It harks back to an old nineteenth-century idea in philology that folk tales form the core of an ethnic and later national identity. The term 'folklore' continues to occupy the same discursive field as 'intangible heritage'. Angola's Law on Authors' Rights defines folklore as 'all literary, artistic and scientific works created on the national territory by authors presumed to originate in certain regions or ethnic communities, passed from generation to generation anonymously or collectively or by other means – and constituting one of the basic elements of the traditional cultural heritage' (Angola 1990: article 4(f)). In 2002, the Asia Pacific Regional Assembly of ICOM developed the Shanghai Charter, defining intangible heritage as follows: 'voices, values, traditions, languages, oral history, folklife, creativity, adaptability and *the distinctiveness of a people*. These could be centred on a place or a collection or a group of people in a particular cultural heritage context' (Shanghai Charter 2002).

WIPO continues to use the term 'expressions of folklore' to describe intangible heritage, although the term traditional cultural expressions is now used as a synonym for this. WIPO also currently uses the term 'traditional knowledge' to refer to *tradition-based* literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields (Mosimege 2003). 'Traditional' is used by WIPO to refer to the mode of transmission (from generation to generation) and to the fact that those who do the transmitting are generally regarded as belonging to a specific group or region (WIPO 2001b: article 33).

'Indigenous' is a term used by communities, and by the UN, UNESCO and many national governments, to define those groups of people who have First Nations status in a country:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems (Blake 2001: 60).

In a more general sense, the term 'indigenous' can be used to describe those people who are not recent settlers or colonists of a place, in other words all people who live in the country of their ancestors (Truscott 2003). Both definitions have a historical reference point – usually assumed as Western colonisation from the fifteenth to the twentieth century, but sometimes intended to include other forms of colonial oppression. They do not, for example, imply that every person is indigenous to Africa, where the oldest human fossils have been discovered. Because definitions of indigeneity are written with reference to some 'original' state of affairs, usually dated as before (Western) colonisation, they are often read to imply that indigeneity refers mainly or solely to non-Western communities or to marginalised communities within Western countries. The term 'indigenous knowledge' is used synonymously with 'traditional' and 'local' knowledge to differentiate the knowledge developed by a community from the international knowledge systems sometimes also called 'Western' systems, generated through universities, government research centres and private industries. Indigenous knowledge refers to the knowledge of indigenous peoples as well as other defined communities (Warren 1992 in Mosimege 2003).

The way in which words like 'traditional' and 'indigenous' function in the definition of intangible heritage is to construct the idea that intangible heritage is generally non-Western, regionally specific, pre-modern, pre-literate heritage, passed from generation to generation. Intangible heritage is not always linked to a specific regionally or ethnically defined community. This is because practising communities may not always be defined by place of residence or ethnicity. They may be defined by sexual orientation (eg. language forms used by the gay community during the 1950s), by interest in a particular game (eg. the community of Fah-Fee players (Witz 2003)), and so on.

The use of terms like 'indigenous' and 'traditional' suggests that some communities (and their heritage practices) are relics of a bygone pre-industrial age. In reality, however, all heritage (especially intangible heritage, because it is constantly being recreated) draws on the past to inform the present: it is always a modern construct, however old its roots. It is hard to say how old these roots should be, or how their age should be measured, but some significant intangible forms may be of quite recent origin. In South Africa, one of the main forms of intangible heritage celebrated at a national level, as a cornerstone of the move to build post-apartheid national identities, is the oral memory of experiences under apartheid governments (1948–1994). These stories range across ethnic and national boundaries, and across a number of self-defined communities (exiles, political prisoners, activists, local communities). Thus, the NHRA (Act 11 of 1999), section 2(xxi), describes 'living heritage' as intangible aspects of inherited culture that may include 'cultural tradition, oral history, performance, ritual, *popular memory*, skills and techniques, indigenous knowledge systems and the holistic approach to nature, society and social relationships'. In Australia, intangible heritage is accepted for listing on the national registers only once it has 'proved its worth' by being passed down from one generation to the next (Truscott 2003).

There are as many intangible heritage forms in the West as elsewhere, and intangible heritage in the West is found not only in marginalised 'indigenous' communities but in mainstream urban society as well. Excluding Western knowledge systems (including alternative medical knowledge systems such as homeopathy) from being listed as intangible heritage may serve to perpetuate the notion that these knowledge systems are

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fundamentally different from non-Western forms of knowledge. This is ironic because it is precisely the widespread and often unethical 'borrowing' by Western medicine of indigenous practices around the world that has led to the need to protect the intellectual property of marginal communities. Treating Western medicine as 'science' and non-Western medicine as 'intangible heritage' may scupper attempts to create a more equal dialogue between the two knowledge forms. Botswana takes an interesting approach to the problem by outlining, in its Cultural Policy, frameworks for managing the relationship between indigenous and Western forms of religion and medical knowledge in schools and hospitals (Botswana 2001).

While it is certainly true that the intangible heritage of many indigenous communities is at risk and needs safeguarding, this important task can be accomplished without defining intangible heritage as 'indigenous' or 'traditional'. Doing so would not help to achieve redress (because marginalised or non-Western heritage would be eligible for listing anyway) or to safeguard intangible heritage in general (because the idea of indigenous or traditional heritage helps to exclude some forms of recent, dominant or Western intangible heritage). What is generally understood to be 'traditional' and 'indigenous' heritage will predominate on any national or international intangible heritage list. With the historical background of oppression in many colonial countries, asserting the value and importance of traditional cultural forms today is vital in ensuring redress and creating a sense of self-worth within a country. At a national level, however, cultural policies often have to emphasise the importance of creating national identities that accommodate a number of different identities, including 'traditional' or 'indigenous' culture (eg. Botswana 2001, and multicultural policies in many other countries). Both these processes of identity formation can be supported by the broad definition of intangible heritage.

Conclusions around defining intangible heritage

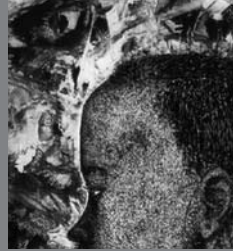
UNESCO (2001a: Annex page 3) pledged to 'Ensure that the safeguarding of intangible cultural heritage is not used to further religious, racial and ethnic intolerance or to foster any beliefs in cultural exclusivity which may lead to disrespect or destruction of other cultures' heritage'. It is important not to allow the new Intangible Heritage Convention, in its relationship with the WHC, to perpetuate existing divisions between rich and poor, East and West or North and South. The process of redress may require that international lists of 'intangible heritage' are dominated for some time by non-Western heritage, while lists of 'tangibles' remain dominated by Western buildings. It is critical, however, not to limit the function of intangible heritage to providing 'traditional' ethnic models as a basis for the uniqueness of national identities. The performing arts have dominated recent listings at an international level, but efforts should be made to include a broad range of cultural forms and media of expression.

The use of the terms 'indigenous' and 'traditional' help to perpetuate a historical distinction between (tangible) Western and (intangible) non-Western cultural heritage. We therefore support a definition of intangible heritage that does not limit instances to the 'traditional' or 'indigenous', or even to cultural forms that have already been passed on from 'generation to generation'. The marginalised nature of indigenous knowledge and other indigenous cultural forms will ensure their listing and safeguarding however broad the definition of intangible heritage may be. If one widens the definition of what can be classified as intangible heritage, this does not mean that the management and listing of this heritage will be unmanageable. After all, every listing (tangible and intangible) has to

be appropriately justified, based on the criteria established below. Resources for heritage management can be allocated on the basis of need, equity (redress) and/or significance; so increased listings need not represent an increased financial burden on national governments.

The definition of intangible heritage should become part of a holistic definition of heritage that includes both tangible and intangible forms. There is no reason why national governments should not safeguard tangible and intangible heritage by means of the same instrument. Similarly, there is little reason to perpetuate the distinction created by UNESCO between intangible heritage *per se* and intangible values associated with objects and places.

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'Physical heritage only attains its true significance when it sheds light on its underlying values. Conversely, intangible heritage must be made incarnate in tangible manifestations, in visible signs, if it is to be conserved' (Luxen 2000). This paradox must inform management of intangible heritage, but at the same time it should be recognised that it is *significance*, not material forms *per se*, that requires safeguarding and that sometimes 'the best solutions are not those that protect, but those that renew' (Buggey in Stovel 1995). Change may be not only inevitable but also desirable in this process of renewal. In order to be successful and ethical, any management strategy for intangible heritage must also involve and protect the practising community. Governments can help communities to manage and safeguard intangible heritage, but appropriate consultative and facilitative mechanisms need to be provided for doing so.

It has not been easy to develop instruments to assist in the sustainable management of intangible heritage, however, especially at an international level. UNESCO's 1989 Recommendation suggested that safeguarding folklore could be achieved by identification (registers and databases), conservation (documentation, archiving), preservation (education about folklore, safeguarding of folklore, support for practising community, promotion of scientific research) and dissemination (publications, films, code of ethics, etc.) (UNESCO 1989). This approach was heavily influenced by existing instruments to manage tangible heritage, such as the WHC and national heritage legislation in the West and much of its former empire. Despite this, the Recommendation did not receive widespread support.

The critique of the 1989 Recommendation was informed by debates about expanding the notion of significance to embrace social value and expanding the idea of authenticity to include local and non-Western ideas of what is original or authentic (Nara 1994; UNESCO 2000). The Recommendation, and indeed the new Intangible Heritage Convention, has been criticised for not creating sufficient mechanisms to involve the practising community and for relying too much on experts to establish the significance of intangible heritage and to document, research and disseminate information about it (Blake 2001; Grenada et al. 2003).

WIPO's Model Provisions (1982) for safeguarding intellectual property rights associated with folklore also failed to attract widespread support, although for different reasons. There has been much subsequent discussion about ways to reinforce or create legal rights to intangible heritage that may already be in the public domain, to manage the rights of communities as well as individuals, and to manage rights that cut across national boundaries (WIPO 2003a; Grenada et al. 2003).

In many countries, indigenous people and other interested parties feel that the safeguarding of intangible heritage is a matter primarily for the relevant indigenous community (eg. Beazley in Campean 2001). Documents like the *Principles and Guidelines for the Protection of the Heritage of Indigenous People* (1995), although still not adopted by the UN member states, offer a community-oriented approach to the management of intangible heritage. Legislation such as the *Northern Territory Aboriginal Sacred Sites Act* in Australia¹² has created workable mechanisms that allow control over intangible heritage management and benefits to remain with communities who owned that heritage (Beazley in Campean 2001; Blake 2001).

12 For all Australian legislation, see (<http://www.aph.gov.au/bills/index.htm>).

In this section, we will assess the ways in which existing instruments provide for the management of intangible heritage. We will discuss the management of intangible heritage under the following headings:

- Creating registers or databases of intangible heritage.
- Involving and protecting the practising community.
- Protecting material traces and places associated with intangible heritage.
- Making intangible forms tangible.
- Recreating and renewing intangible heritage.

Creating registers or databases of intangible heritage

Registers, lists or databases of intangible heritage have already been established at international level (eg. UNESCO's Masterpieces of the Oral and Intangible Heritage) and at national level (eg. in Japan, Australia, South Africa). These registers are compiled for the purpose of identifying and safeguarding intangible heritage. Other databases and lists are used to establish levels of origin and innovation for patents and for scientific research or community benefit (as a memory bank). In this section, we have focused on debates about the broad criteria for listing intangible heritage on national heritage registers or international heritage registers managed by UNESCO, in comparison with criteria for tangible heritage forms. Similar criteria would be used by other lists, although their specific requirements (geographical area, scientific focus, etc.) may require modifications to the criteria.

The criteria under discussion are used to select specific heritage forms that warrant special protection or recognition as intangible heritage. In this section, we will discuss the usefulness of older criteria used for places or objects and the development of new criteria for the identification of intangible heritage.

Use of established criteria

Most national heritage policies do not explicitly safeguard intangible heritage. A few national and international instruments refer directly to intangible heritage, for example the UNESCO Draft Convention (2003e), heritage legislation in East Asia, Australia, Botswana (2001) and the South African NHRA (1999). The NHRA includes in the National Estate (the national heritage register) all places and objects associated with oral traditions and living heritage (1999: section 3(2)). In section 5(7), it makes specific provision for protecting the living heritage components associated with objects and places: 'The identification, assessment and management of the Heritage Resources of South Africa must ... take account of all relevant cultural values and Indigenous Knowledge Systems'. The NHRA does not, however, specifically provide for the safeguarding of living heritage not associated with objects or places. In future, national legislation will have to deal both with intangible values associated with places and objects as well as with intangible heritage *per se*.

Values currently used as criteria for the identification of cultural and environmental heritage places or objects in various countries and in the WHC include:

- Value to society in the present – social value (including aesthetic and spiritual value);
- Value to our understanding of the human past – historic value;

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- Value to our understanding of people and their environment – scientific value;
- Value to our understanding of the environment – environmental value.

In determining these values, an assessment is often made of:

- Rarity;
- Representativeness;
- Ability to demonstrate important phases or characteristics;
- Ability to contribute to an understanding of important natural or cultural phenomena.

Not all legislation uses these categories; most of the legislation does not use all of them. The object of this research report is not to explore the different national criteria for assessing tangible heritage in detail but to explore to what extent we can use the same kinds of criteria for identifying intangible heritage.

Criteria established by the WHC for the identification of heritage places have traditionally emphasised the need for expert analysis to assess exceptional universal value. The inappropriate focus on expert opinion was one of the criticisms of the 'Recommendation on the Safeguarding of Traditional Culture and Folklore' (Smith & Marotta in press), and the importance of community definitions of value is now recognised. The emphasis on expert analysis and on exceptional universal value has also been challenged within the context of the WHC by the Nara Document on Authenticity (Nara 1994). In their critique of the draft of the new Convention (2003e), Grenada and other nations (2003) have suggested that 'exceptional universal value' is also an inappropriate criterion for listing because intangible heritage gains its value from communities that practise it, not from the international community.

Among existing criteria, social, aesthetic and spiritual values are probably the most relevant in assessing intangible heritage. They have been described as 'intangible' values of places (Truscott 2000). Social value has not been given adequate attention in heritage legislation until recently. In many countries, social value is still not mentioned in heritage legislation as a criterion for identifying heritage – for example, see heritage legislation from Lesotho, Malawi and Malta. Where such old-style heritage legislation did refer to social value, this was often expressed as 'artistic' or 'aesthetic' value. The assumption was that most of these values are high-culture values assigned by experts and not by 'ordinary' people.

This state of affairs is beginning to change, for example in Australia where both the Australian Burra Charter and the *Australian Heritage Commission Act* (1975) were criticised for their preoccupation with material remains, thus marginalising people's experiences and memories of a place (Byrne et al.; McCarthy & Ashton in Smith & Marotta in press). Byrne et al argued that social value includes, and is therefore more important than, all the other measures of value. The revision of the Burra Charter in 1999 sought to address these concerns (Truscott 2003). New Zealand's Aotearoa Charter (1992), although similar in many respects to the Burra Charter, recognises the importance of indigenous heritage definitions and management involvement by indigenous peoples (James 1996). The South African NHRA (1999: section 3(3)(a)) explicitly recognises the 'importance in the community' of a place or object.

It is not sufficient to have criteria that simply *recognise* social or community-defined values associated with heritage practices – they need to be used to *identify* heritage. With

regard to the listing of places in Australia, 'social value and aesthetic value ... have long been [part of the definition of] cultural heritage significance, and recognised by most heritage practitioners as values expressing community feelings about place, [but] heritage agencies did not use these criteria in heritage identification' until guidelines to assess social significance had been drafted (Truscott 2000). In order to assess social value, it is also important to be able to identify who the relevant communities are.

Any government or organisation developing a set of criteria for identifying intangible heritage for the purpose of official recognition or resource allocation for safeguarding has to make a decision about what weighting should be given to expert (or outsider) judgements of the value of the resource and those made by the practising community. In some quarters, the importance attached to community values of the intangible heritage resource ('social value') completely overrides 'expert' criteria such as rarity or scientific value. This position is presented in Grenada et al. (2003) and in the *Ask First* guide, compiled by Indigenous communities in Australia (Smith & Marotta in press). The argument is that the value of intangible heritage, and the reason it has been passed on informally, rests with the practising community and not with any outside criteria of value.

Smith has pointed out that because communities are so involved in safeguarding their own intangible heritage, an assessment of the significance of intangible heritage forms in comparative or outsider terms only becomes relevant when deciding on 'resource allocation for documenting and archiving, not for the conservation of the living heritage' (2002: n.p.). However, the safeguarding or conservation of intangible heritage can sometimes be assisted by a formal significance assessment process as well. Listing on national heritage registers would be one way of supporting practising communities by formally recognising the community value associated with the resource and thus opening the door for resource allocation. After intangible heritage forms have been identified as socially significant by communities, and possibly listed on national registers, expert assessments of historical, environmental or scientific value may be valuable in describing their nature, history and comparative importance. This data would be useful in determining priorities and strategies for heritage management, even if the community drives the heritage management process. Overreliance on expert-driven assessment and management may, however, mean that the community is distanced from its own heritage (Truscott 2003).

New criteria for listing intangible heritage

The particular nature of intangible heritage requires some thought to be given to the development of additional criteria that could help in identifying heritage on a national heritage register or on international lists such as the proposed new UNESCO intangible heritage list.

Pros and cons of listing

Because intangible resources are constantly being recreated, and are therefore constantly changing, and because they depend on the practising community to pass on knowledge or practices, a listing process will affect them immediately (positively and/or negatively) and probably more fundamentally than it would affect a building or place. The safeguarding of intangible heritage should include considerations of intellectual property, protecting secrecy where necessary and retaining the significant context of the activity.

Inscription offers little added protection for sites listed under the WHC. One of the results of inscription of sites on the World Heritage List is that listed places attract considerably increased tourist numbers. World Heritage Sites are required to present management plans to ICOMOS, but these can be submitted some time after listing, periodic monitoring can be superficial and sanctions for mismanagement are minimal at the WHC level. Most monitoring of heritage places happens at a national level and therefore depends on national resources, focus and capacity.

Increased tourism is a particularly attractive reason for poorer countries to inscribe heritage places, and it will also be an incentive for intangible heritage to be listed on international or national registers. For example:

The Philippines has recently made some efforts with respect to integrating intangible heritage into cultural tourism. An example is the recent proclamation by UNESCO of the Ifuago heroic ballads (the Hudhud) as [a masterpiece of the] intangible heritage of humanity. Migration of female workers from rural rice terraces to the cities has adversely affected the performance of these ballads. Efforts are being made within the very province in which the ballads originated to organize and train new singers for scheduled performances at schools of living traditions that tourists can attend. There are other related programs such as development of the original site of the Hudhud-Pumbakhayon's Rock – as a tourist destination. It is interesting to note that, as with most other heritage forms, the physical rice terraces were protected long before the intangible heritage forms associated with them [the ballads]. (Beazley 2003; López 2002)

In the absence of clear and implemented strategies for the safeguarding of recently inscribed and vulnerable places and intangible heritage, they can suffer further damage after listing. Increased tourism opportunities can put pressure on performers, for example, to change the content, status and form of their performances (Morris 2003). In the Basque region of Spain, the Alarde festival was transformed into a public performance by the municipal government, which began a process of changing the meaning of the festival from being a celebration of a Spanish victory over the French 350 years before to a celebration of Basqueness today (Wood 1998: 227). In Papua-New Guinea, Chambri initiation rites now incorporate the ability to produce carvings for the tourist market as a proof of manhood. Contact with outsiders has often been used as a vehicle for ethnic identity, and increased tourism in the area has provided a new kind of outsider (the tourist) as a reference point (Wood 1998: 224).

Change in cultural practices (including the examples above) does not necessarily involve a loss of authenticity or significance – change is often essential for preserving significance. But change to intangible heritage should be documented and sometimes managed or mitigated to prevent loss of significance. There will of course always be different opinions, even within a practising community, of what the intangible heritage means and why it is important. Listing on national or international heritage registers will, however, create new cultural and economic incentives for change that need to be matched with an awareness of the effect of these changes on the significance and authenticity of the heritage. One way of managing this problem is only to list intangible heritage with excellent safeguarding strategies. Grenada et al. (2003) suggest that

international lists of intangible heritage should include only intangible heritage that has been listed by member states on national registers (based on community value) and that has been particularly well safeguarded before international listing is applied for.

Values in listing criteria

There may be a mismatch between the values of the intangible resource and the values of the national or international listing body. We therefore need to include values in the criteria for listing. UNESCO's draft Convention (2003e) requires that intangible heritage inscribed on the international list must be in conformity with the principles of human rights. Some aspects of traditional cultures such as child marriage, female genital mutilation, and acts contrary to human rights can hardly be maintained in the face of general international agreement on human rights standards (Prott 1999). At a national level, we might find a similar situation. The Cultural Policy of Botswana, for example, recognises that '[t]here is need for constant re-appraisal of certain cultural assumptions which may be found to be at variance with the notion of fundamental human rights especially in so far as these affect children, women and other disadvantaged groups in society' (2001: section 3.5). A similar issue would arise in South Africa where the Constitution (1996) protects human rights.

Many cultural practices differentiate between people on the basis of gender, ethnicity, age, religion, physical ability, and so on. Those who wish to protect their power base in society often appeal to 'tradition' as a way of legitimising continued discriminatory practice (Swanson 2003). Other forms of discrimination are not considered serious enough to warrant challenge or change. Douglas Hofstadter (1985: 159ff.) had to formulate a racist analogy before the innate sexism of the English language (gendered pronouns, use of masculine forms to describe people, gender-differentiated titles) could be exposed. Could the existence of such discriminatory aspects of our languages (and there are many) prevent the language from being listed as intangible heritage?

Similarly, traditions of respect within a society may reveal power relationships that discriminate on the basis of gender, age or marital status. The example of *hlonipha* raises an interesting question about whether cultural practices such as these, although more benign than, say, female circumcision, should be given government assistance and listed on national or international heritage registers.

Hlonipha is a term used to describe practises of respectfulness between married women and their in-laws, and during initiation. The practice is common among Africans in the sub-Saharan region, but its form varies from one house to another. Hlonipha is used to describe specific language forms used by married women (*umakoti* in isiXhosa) to refer to certain objects or places and ancestors (both living and dead), and to her new in-laws. Adult women learn about hlonipha (*ukuhlonipha*) during *uduli*, the African wedding ceremony, from mothers-in-law and other older mothers. The in-laws give *umakoti* a new name, which they and community members then use, or they can call her by her clan name. The father-in-law (whom she calls *tatazala*) is prohibited from entering *entangeni* (the house or room where the bride and bridegroom sleep). Some words are forbidden: an *umakoti* who lives at *Kwantonti* (a place) is not expected to use words like 'toti' in her vocabulary because it sounds like *Kwantonti*, which she is prohibited from using. She cannot go to *ebuhlanti*, the *kraal*

where all cultural practices and rituals take place, or to places where family members are buried, particularly the father-in-law. As part of hlonipha, married women are expected to dress and act in a way that distinguishes them from the daughter(s) of the in-laws and from unmarried women and reflects their social status. When boys and girls are in initiation school, called esuthwini or entabeni and intonjana respectively, they use hlonipha in communicating with their inmates and other people. Boys and girls undergoing initiation use hlonipha for a short time – only until they return to the community. (Dondolo 2003)

Would one have to sanitise intangible heritage of discriminatory practice before listing it, and how would this affect the nature of the resource? Is it appropriate to list discriminatory practices as intangible heritage but note that these forms of discrimination are no longer encouraged (Prosalendis 2003), and to say that non-discriminatory ways of celebrating and promoting that intangible heritage form will be invited? This seems to have been the approach adopted by UNESCO. The ‘oral heritage of the Gelede’, for example, was listed as a Masterpiece by UNESCO although the description of the resource states that the ‘mythical origin of the Gelede is said to reflect the transformation from a matriarchal society into a patriarchal society’ (UNESCO 2003h). Neither of these social forms could be described as conforming to a human rights standard.

Guidelines for listing including security mechanisms

The listing process may result in the provision of information to the public about intangible resources that are supposed to be restricted to community representatives and/or constitute the basis of some form of intellectual property rights over a resource. We therefore need to establish guidelines for application and listing which assess the public or private status of the information and of the ownership of the resource. WIPO has developed technical requirements for databases such as heritage registers, including the need for appropriate security mechanisms¹³ and access limitations (WIPO 2003a: 10–11). The Australian Institute of Aboriginal and Torres Strait Islander Studies¹⁴ enforces provisions for confidentiality and access, which have been determined by the relevant communities. Many Indigenous communities are now using ethnological records of earlier dance ceremonies and other intangible heritage at the Institute to inform and revitalise current cultural practices (Truscott 2003). Listing without information about access and ownership may cause legal and moral difficulties, so assessments of this nature should be a key part of the listing process. Although much intangible heritage will be ‘owned’ by communities or individuals within them, the existence of ‘owners’ should not be a criterion for listing. This is because some resources will not have ‘owners’ who wish to register their ownership of the resource, and some resources will have several ‘owners’ competing for ownership of the status and rights accruing to the listing.

The issue of redress

The need for redress in both national and international heritage listings has emphasised the inclusion of vulnerable or previously marginalised heritage. We have discussed above the importance of breaking down the notion that intangible heritage is ‘primitive culture’, as opposed to the ‘civilised culture’ represented by the WHC (Mbembe 2003). This can be done by defining intangible heritage very broadly to include all knowledge systems, rituals, and so on, whether Western or not. However, the listing of intangible heritage

¹³ For example, see document WIPO/GRTKF/IC/4/14 (<http://www.wipo.org/globalissues/igc/documents/index.html>).

¹⁴ See (www.aiatsis.gov.au).

should not ignore the power relationship between Western and non-Western heritage forms (Swanson, Seleti & Mndende 2003), between tangible and intangible heritage forms, and so on. One way of achieving redress can be to encourage non-Western listings (as in the Global Strategy); another can be to require that listings focus on vulnerable resources (which would include previously marginalised forms). The problem with making vulnerability a criterion for listing is that lists may then exclude intangible cultural forms that are extremely valuable to communities and are still being practised (Mbembe 2003). We would therefore suggest that any instruments for protecting intangible heritage record as one of their aims the recognition of formerly marginalised intangible heritage and provide strategies for encouraging such listings. However, we do not recommend that vulnerability or marginalisation be a criterion for listing because that would exclude any other kinds of listings completely and thus perpetuate the historical divide between Western tangible heritage and non-Western intangible heritage.

Lists of intangible heritage may differ from existing heritage resource lists of places and objects in that they may require more information about communities 'owning' the resources (as distinct from property ownership), the values associated with the resource in relation to human rights discourse and information access restrictions. It remains to be discussed whether human rights issues would be covered by existing assessments of significance. This does not necessarily mean that existing databases and lists of places and objects need to be separated from lists of intangible heritage, just that new fields may need to be created in existing databases and lists. New approaches to security of information will also need to be devised.

Involving and protecting the practising community

In this research report we have coined the term 'practising community' to describe a community that has created and/or practised an intangible cultural form. Elsewhere (eg. Blake 2001) the term 'holding' community has been used to express the (exclusive) rights of ownership that communities are deemed to hold over certain 'cultural expressions'. However, exclusive community ownership over heritage is both philosophically problematic and difficult to prove (Handler in press). Ownership of an intangible heritage resource is not the same as ownership of a thing or a place. Intangible heritage can be shared, copied and changed much more easily than an object or place, and it has to change over time. In describing the relationship between people and their intangible heritage, we have accordingly chosen to focus on the role of the community in the transmission and practice of the heritage. This is the main mechanism for safeguarding that heritage and also the main way of defining who the 'community' is.

The idea of exclusive community ownership of intangible heritage is attractive because it allows the application of certain existing legal mechanisms such as copyright and patent laws to protect the rights of communities. These legal mechanisms are, however, not the only ways of ensuring that community control over their heritage is protected and that benefits accruing from the commercial use of that heritage accrue to the relevant communities. There are also problems with using the term 'community' itself. Communities are not the organic, stable and coherent groups they are often assumed to be. We do not always know exactly who practised a ritual or owned certain knowledge in the past or who their descendants are (Handler in press). There may also be a complex relationship between individual and collective ownership of a resource (Truscott 2003).

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Involving and protecting the practising community is perhaps the most important aspect of any approach to developing instruments for safeguarding intangible heritage. This has been recognised in Australia:

Australia's identification of intangible heritage is based on the empowerment of communities. It is the communities that identify what is significant about their culture and their place and what should be identified and protected and which, if any, cultural expressions should be 'fixed' as a means of preserving them. This is particularly the case in relation to [Indigenous] cultural heritage; the identification of what is of value and how, and if, it should be 'preserved' is a matter for [Indigenous] communities to determine as part of their intellectual property rights. (Beazley in Campean 2001: Australia page 15)

It has also been recognised in declarations such as the Declaration of Oaxaca,¹⁵ a declaration on 'Cultural heritage in daily life and its conservation through community support' prepared by the Mexican Committee of ICOMOS and adopted by UNESCO in 1993 (UNESCO 1993b). The Declaration emphasises the importance of respect for community roles in creating meaning around heritage places and the creation of a role for communities in conserving both the meanings and fabric associated with places. The best way to conserve most forms of heritage is through the continuation of traditional practices by communities who gave life to it. The creation of specialist conservation and management roles and structures external to such communities may distance these communities from their heritage, underplay the importance of living traditions as part of this heritage, and thus threaten its very existence (Johnston 1992).

Legal protection without community involvement can negate the purpose of listing a place or heritage resource on national or international heritage registers. This is true of heritage with meaning for all people, not just the heritage of certain groups of people. Johnston gives the example of a small house in the country ('Bush') in East Gippsland, Australia:

I don't know who owns the land (probably the government) but as far as the local community is concerned, a local man is the custodian of this place and nothing should be done without his agreement. This is an issue that is common with indigenous places, but not historic places [i.e. places associated with settler history] so the 'system' doesn't recognise his rights. I keep wondering whether this place should be nominated for listing and protection, or whether this would disenfranchise the custodian and therefore the community. And it is the custodian [and the] community who are actively protecting the place now. It is remote, so government listing won't offer any real protection. (Johnston in Campean 2001: Australia page 35)

Community involvement is essential to the management of intangible heritage, but it is often difficult to define who the practising community is, to select appropriate representatives from the community, and to manage the relationship between government, community and potential sources of income. This is not a problem that can be solved by policy instruments, but conflict can be minimised by defining clear channels

15 See (<http://www.unesco.org/general/fre/legal/cltheritage/oaxaca.html>).

of communication, providing dispute-resolution mechanisms, clarifying the question of ownership over intangible heritage and providing other sources of income from heritage. National governments have therefore devised instruments to do the following:

- Create structures for community representation (or work with existing structures).
- Help communities to manage disputes over meaning.
- Draft laws to protect community rights.
- Provide financial incentives to safeguard intangible heritage and aid development.

Perhaps the key issue in performing all of these functions is the need to balance community control over heritage with government interventions to help safeguard that heritage. Each function will be discussed below.

Structures for community representation

The European Landscape Convention (2000), among other environmental and heritage management instruments, has emphasised the participation of local people in decision-making about landscape protection. This offers a useful approach for initiatives related to intangible heritage. Parks Canada has also been sensitive to differences between Western and Aboriginal world views and the implications that these different views have for the commemoration of the history of Aboriginal peoples in Canada. Parks Canada has developed a working definition of 'Aboriginal cultural landscapes' and guidelines for the identification and evaluation of such landscapes. It emphasises that the identification process has to be rooted in the culture of the associated people and their traditional knowledge (Buggey in Campean 2001).

Simply legislating for community participation may result in tokenism, a few participatory workshops, but no real engagement. This is especially true where community structures to manage or engage with the intangible heritage do not already exist. Communities in several countries have been successfully assisted to engage in heritage conservation through the establishment of co-operative bodies. In Mexico, for example, the state has promoted the creation of civil associations, neighbourhood councils and *campesino* (rural inhabitant) unions for the protection of monuments or monument zones (López 2002). Such specially established organisations, particularly in communities practising forms of intangible heritage, can help create awareness of government programmes designed to list intangible heritage and provide guidance on how to seek assistance from government. They can be constituted from a broad range of community representatives, or from selected community experts or elders, as required by the nature of the resource, and tasked with government liaison over the management of the resource.

In Australia a similar system has been used to manage Indigenous sacred places.

The Northern Territory Aboriginal Sacred Sites Act provides a process for a developer or land user to obtain an Authority Certificate from the Government Aboriginal Areas Protection Authority (AAPA)¹⁶ allowing them to undertake work in a particular area. The AAPA comprises twelve members, [ten of whom] are traditional owners or custodians of sacred places. There is also a gender balance in the Authority to ensure that cultural restrictions can be observed when the Authority makes decisions on protecting sites. AAPA staff consults with the relevant traditional

¹⁶ See (www.aapa.nt.gov.au).

owners of an area where a development is proposed to establish whether there are any sacred sites. These may be protected either by a refusal to issue an Authority Certificate or by attaching conditions to a certificate. A developer may also ask for a meeting with Traditional Owners to discuss and reach an agreement in relation to a proposed development. The Act also enables Indigenous people to register their sacred sites if they so wish. Registration means that the issue of significance has been determined should a site be injured or desecrated. It also allows areas to be fenced off and notices warning of cultural restrictions to be posted. Landowners can make representations to the AAPA where sacred places occur on their land. The AAPA then decides whether or not to issue an Authority Certificate for the use of the land by the landowner. Traditional Owners and custodians also have rights of access to sacred sites on private land. (Beazley in Campean 2001: Australia page 17)

In New Zealand, two statutory bodies with community representation and control have been established to manage the heritage of the indigenous Maori. For some time New Zealand has regulated the local sale and export of Maori material cultural objects. Recent proposals to reform this system have included allowing Maori custom to determine ownership of newly found objects. A quasi-judicial body, the Waitangi Tribunal, was established to manage this process. Many tribunal decisions have contained lengthy discussions of Maori *taonga* (cultural treasures) and of alleged misconduct by former governments and their agents in relation to these objects and to Maori cultural heritage in general. New Zealand has to reconcile the claims of its indigenous peoples with other priorities, such as economic development and environmental protection. A Maori Heritage Council was accordingly established under New Zealand heritage conservation law to ensure that places of Maori interest will be protected and to mediate in any conflicts between the interests of Maoris and others, such as scientists who might wish to investigate a sensitive site (Paterson 1999).

In South Africa, recent legislation (Act 19 of 2002) has provided for the formation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to promote the right of communities to develop their historically diminished heritage; and to recommend the establishment or recognition of community councils. The Commission is empowered to organise national consultative conferences with various representatives of the community and recognise and fund community councils to represent particular culturally defined groups (South Africa 2002).

Managing disputes over meaning

Government agencies and community representatives may play a role where there are disputes over intangible heritage. These will probably arise either from disputes over the meaning and management of the heritage itself or from contestation over financial benefit accruing from use of the heritage, perhaps leading to disputes over ownership and intellectual property. One of the key disputes over meaning may arise from the difficulty of defining what the core of the intangible heritage is and therefore what change is fundamental (and possibly damaging) and what change is incidental (and possibly interesting and useful).

Disputes within practising communities over the meaning and appropriate management of heritage cannot always be resolved. They are, however, important because they reveal the multiple meanings and power relationships in the expression of cultural forms and the way in which these change over time. It may therefore be more important to help communities or stakeholders to discuss and record such disputes than to resolve them by achieving consensus. As Jaireth argues:

[M]ultiple interpretations of a heritage site or an intangible heritage event or issue should be respected. In particular, different perceptions of significance held by specific social groupings, e.g. women, the aged, youth, indigenous peoples, ethnic minorities should be respected, including through the recognition and repetition of specific language use ... Complex mediations of power/knowledge, or politico-epistemic practices, can constitute (or lead to the social recognition) of 'new' subjects of heritage value... [I]n Australia a campaign for the protection of an urban heritage site where Indigenous organisations had met over decades to plan their strategies for improved services and social recognition, has been interpreted in multiple ways. It is seen as a site laden with memories of an ongoing struggle for self-determination; to others evidence of a political mainstream movement for indigenous democratisation; and to others again, a site where divisive stories were told. (Jaireth in Campean 2001: Australia page 28)

In South Africa, Robben Island has been listed under criterion (vi) of the WHC for its symbolic meaning ('the triumph of the human spirit over oppression'). It is a place that was occupied by successive colonial governments as a prison and place of banishment and has now been reclaimed by the first democratic government of South Africa as a site of renewal and memory. There are, however, ongoing disputes about the place, including the relative importance of recent prison history, longer-term colonial history, and environmental significance. Some visitors even come to the island to remind themselves of the 'good old days' of apartheid (Davis 1998).

Discussions about the commemoration of the house where Pan Africanist Congress (PAC) leader Robert Sobukwe was kept separately from other prisoners on Robben Island in the 1960s and 1970s can provide an illustration of how disputes over significance can arise. The story of the dispute over the dog kennels can give greater insight into the multiple meanings associated with the place, and how they relate to each other. PAC representatives have asked that some dog kennels near the house be removed because they were built after Sobukwe's transfer to house arrest on the mainland and partially block the view of the road, from which other prisoners sometimes saw their leader signaling to them with a handful of soil that they were still the 'sons of the soil'. However, for political prisoners held in the main prison during the 1980s, the dog kennels represent the harsh culture of repression and surveillance at that time. The dog kennels may have been situated near Sobukwe's house by the prison authorities precisely to block the view of the house from the road and change prisoners' associations with the place.

As part of the management strategy for intangible heritage, it is thus important to record and engage with disputes over meaning – all the interpretations of the Sobukwe house

relate to the symbolic significance of Robben Island, a place of struggle and resistance against oppression. But ultimately, decisions also have to be made whether or not to remove the dog kennels from the Sobukwe house site. Decisions (at a community or government level) also have to be made about whether to allow restrictions on how particular forms of intangible heritage (eg. rituals, knowledge or skills) may be altered or practised without damaging significance. This issue will be discussed further below.

A legal framework for the protection of community rights

Many disputes over ownership are rooted in the benefits accruing to ownership over intangible heritage. Marginalised communities, whose knowledge has been acquired gratis in the past by large commercial concerns, are particularly at risk from sharing information about their heritage on national registers or in other forums and later finding that it is being sold for personal gain. Because cultural development is linked to economic development, one of the cornerstones of the discussions on intangible heritage has to be the establishment and protection of the rights of practising communities. These rights can be established through various legal instruments, but they should be drafted and administered in a way that helps communities to exercise them.

WIPO notes that 'the cultural, environmental and economic importance of traditional knowledge has led to concerns that it should both be *preserved* (i.e. safeguarded against loss or dissipation) and *protected* (i.e. safeguarded against inappropriate or unauthorised use by others)'. Most of the discussions around rights for practising communities have focused on intellectual property mechanisms, whose general function is to provide *protection* against unauthorised use by others rather than to aid *preservation* (WIPO 2003a: 7). This, and the problem of determining ownership of intangible heritage, means that provision for community rights should not stop at intellectual property. Intellectual property mechanisms need to form part of a broader, co-ordinated protection and preservation strategy (WIPO 2003a: 6).

A number of different kinds of legal mechanisms can be employed:

- Intellectual property-related measures (eg. laws regulating private property rights over the intellectual content of traditional knowledge and giving exclusive rights to control the commercial exploitation of traditional knowledge and safeguard the integrity of and credit for cultural products) or non-intellectual property-related measures (eg. laws regulating land tenure, religious expression, etc., and those protecting indigenous communities).
- Legally binding forms (eg. intellectual property-related systems, *sui generis* regimes, contracts, common law, customary law as recognised by the legal system) or non-legally binding forms (eg. guidelines, codes of conduct, national registers or databases).
- International, regional or national measures (WIPO 2001b).

There are at present no international intellectual property standards specifically to protect traditional knowledge, but instruments such as the TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights, World Trade Organisation 1994), the UN Convention on Biological Diversity (1992) and the Berne Convention (as amended in 1973) do provide some protection for traditional knowledge relating to biological diversity and for expressions of folklore (WIPO 2001b). However, these instruments do not provide sufficient protection for intangible heritage, as they are not specifically designed to do so. TRIPS serves mainly to facilitate international

trade, for example, and the Berne Convention provisions on copyright do not protect moral rights but focus on artistic and literary works (see Blake 2001: 23–25).

The ‘Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions’, were adopted by WIPO and UNESCO in 1982 as a form of *sui generis* legislation to protect that intangible heritage not protected by other means, but they did not receive universal support from member countries. Two main problems with the Model Provisions were identified in 1984 by a group of experts: the lack of appropriate tools for the identification of the traditional cultural expressions to be protected and the lack of workable mechanisms for settling issues around expressions of folklore that can be found in more than one country (UNESCO 2001a). Two further complaints expressed in international debates about the Model Provisions were that (1) they did not cover traditional knowledge and (2) they did not provide for exclusive ownership of the rights to expressions of folklore (WIPO 2001a: section 19). Blake has pointed out that ‘folklore’ was not defined to include ‘traditional knowledge, practical know-how, spiritual or ritual elements of culture’ (2001: 20).

The United Nations Working Group on Indigenous Populations drafted ‘Principles and Guidelines for the Protection of the Heritage of Indigenous People’ in the mid-1990s (WIPO 2001b: 14). Like the Model Provisions, the Principles and Guidelines would have provided some form of *sui generis* intellectual property-related protection for intangible heritage (WIPO 2001b). But neither the United Nations Draft Declaration on the Rights of Indigenous Peoples (UN 1994) nor the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (UN 1995) has been adopted by Member States (UNESCO 2001a).

Broadly speaking, it has been difficult to develop international agreements that protect the rights of practising communities to benefits relating to their intangible heritage for two reasons:

- The emphasis has been placed on intellectual property instruments, such as copyright, which are too limited in their scope (Blake 2001: 13ff).
- It has been difficult to obtain agreement among individual countries that oppose any adaptation that may make the traditional intellectual property system more complex (Blake 2001: v).

Fact-finding missions were therefore conducted by WIPO in the late 1990s to identify problems with the Model Provisions and to assess the intellectual property needs and expectations of the holders of traditional knowledge. The report from these meetings concluded that existing intellectual property law does not give appropriate protection to expressions of folklore and that a better *sui generis* regime for protecting intangible heritage needs to be developed (UNESCO 2001a; WIPO 2003a: 23–24). Blake suggests that such an instrument would have to:

- Recognise traditional (customary) forms of collective ownership and communal authorship, including moral as well as economic rights (as do the Model Provisions);
- Prevent the unauthorised registration of sacred and culturally significant symbols and words as trademarks;
- Require proof of prior informed consent in patents that employ traditional knowledge; and
- Provide protection in perpetuity. (2001: 28)

Some aspects of intellectual property law (moral rights, trademarks, indications of geographical origin, prior informed consent under patent law, trade secrets and industrial design protection) can be useful in protecting community rights relating to intangible heritage (Blake 2001: 16–17). WIPO is busy modifying the Model Provisions to create international instruments that could protect intellectual property rights over intangible heritage. A recent report from WIPO (2003a: 18–19) suggests that separate intellectual property mechanisms can be developed for traditional knowledge and traditional cultural expressions, and/or for specific clusters of subject matter (ideas, expressions and distinctive symbols). They note that any *sui generis* intellectual property instruments for intangible heritage should draw, where possible, from existing intellectual property mechanisms and be administered by the same authority (WIPO 2003a: 26).

In some quarters (Grenada et al. 2003), the new Intangible Heritage Convention is seen as a way of providing a legal basis for asserting intellectual property rights and for reactivating property rights (although not retrospectively) over knowledge that is already in the public domain but used to be owned by a particular community. This could be very problematic. It provides a way for people to gain rights through listing under the new Convention and consequently places an additional onus on the mechanisms for listing to ensure (a) that the appropriate communities are being recognised as the owners of these rights and (b) that applications are not being drafted for the primary purpose of gaining such rights. This may in some cases place the intangible heritage at risk. Given the complexity of instruments to protect intellectual property for intangible heritage, their relationship to broader legal instruments, and the difficulty of obtaining agreement on their form, it may be wiser to separate the Intangible Heritage Convention from any *sui generis* regime to protect intellectual property.

Various regional bodies have looked at the problems of protecting traditional knowledge. Of specific relevance to intangible heritage are the proposals for the protection of traditional knowledge by the Member States of the Andean Community and Pacific Island States (WIPO 2001b). For example, article 136(g) of Decision 486 of the Commission of the Andean Community (2000) provides that 'signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent'. This Decision was enforced by the Colombian government in one case although the community concerned had itself not objected (WIPO 2003b: 5–7).

Another regional initiative has been the development of a model law by the Pacific Island states (Pacific Model Law 2002). The *Model Law for the Protection of Traditional Knowledge and Expressions of Culture*, or Pacific Model Law, is a model for national legislation. It is not a regional agreement as the Andean Community Decisions are, but it recognises the importance of regional collaboration in protecting intellectual property rights associated with intangible heritage. It has drawn from the WIPO review of the 1982 Model Provisions. It aims to 'protect the rights of traditional owners in their traditional knowledge and expressions of culture and permit traditionbased creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefitsharing' (Pacific Model Law 2002: explanatory memorandum). It does this by creating

'new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain.' These rights fall into two categories: traditional cultural rights and moral rights:

Traditional cultural rights grant traditional owners exclusive rights in respect of a range of uses of traditional knowledge and expressions of culture that are of a noncustomary nature, irrespective of whether they are for commercial or noncommercial purposes. This includes the use of traditional knowledge and cultural expressions for the making of new creations and innovations based thereon ('derivative works').

The moral rights created for traditional owners are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture. (Pacific Model Law 2002: explanatory memorandum – our emphasis)

The existence of these rights does not depend upon registration or other formalities. A 'prospective user of traditional knowledge or expressions' can apply either to a 'Cultural Authority' which can identify 'traditional owners' and act as a liaison between prospective users and traditional owners, or they can deal directly with the 'traditional owners'. An 'authorised user agreement' is drawn up to record the prior and informed consent of the traditional owners. The Cultural Authority has a dual role in providing advice to traditional owners about the terms and conditions of authorised user agreements and maintaining a record of finalised 'authorised user agreements'. These agreements must cover all non-customary uses. Acknowledgement of the source, appropriate use and benefit sharing (from commercial use) must be provided for (Pacific Model Law 2002: explanatory memorandum). The Pacific Model Law is thus a good example of an initiative that encourages regional co-operation, covers both tangible and intangible heritage, protects cultural resources that are already in the public domain, provides *exclusive* rights for *communities* and reduces the burden on practising communities in exercising their rights.

At a national level, it is possible to protect community rights to some degree through general legal mechanisms for protecting intellectual property. 'Australia does not have specific provisions in its patents, trademarks and designs legislation to protect traditional knowledge. However, certification [of] trademarks has been used recently as a mechanism to help protect the interests of indigenous and traditional knowledge owners through identifying or authenticating products or services provided by indigenous owners or in collaboration with indigenous owners. The trademark system has also been used by, for example, arts centres as a mechanism to promote the arts and crafts of indigenous people. The designs system has been used by traditional knowledge owners to protect indigenous designs' (WIPO 2003b: 4). The Australian courts even regulate the relationship between an Indigenous artist and the practising community:

In *Bulun Bulun & Milpurrurru v R & T Textiles Pty Ltd* (1998) 41 IPR 513 the Court found that an Indigenous person had a fiduciary duty to his community. The court found that the relationship between Mr. Bulun Bulun (the artist) and his community in regard to the creation of the painting was one of mutual trust and confidence which was found to be sufficient, under Australian law, for a fiduciary relationship between Mr. Bulun Bulun and his community to arise. The judge found that, on the evidence of the customary law of the Ganalbingu people, Mr. Bulun

Bulun owed two fiduciary obligations to his community. First, he was not to exploit the painting in a manner contrary to his community's customary law. Secondly, in the event of infringement by a third party, he was to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the painting. The court recognized two instances in which equitable relief in favor of a tribal community might be granted, in a court's discretion, in circumstances where copyright is infringed in a work embodying ritual knowledge: first, if the copyright owner fails or refuses to take appropriate action to enforce the copyright; and second, if the copyright owner cannot be identified or found. (WIPO 2003b:3–4)

Many developing countries have specific references to folklore in their copyright legislation (Blavin 2003). The government of Malawi bypasses the problem of establishing ownership in its *Copyrights Act* of 1989, but at the expense of losing community control over intangible heritage (this trend is discussed in Blavin 2003). The Act vests copyright over 'expressions of folklore' in the government of Malawi. Certain uses of expressions of folklore require government authorisation and others do not. If folklore is employed for commercial purposes or gainful purposes or outside their traditional and customary context, prior written authorisation by the Ministry of Culture is required. The *Commercial Advertising (Traditional Music) Act* of 1978 similarly 'provides for the control of the recording and reproduction for commercial advertising purposes of Malawian traditional music and dance' (Mvula 2002: 113). Angola's Law on Authors' Rights (1990) also provides (article 15) for protection of folklore by vesting in the state (the Secretariat for Culture) copyright over works of folklore of which the author is unknown (which will include most such works). It allows works of folklore to be 'freely used by a public person for non-lucrative purposes'.

Namibia, by contrast, has passed the *Copyright and Neighbouring Rights Protection Act* (6 of 1994, amended 2000) that provides for the protection of the rights to 'expressions of folklore' when used for commercial gain, and the benefits from the rights to expressions of folklore go to the community from which the expression was derived. The Act protects Namibian folkloric expressions (including objects). Examples include traditional headgear, Bushman (San) art and dress, traditional music and stories, which may not be photographed, reproduced, published or otherwise exploited by outsiders for commercial gain. Namibia is relatively happy with the Model Provisions but it has not framed its legislation exactly in line with them. For example, there is not clarity in the legislation as to whether the Act gives communities exclusive or non-exclusive rights over the expressions of folklore. Communities need to approach a government agency to seek redress if transgressions of their rights have been committed (Shinavene 2001).

In South Africa, it is proposed to give indigenous knowledge specific protection. A Bill on the protection and promotion of indigenous knowledge systems will be presented to Parliament in 2003. It is intended to protect indigenous knowledge against 'illicit use and exploitation' and other 'prejudicial acts'. It has drawn from the work of WIPO in revising the Model Provisions (Portfolio Committee 2000). Meanwhile, benefit-sharing models have been developed in regard to the commercial use of indigenous plants. One example is the development of a pharmacological preparation (known as P57) from the *hoodia* plant, traditionally used by the San community to suppress hunger and thirst during long hunting trips. In 1996, scientists from the parastatal Council for Scientific and Industrial Research (CSIR) in South Africa isolated the *hoodia's* hunger-suppressing chemical

component, P57, and patented it. The following year they licensed the United Kingdom-based firm Phytopharm to develop and commercialise P57 further. After protests from the San community about this, the CSIR and the South African San Council developed a benefit-sharing agreement that recognises and rewards the San people as holders of traditional knowledge. In a novel arrangement, the South African San will now share profits across the borders with San in Angola, Botswana, Namibia, Zambia and Zimbabwe. The San will get up to eight per cent of payments received by the CSIR from Phytopharm within the 15 years of the patent (Sayagues 2003).

Experience has shown that the formal creation or legal availability of rights in traditional cultural expressions does not necessarily lead to the effective exploitation of these rights and to the flow of benefits back to their custodians (WIPO 2003a: 6). The need for the 'prior informed consent' of communities in giving access to their heritage has been identified as a key principle of any intellectual property-related protection for intangible heritage. Thus, 'capacity and awareness building may be as important as formal legal or policy measures to achieve the desired outcome of an optimal equitable sharing of benefits when access to [traditional knowledge], [traditional cultural expressions] or genetic resources does occur' (WIPO 2003a: 5). Attempts have also been made to employ 'defensive' mechanisms that do not require communities to initiate a legal challenge. For example, laws can require patent applications to take into account prior art (inventions) derived from traditional knowledge. This depends on the documentation of traditional knowledge in databases and its accessibility in the international search and examination of patent applications. In the area of trademark law, defensive protection mechanisms discussed included identifying grounds for the refusal to register a trademark where its registration or use would offend a significant part of the relevant community (WIPO 2003a).

At both national and international levels, communities may need to be assisted in asserting their intellectual property rights and provided with defensive mechanisms whereby their rights are automatically protected by other bodies such as government or patent authorities. Intellectual property rights must be used to supplement and extend the effective reach of customary law and practices to prevent their undermining the traditional framework of regulation and transmission (WIPO 2003a). One of the particular problems that regulation of intellectual property faces is the difficulty of retrospectively addressing problems that arise from inappropriate access to traditional knowledge. That is why WIPO focuses on 'the point of access' – the point at which an outside party intersects with the community to gain access to the knowledge. However, much of this intangible heritage is already in the 'public domain'. The growing trend of museums to digitise their cultural heritage collections and make them publicly available for curatorial as well as commercial purposes is making it more difficult to contain this knowledge and return it to some kind of community control (WIPO 2003a: 14). *Sui generis* intellectual property mechanisms can help safeguard intangible heritage but other forms of legal protection enabling, for example, religious freedom or access to land may be necessary to enable communities to continue practising their intangible heritage.

One of the main problems with the focus on protecting intellectual property rights as a mechanism for safeguarding intangibles and promoting community development is their reliance on the concept of exclusive community ownership. The challenge for instruments safeguarding intangible heritage is to revise the current concept of ownership to create a model that:

- Recognises and validates a range of cultural identities and cultural contributions to the creative diversity of humankind.
- Channels benefits back into communities that contributed to creating or maintaining intangible heritage, especially where others have reaped profits.
- Makes provision for the fact that:
 - Owning an intangible resource like a skill or practice is not the same as owning a heritage object – it can be shared, copied and changed much more easily.
 - Many practising communities do not regard their cultural heritage as property but rather as a series of relationships and obligations of the individual and the community (Daes in Blake 2001: 61).
 - We do not always know exactly who practised a ritual or owned certain knowledge in the past, who their descendants are and the relationship between individual and collective ownership of a resource (Handler in press).

The motivation behind the concept of ownership is to recognise and affirm previously denigrated cultural forms and the identity of people who practised them (who were often subjected to other forms of oppression), and to provide economic benefit to people who claim those cultural identities today. It is possible to achieve these aims without relying on the concept of exclusive ownership. However, marginalised communities as well as national governments draw political capital from the notion of discrete and historically fixed communities and from the need to affirm marginalised identities. Also, government seeks to fund poverty relief programmes through commercial enterprise. If we admit the difficulty of assigning ownership over cultural practices and of defining who should receive benefits for having practised them in the past, payment by commercial enterprises in individual cases cannot be justified on the basis of ownership. General laws to provide for compensation on demand will be opposed by most commercial concerns.

It is therefore essential to use intellectual property law alongside mechanisms for the safeguarding of heritage that do not depend on proving exclusive ownership of heritage. Safeguarding intangible heritage will have to become part of a broader strategy for community development and will be inseparable from debates around development, land rights and identity politics at a national level (Daes in Blake 2001: 61). It is important not to separate budgets for safeguarding intangible heritage from community development funding, but to integrate issues around heritage conservation into all development work and to write national instruments for safeguarding intangible heritage with this in mind.

Providing financial incentives for protecting intangible heritage

It is potentially just as expensive to maintain a heritage place, conserve a heritage object or practise a form of intangible heritage. Financing options that are beneficial to owners of cultural property should therefore be created in view of the high costs of this investment in the conservation of such property (López 2002). This may be difficult because of the bias towards building conservation. But Prott suggests that financial incentives for maintaining intangible heritage forms may be more important than legal regulation:

[T]here is a place for legal regulation [of intangible heritage], but too much should not be expected of it. Law which runs counter to the most powerful social processes [of social change and globalisation] currently at work is unlikely to be successful in the long term without a degree of compulsion not acceptable in most societies today. Therefore it should be

used as one of a number of social controls, such as education, while using incentive schemes (prizes, tax incentives, sponsorship arrangements) to work with existing elements of the social processes of the communities concerned. Above all, it should seek to empower those persons who are bearers of traditional culture to continue to provide alternative models of behavior and different criteria of 'success' than those portrayed by other means from outside the community. (Prott 1999)

The process of listing intangible heritage on national or international heritage registers is one way of vetting them for the receipt of monies to assist in their safeguarding. UNESCO has devoted a portion of the new Convention to discussing this financial assistance. It is proposing the establishment of an Intangible Cultural Heritage Fund that will accept contributions from member states and disburse funds for the safeguarding of intangible heritage on application by member states. The funds may be disbursed for expert studies on the problems raised by intangible heritage, expert assistance to member states, the training of people to safeguard intangible heritage within member states, the development of an infrastructure for safeguarding intangible heritage in member states and for equipment (UNESCO 2002b: article 22).

Because of the limited funds available at an international level (there are some disputes over who will pay what amount (Madiba 2003)) and their probable use for expert visits and the preparation of applications for international listing, as has happened with the World Heritage Fund, most monies for the safeguarding of intangible heritage, especially for community work, will have to be raised at a national level. The draft Convention proposes that '[i]n addition to having recourse to the Intangible Cultural Heritage Fund, each State Party may adopt other fund-raising methods to safeguard such heritage present in its territory. These measures include (a) the creation of national public and private foundations or associations aimed at encouraging measures for the safeguarding of the intangible cultural heritage; and (b) where a State Party has assigned its competent national authority the role of receiving funds to be used for the intangible cultural heritage, ...- such funds ... may be used to support the safeguarding of such heritage' (UNESCO 2003e: article 17).

The European Union (EU)-funded 'Support Programmes for Cultural Initiatives' (PSIC) in a number of West African French-speaking countries is a good example of regional funding that provides for a cross-subsidisation of developing countries. The PSIC support programmes are components of the Cultural Action Support Programmes (PSAC) that in turn form an integral part of National Indicative Programmes (PIN) established by the EU. In Senegal, the PSIC contributed nearly three million euros to the production, promotion, distribution and circulation of cultural products and shows. This has assisted the emergence of local festivals. These include the Traditional Music Festival of Diourbel (a region populated mainly by Serers and Wolofs, two of the main ethnic groups in Senegal); the Festival of the Water People of Dakar (concerning the cultural traditions and practices of the Lébous (Wolof fishermen), Niominkas (Serer fishermen), and so on; and the Origins Festival produced by the Diola and Serer ethnic groups (Tambadou 2003).

At a national level, financial instruments have been created to assist the conservation of built heritage. One example is tax incentives that exempt owners of property declared to be artistic or historic monuments from the payment of property taxes, provided they keep such property in good condition, and those applicable to individuals who seek to restore

and live in such property, ensuring that its use is in keeping with its value and history (López 2002). Similar financial instruments could be applied to intangible heritage but the danger might lie in the systematic listing or alteration of intangible resources to extract maximum financial benefit from them. An exciting result of financial incentive schemes could, however, be the application of largely forgotten aesthetics or marginal technologies to new problems and new creations, or the validation of vibrant everyday cultural resources that are not defined as 'high culture'.

Many countries today have governmental and non-governmental funds available for the performing arts and music. These funds already support forms of intangible heritage (dance, opera, etc.), but they do not generally cover community rituals that do not or cannot attract commercial audiences. This can be changed, but it is also necessary to continue to fund some established art forms and to have funding for completely new approaches to performance or art. Some new sources of funding must therefore be sought for intangible heritage forms. Japan, for example, funds the safeguarding of intangible heritage through the UNESCO Japan Funds in Trust for Intangible Cultural Heritage (Beazley 2003). What can such funds or incentive schemes do to help safeguard intangible heritage? Many forms of intangible heritage (although not all) have been passed down through the generations without costing the government anything. Ideally, existing modes of transmission and social structures that support them can be bolstered through outside incentives (eg. creating local job opportunities to reduce migration). Circumstances may also change irrevocably and threaten to interrupt the mode of transmission. In both situations, intangible heritage forms can be given a new economic value through direct funding or the creation of new income-generating opportunities associated with it. This can be positive or negative for the resource, involving new modes of transmission and possible changes in purpose and form.

Some forms of intangible heritage may not be able to attract significant audiences and thus generate income, either in the short term because they need time to create a market for goods or in the long term because they involve secret knowledge that the community cannot share. Commercial performances of a ritual will also significantly change its form and purpose (Truscott 2003). Simply creating a heritage product for sale to outsiders will not necessarily safeguard intangible heritage or be sustainable. At present, heritage products are often perceived very narrowly as a brief visit to the local community (or to cultural villages designed especially for tourists), on-site performances and the sale of crafts. Communities often struggle to devise workable business plans that address the difference between what they do for themselves and what they do for tourists; they struggle to estimate visitor numbers and to attract sufficient visitors on-site and they struggle to develop marketing infrastructure for products. Seed funding can be provided to help create local and international markets for the sale of goods (eg. cheeses produced by local methods, screen-prints of local designs) and setting up education programmes for outsiders. Community members could be paid to teach skills that can be generally shared (such as thatching, dance, knowledge about the environment, etc.). But these initiatives are best planned on a regional or national basis, as small concerns cannot fund large marketing and supply networks. Practising communities have also found that many of these commercial initiatives have unexpected and undesired effects on the community and its heritage (Truscott 2003).

Protecting material traces and places associated with intangible heritage

The idea of the 'cultural landscape', now used in the WHC and some national legislation, cuts across notions of 'urban', 'rural' or 'wilderness' as well as across notions of 'natural' and 'cultural' heritage. It allows us to explore the interrelationship between human activity and the natural environment. Heritage legislation in Canada is generally quite vague about cultural landscape definitions and terms. This has allowed notions of cultural landscape to evolve in a dynamic way. Certain urban heritage districts have identified rituals as well as artefacts that are protected under heritage legislation (Smith in Campean 2001). Such approaches permit much greater attention to be focused on community associations with landscapes and places. 'In the UK the Countryside Commission (now the Countryside Agency)¹⁷ is running a 10-year programme called the "Rural Heritage Initiative" and this aims to record and protect local historical features and local customs and traditions' (Beazley in Campean 2001: Australia page 19).

The regulatory frameworks for monitoring listed places and objects are quite well established. However, many of these guidelines and instruments focus on protecting the physical fabric: this is not always appropriate where the intangible values may actually require decay or replacement. In Mexico, for example, there is a Register of Monuments and Monument Zones for archaeological, historical and artistic monuments. The authorities issue permits and licences in cases of conservation and restoration projects, archaeological recovery, exhibition, and so on. They carry out verification and inspection activities to ensure compliance by individuals with heritage laws. Administrative or criminal penalties are imposed where a violation of the law is discovered. (López 2002). Similar heritage management frameworks operate under the auspices of national heritage bodies around the world. Many existing regulations cover the prevention of removal of, or illicit trade in, heritage objects or archaeological remains and the prevention of inappropriate development and decay of heritage places. Different meanings and significances (i.e. intangible heritage values) associated with tangible fabric may make this approach inappropriate, however. In Japan, conservation of built heritage allows for constant replacement of rotting wooden structures in the traditional way. The Aotearoa Charter (1992) was drafted in New Zealand to accommodate Maori beliefs about allowing places imbued with the wairua (the spirit) of ancestors to be allowed to decay (Johnston 1992).

The second main problem with existing instruments for managing places and objects is that they do not provide sufficiently for the identification and management of the intangible values associated with them (Smith & Marotta in press).

The federal government in Canada saved the remnants of the Rideau Convent Chapel after its destruction in 1972 and reconstructed it inside the new National Gallery of Canada. The late 19th Century chapel was the work of Georges Bouillon, priest and architect. It now sits devoid of religious ritual, and in a curious limbo. The assumption of purely physical value in fact led to major replacement of missing elements so that original and replacement fabric are no longer easily distinguishable. Across the road from the National Gallery is Notre Dame Cathedral, which happens to have another Georges Bouillon interior, this one in active use as part of an important sacred site. The federal government has a cost-sharing

¹⁷ See (www.countryside.gov.uk).

program which allows it to support the preservation of this interior as well. The support is again directed only towards conservation of the physical fabric. The strength of the Cathedral interior is connected in part to the ability of parishioners (primarily) and visitors (secondarily) to experience the Bouillon interior during sacred ceremonies. This interrelationship of artifact and ritual is a historic and cultural reality that is as fragile as the physical fabric. There is no government initiative to support the survival of this relationship, but it would seem only reasonable that it be considered and it is beginning to be discussed. (Smith in Campean 2001: Canada page 45)

The same issue has arisen in Australia: 'For Indigenous Australians the place and the content are frequently inextricably linked: for example stories of ancestral beings are linked to manifestations in the landscape and the landscape may be depicted to represent ancestral beings. In this case, conservation of content without conservation of place would lead to a reduction in the cultural importance both the place and the content' (Beazley in Campean 2001: Australia page 15).

Widell notes that in the creation of historic districts in the United States, more attention was focused on the buildings than on the people. She shows that an alternative model exists in Japan where the local people and their intangible heritage are part of a historical district:

The groups of 'traditional' buildings that still remain in urban settings in Japan date largely from the Edo (1600–1867), Meiji or Taisho (1912–1926) periods. They are called *machinami*. When a collection of these buildings is identified and designated as a *machinami*, the people and activities that occupy the buildings, including the products and foods, and festivals they produce are as important as the preservation of the buildings. In fact, some believe that without the people using the buildings in the original manner, there would be no *machinami*. ... The goal for residents in Japanese historic districts is to actively participate in preserving the intangible cultural heritage through participation in festivals or even earning their living through the continuation of traditional candy making, metal working, or laquerware. Visitors to these historic districts ... value these traditional foods, festivals, and goods and continue their existence through seeking them out for purchase. Subsidies are also provided by local prefecture and national governments making these occupations sufficiently profitable to be appealing to new generations. (Widell in Campean 2001: Japan page 23)

Making intangible forms tangible

One of the problems with existing guidelines for managing intangible values, even in Australia where this idea is relatively well established, is that they tend not to provide sufficiently detailed guidelines for oral documentation as part of the conservation process of the heritage resource (Smith & Marotta in press). We have therefore gone into some detail in this section on the issues that could be raised in such guidelines. This kind of information is widely available in publications such as that of Ritchie (1995) and in various codes of ethics and guidelines regulating the relationship between experts, business, government and indigenous communities (eg. UN 1995).

Documentation of an intangible resource is necessary to enable listing of the resource but it can also be a means of safeguarding the resource. It should, however, be remembered that recording a performance or ritual, a memory, knowledge system or a mode of doing something will never completely reproduce that intangible heritage form. It must always be a snapshot at one point in time, and it must also be a partial reproduction. Modes of recording or documentation may include a number of the following media: video, audio, transcription and illustration. The significance of the heritage resource, community requirements and the advantages and limitations of each format should be clearly understood before choices are made as to which media are employed for documentation. Multimedia documentation is usually preferable, including video, audio, photographs, maps, notes and sketches.

The use of various approaches to documentation can be beneficial: recording life histories, visiting places, group and individual interviews, participant observation, sketching, map-making, and so on. Some of the media for documentation may also serve as mnemonic triggers within interviews, for example during a discussion of pictures or instruments that carry meaning for the interviewee (Field 2003). At Robben Island Museum, Memories Project interviews with former political prisoners were conducted after 1997 both on the island and in people's current homes and work places. A series of interviews was often done with each person, including some interviews with small and large groups of former political prisoners. The community-centred approach to intangible heritage has fore-grounded the importance of community-led documentation projects. The Khayaletu community organisation of Worcester in the Western Cape region of South Africa, for example, is currently conducting oral interviews among community members. Young unemployed members of the community (some of whom are university graduates) conduct interviews with older community members about the history of the black township and plan various memorial as well as education and development projects based on this work. Some funding has been sourced from government for consumables and infrastructure, but neither interviewers nor interviewees are paid for their contributions.

Footage of a ritual or interview is always selective in terms of when the camera starts and stops, what is deemed appropriate to say or do in front of the recording device, and the framing of the shots. Transcription of an oral text makes the oral resource tangible, but it is selective in that it omits tone, some verbal gestures and other nuances. Translation into other languages is never exact. In the end, published texts from oral sources are sometimes thrice removed from what the source meant. The published texts are as much the creation of the researcher and publisher as they are a presentation of the oral interviews (Mamba 2002: 185). It is therefore essential, as far as possible, to supplement transcription of oral testimonies with video material and supplementary information about the meaning of the testimonies, provided if possible by the researcher as well as the original source. Interviews should be conducted where possible in the language most comfortable for the interviewee, and translator's notes should be provided on nuances of terminology or meaning that could be lost through the process of translation.

People involved in documenting intangible resources should be required to sign a code of ethics. An example is the Australian Institute of Aboriginal and Torres Strait Islander Studies Guidelines for Ethical Research in Indigenous Studies (AIATSIS 2000). Training, where necessary, should be given to members of the practising community in order to assist them in self-documentation. Before documentation begins, agreement over the scope of documentation, its status in terms of public and private access, where the

original materials will be lodged and issues around copyright over the materials, should be discussed with the people who will feature in the documentation process and those who represent the practising community as a whole. Once documentation of an intangible resource has been completed, the materials should be safely stored, copied, accessioned and lodged with an appropriate agency, along with any documentation about limitations and rights of access and copyright (see Smith & Marotta in press). A schedule for further documentation should be drawn up to provide repeated snapshots of the heritage resource in the future.

Recreating and renewing intangible heritage

Because intangible heritage is defined by its mode of transmission and ephemeral form, one key way of safeguarding it is to protect the channels of transmission. Intangible heritage is transmitted largely by crafts of memory such as mnemonic devices in poetry or ritual, or institutionalised systems like apprenticeship. If there is no strong material form, safeguarding the mode of transmission can be more valuable than safeguarding a snapshot of an intangible heritage form (Hofmeyr 2003). 'It is impossible to conserve or "authentically" re-create culture, culture as we live it every day' – any intervention to save or conserve any form of heritage involves doing something new (Handler in press).

But this is, of course, as true of 'traditional' transmission as it is of government-sponsored or externally aided transmission of cultural forms. 'When people act in the world, they are not simply reproducing culture or structure, they are creating it anew, even that part of it which we imagine to be "conventional": The symbolic associations that people share ... their "morality," "culture," "grammar," or "customs" ... are as much dependent upon continual reinvention as the individual idiosyncrasies, details, and quirks that they perceive in themselves or in the world around them' (Wagner in Handler in press). Any interventions designed to support existing social practices because of their social value must take account of *and embrace* this fluidity both in the practices and the values attached to them. It is, however, difficult to draw a firm line between 'normal' change in the practice of intangible heritage and change that undermines its significance. One of the key questions here is who decides where to draw this line.

UNESCO's Living Human Treasures system gives recognition and support to 'persons who ... have in the very highest degree, the skills and techniques necessary for the production of selected aspects of the cultural life of a people and the continued existence of their material cultural heritage'. It follows similar initiatives in Japan, Korea, the Philippines, Thailand, Romania and France. The system is designed to reward people who embody key skills and techniques so that they will (a) continue with their own work, (b) where desirable, develop and expand the frontiers of that work and (c) train younger people to take their place in due course. The system is also designed to 'encourage younger people to devote their lives to learning these skills and techniques by holding out to them the possibility of fame, perhaps riches also, if they can achieve the necessary level of excellence' (UNESCO 2003g). This system will work well in situations where performance or practice of a skill can be perpetuated by maintaining the presence of key skilled individuals.

Re-enactment of rituals and other performances has been identified as a critical means of preserving their heritage value. It is not enough to re-enact rituals for tourists or

specialists, however – the involvement of the practising community is often essential because the purpose of many rituals is to teach community members about the mores of the society – performance is a mode of transmission as well as a mode of expression.

In Malawi there is a dance known as Gule Wankulu. The dance is also found in the Tete province of Mozambique, and the Eastern province of Zambia. Gule Wankulu has a strong influence on the lives of its adherents, for it is not just a dance, but an expression of religion and emotional feeling. ... What makes Gule Wankulu a fascinating and mysterious phenomenon to many people is the secrecy of the organization, its association with the dead and witchcraft, the usual masks and figures, and the strict discipline among its members. Originally it was performed at the funerals of chiefs, at weddings, and at initiation ceremonies for girls. It is a very effective means of teaching local customs and morals. (Mvula 2002: 81)

Representatives of practising communities may wish to control who may perform a particular ritual, who may make certain objects or perform medical services, who may wear a specific headdress, and so on. One could devise a system of performance permits from a community group that enforces community rules. Some of these restrictions may seem appropriate to an outsider, others may not. But, more importantly for this discussion, some may be in tune with a human rights ethic and others may not.

Unlike old-fashioned approaches to the conservation of tangible heritage, the process of trying to renew intangible forms requires a much greater engagement with ideas than with fabric. Heritage retains its meaning only by maintaining community involvement, so this engagement is essential. But we need to ensure that the engagement with our ideological or intellectual inheritance is a critical one as well as a respectful one. What is the difference between perpetuating inequality and respecting cultural practices you do not agree with? For example, if women were not traditionally allowed to hunt in an Inuit kayak, can women tourists to Greenland be permitted to try one out today? If African braiding techniques were to be regarded as intangible heritage, and if they were traditionally restricted to women, is their use by British soccer player David Beckham an interesting gender reversal or an affront to African women?

Prott explains how the mismatch between an inegalitarian heritage and a human rights dream affects modes of transmission for intangible heritage:

Preserving the social processes which have produced folklore and traditional knowledge is much more difficult than just recording them or preserving the results in a museum. For example, where traditional skills are handed down from elderly persons with a lifetime of expertise, with decades of experience in increasing cultural knowledge, and with primary responsibility for their transmission to the next generation, respect for the aged is a very important aspect of that transmission. In a society where youth is elevated as equally or more important, that transmission may well be interrupted and the traditions less respected than the radical, the new, the exotic. Similarly, the sharp division in some cultures between the social processes undertaken by women and those by men may be radically changed by new ideas of gender equality which interfere with the traditional attribution of roles and skills. (Prott 1999)

The renewal of intangible heritage forms raises important questions about the role of the state in regulating social relations. Restrictions on the celebration of traditional practices because they are incompatible with human rights may be less appropriate than encouraging a broadening of these practices while retaining an understanding of their older form. This may mean a change in who practises certain cultural forms and how they are transmitted, but it may thereby guarantee their continued use:

Historic preservation citizen groups in Japan have done an excellent job at connecting those living in other parts of the country with threatened tangible and intangible resources. A good example is providing the skill and labor needed to reroof large structures in the mountainous areas once used by farmer[s] for the silk worm industry. Every year, the Japan National Trust transports hundreds of individuals by train to these outlying areas in a citizen effort to work side by side with the farmers to replace or repair the rush roofs on the buildings. (Widell in Campean 2001: Japan page 24)

This approach may work well in Japan where many Japanese urbanites identify with rural traditions and are accepted by rural people as being appropriate apprentices. In more culturally diverse situations, especially where tensions exist between dominant and marginalised communities (Truscott 2003), where knowledge is marked as secret or sacred, or where people do not have the money to fund an apprenticeship; the same model may not work as well. Communities could, however, ensure continued use of some forms of intangible heritage by teaching outsiders skills (see above). A legally binding agreement could be reached at the point of access on the use of the skills by outsiders after their apprenticeship. This could shift the power dynamic between the passing tourist watching the person making crafts in a cultural village: the tourist becomes a learner and the craftsperson becomes a teacher. There are precedents for this kind of outsider apprenticeship, even for sacred knowledge (eg. 'white' *sangomas* or traditional healers in South Africa), although examples are usually isolated.

Heritage resources, whether tangible or intangible, need to continue to be made useful and relevant in the present if they are to be 'safeguarded'. Broadcasting in the vernacular is one excellent way of safeguarding dialects, marginalised language forms and oral tradition while giving them new currency and relevance today. Governments can sponsor or encourage cultural programmes on radio and television to help people engage with a diversity of intangible heritage forms. Southern African Development Community countries like Lesotho, Malawi, Namibia and Mozambique have used this approach (Bhebe 2002).

Conclusions around managing intangible heritage

Most heritage practice is designed to maintain and protect significance associated with physical fabric rather than cultural practice or knowledge. The fundamental challenge to policy-makers concerned with heritage management, especially of intangible heritage, is the need to understand and respect the fluidity of cultural practices and the values attached to them while defining them, documenting them in some way and encouraging their future transmission. We also need to modify the concept of ownership to allow for benefits to accrue to practising communities while accepting the difficulty of assigning ownership over cultural practices and of defining who should receive benefits for having practised them in the past.



INFRASTRUCTURE FOR IMPLEMENTING HERITAGE POLICY

In policy reviews, more attention is usually focused on the legislation than on its likely mode of implementation. One of the interesting features of the discussion on intangible heritage is that it challenges the neat compartmentalisation of government departments, UNESCO divisions and legislative categories. The way in which instruments to safeguard intangible heritage deal with these challenges to the existing structure will determine whether the matter of intangible heritage becomes a positive force for change within heritage management and the culture-development axis, or a holdall for the bits of the heritage sector that are tricky for other sectors to deal with.

Most communities, whether Western or not, indigenous or not, make little distinction between the tangible and the intangible or between heritage places and other forms of heritage (Munjeri 2000). At an official level, however, the legislation and administrative processes relating to heritage places, objects and performance art (or intangible heritage) are often separated. This differentiation is not really an analytical one, having its origin in the fact that initial attention was given mainly to the built heritage, which was later expanded to include cultural associations with natural sites. The historical development of the concept of intangible heritage has meant that policy managing intangible heritage is treated largely as an add-on. At an international level, intangible heritage values associated with places have been accommodated by criterion (vi) of the WHC, while intangible heritage *per se* (performing arts, orality, knowledge) will be accommodated in the new Convention on intangible heritage.

At a national level this differentiation is sometimes reproduced, where for example in South Africa we recognise a broad definition of intangible heritage and have numerous oral history projects, but current heritage legislation only formally protects those intangible heritage associated with objects and places. The federal Department of Canadian Heritage is unusual compared to other national governments in that it deals with both tangible and intangible heritage. There is a growing interest in that Department in 'bringing issues of ecological integrity and diversity [together] with those of cultural integrity and diversity, and exploring the relationships between natural and human ecology. The Department has taken strong steps towards a more integrated view of heritage which builds on the views of cultural landscape articulated by First Nations communities. These views are seen as a way towards embracing a complex cultural diversity within a complex physical environment' (Smith in Campean 2001: Canada page 47).

In Japan, the *Cultural Properties Protection Act* of 1950 also protects both tangible and intangible heritage. Intangible heritage is divided into Intangible Cultural Properties (artistry and skills employed in drama, music and applied arts) and Folk-Cultural Properties (clothing, implements, houses, etc. used in connection with intangible folk-cultural properties such as manners and customs related to food, clothing and housing, occupations, religious faith, festivals and other annual observances, folk performing arts) (Nishimura in Campean 2001). This seems to be a division between high culture and low culture or between intangible heritage with and without tangible forms. An interesting aspect of the Japanese legislation is its relatively late (1996) but nevertheless decisive inclusion of listed buildings in the same legislation and the early use of a special category of place heritage related to Japanese aesthetics (the original legislation dates from 1919). In the *Cultural Properties Protection Act*, tangibles are divided into Tangible Cultural Properties (buildings and other structures, fine and applied arts), Monuments, Groups of Historic Buildings, Cultural Properties Conservation Techniques and Buried Cultural Properties. Monuments are further subdivided into three categories such as Historic Sites,

Places of Scenic Beauty and Natural Monuments. Places of Scenic Beauty (*Meishou* in Japanese) is a unique interpretation of the notion of a cultural landscape. It includes gardens, bridges, gorges, seashores, mountains and other places of scenic beauty that possess high artistic or aesthetic values for Japanese society (Nishimura in Campean 2001).

Engaging with intangible heritage issues may help ministries to raise awareness of the importance of heritage and of intragovernmental collaboration. National culture or heritage ministries, especially in developing countries, are generally poorly funded because it is difficult to convince governments of the monetary value of heritage as a tool of local and national identity or to demonstrate the link between associated income (such as tourism) and expenditure on heritage. Broadening the concept of heritage may help to raise the profile of cultural ministries and provide points of integration with other ministries. Including intangible heritage in national heritage registers can, for example, encourage better communication between government departments and between different stakeholders, including indigenous communities. In Australia, for example, policy development on intangible heritage and the interdisciplinary work of the AHC and Australia ICOMOS have actually helped to foster greater dialogue between the various departments responsible for heritage (Truscott 2003).

Australian heritage conservation is ... marked by its compartmentalisation into separate government structures for heritage places and movable heritage, reinforced by administrative divisions between natural and cultural heritage and between indigenous and non-indigenous cultural heritage. ... This is further complicated by Australia's federal system of government with different levels of responsibility for heritage. ... Non-indigenous intangible values also tend to be categorised separately into the arts or folklore ... This increasing convergence by the different streams of heritage conservation in Australia to accept intangible values represents an increasing confidence with the insubstantial and the unmeasurable. (Truscott 2000)



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Although tangible heritage always has intangible significance, the concept of intangible heritage can provide an important corrective to the focus on heritage places and objects. This is especially important in countries that have suffered under a colonial past in which the cultural resources of large sections of the population were ignored and denigrated. It can assist in acknowledging non-Western heritage forms at an international level and reminding the West of its own intangible heritage. The difference between tangible and intangible heritage should not, however, be expressed within the old civilised/primitive or Western/non-Western dichotomies that characterised so much of Western thought in the nineteenth and twentieth centuries. It is therefore essential not to restrict the definition of intangible heritage to 'primitive culture' or the pre-modern folklore of an indigenous community of a specific region. Intangible heritage consists of traditional, indigenous or local cultural forms but it is also made up of vibrant contemporary mixtures of cultural practice that may or may not relate to a national or regional identities.

There is no reason why national governments should not seek to safeguard tangible and intangible heritage in the same instrument and to search for a holistic definition of heritage. Similarly, there is little reason to perpetuate the distinction created by UNESCO between intangible heritage *per se* and intangible values associated with objects and places.

Instruments providing for the management of all cultural heritage should:

- Identify and acknowledge the value of the resource in national or international terms and within the culture of the community owning the resource (Johnston in Smith & Marotta in press).
- Safeguard the resource, including its continued transmission, dissemination and use (UNESCO 2001a: 5–6). Instruments should record changes in the resource as the practice of and knowledge about the resource becomes more widespread (limits must be placed on wider access to this knowledge where appropriate). Attention should be paid to potentially negative impacts of policy instruments themselves on the identification, management or practice of cultural heritage forms.
- Benefit the practising or 'owner' community. This may include acknowledging the community's right to expression through the medium of the heritage resource (Johnston in Smith & Marotta in press), reinforcing identity for the community owning the resource (Johnston in Smith & Marotta in press; UNESCO 2001a: 5–6) and assisting the community's development (Stockholm 1998).
- Benefit the broader community where possible, encouraging social co-operation within and between groups, enhance the creative diversity of humanity and encourage the appreciation, use and enjoyment of this diversity (UNESCO 2001a: 5–6).

Management of intangible heritage requires careful extension and adaptation of existing measures for managing heritage places and objects. Most policies on intangible heritage could and should apply to tangible heritage forms. All heritage, tangible and intangible, naturally changes over time, a fact accepted in traditional heritage management practices for places and objects. Managing intangible heritage poses new challenges because it is always being recreated. The speed of change is very rapid and the ambit of change is potentially very broad – what core significance should be protected and how should this be done? Management of intangible heritage can involve the collation of information in registers or databases and strategies for involving and protecting the practising community, including financial instruments. It should also include the adoption of an approach to protect material traces and places associated with intangible heritage, to

make intangible forms tangible and to recreate and renew intangible heritage. Any 'safeguarding' interventions will, however, introduce new incentives for change by (a) defining and limiting what they are and what they mean, and (b) providing a new environment for engagement in cultural practices (incentives provided by tourism, use for political lobbying, etc.).

Conserving or safeguarding both tangible and intangible heritage does not mean preventing change. It should include:

- Involving as many stakeholders as possible in helping to identify what makes a heritage form significant.
- Establishing ethical and effective methods of ensuring that the significance of a heritage form is safeguarded, including for example the continued practice and transmission of intangible heritage forms, even if in an altered format.
- Engaging relevant communities in practising, recording and documenting their heritage and its changes over time (assisted where necessary by others).
- Developing a clear strategy for creating and managing benefits accruing from use of the heritage.

Instruments safeguarding intangible heritage should thus support the rights of practising communities to identify, manage and benefit from their own cultural practices. They should also encourage the extension of the practising community where possible. In performing these tasks, it is essential that governments create channels of communication not only with communities but also between departments responsible for different aspects of this heritage.

This can be achieved by establishing a government agency or agencies to do the following:

- Maintain and administer the listing and information management process for registers of intangible heritage.
- Proactively seek listings of threatened resources and ensure the implementation of management plans for them.
- Make independent decisions around the compatibility of intangible resources with human rights codes.
- Assist communities to list resources where necessary and where necessary also to manage them after listing.
- Help to document and address disputes arising over the ownership and management of intangible heritage.
- Help to protect community rights and to channel benefits related to intangible heritage back into communities.
- Develop funding strategies for community-based management of the resource.
- Engage with other government and non-governmental agencies.

The format for listing of intangible heritage on national or international registers will need to be different from that used to create lists of tangible resources. On seeking listing on national or international heritage registers, practising communities would need to provide information to confirm the provenance, significance and ownership of such resources. There would have to be a variation on this documentation process for resources that do not have a cohesive, well-defined or extant practising community, or whose practising community is willing but unable to be involved in listing the resource. In creating such registers or databases, due attention should be given to the protection of intellectual property.

The following information should be provided for each intangible heritage form on such databases, making allowances for access restrictions:

- The historical background to the intangible heritage and a description of it that acknowledges its vitality and fluidity.
- A clear description of who (if anyone) claims to be the practising community associated with the intangible heritage and verified evidence for the basis of this claim.
- A statement that the values expressed by the resource conform to the principles of human rights (where such values are enshrined in international or national charters or legislation) or that values not conforming to these principles will be debated and/or discouraged from further transmission.
- A clear statement of the significance of the intangible heritage, including the value of the resource to the practising community (especially its social value), its relationship to community identity (Field 2003), and the value of the intangible heritage in a broader context (including scientific, environmental and historical values; rarity, representativeness, etc.).
- A clear and viable strategy, related to its mode of transmission, for managing and sustaining the intangible heritage and its benefit to the community.
- Information about the public or restricted status of the intangible heritage and associated data.

Policy instruments should make a clear link between intangible heritage management and developing a model for benefiting the practising community. Intellectual property rights must be part of this model, but the notion of ownership (individual or collective) may have limitations.

Economic incentives to safeguard intangible heritage will probably play the largest role of all in encouraging transmission and re-enactment of intangible heritage. New reasons for cultural production will change traditional craft techniques, performances and other forms of expression and may (or may not) have a negative impact on the meaning of the heritage resource for the community. Simply creating a heritage product for sale to outsiders will not necessarily safeguard intangible heritage or be sustainable. Models of successful interventions and innovative instruments need to be developed and shared more broadly. The most successful incentives, and safeguarding strategies, will involve the use of intangible heritage forms as springboards for new cultural expressions that have relevance and meaning in the modern world. An excellent example can be found in broadcasting initiatives that use local vernaculars to tell current news and provide cultural commentaries while collecting advertising revenue.

As the intangible characteristic of heritage is given by the community rather than the expert, it implies a new 'contract' between civil society and the state (Roy in Campean 2001). In the practice of safeguarding intangible heritage, we constantly need to ask ourselves (a) whose voices are heard and (b) whose interests are ultimately served (Ryan in Campean 2001). This requires sensitivity on the part of government agencies towards the relationship between heritage 'experts' and community representatives and recognition of the need to manage the distribution of potential benefits in the most equitable and appropriate way.

However, it is also important to address the needs and rights of the broader national or international community. Heritage is often deployed as part of an attempt by community

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elders to strengthen a shaky current power base and recreate some idyllic past in which, for example, men were men, women were in the kitchen and children listened to their elders. Recording what we know of the past (whatever its moral status) and using it to inform the present is helpful and valuable, but uncritically accepting utopian versions of the past or perpetuating damaging aspects of the past is not. We cannot, for example, condone the physical abuse of women because it is 'traditional'. The notion of human rights is often presented as a universal aim of all societies but in reality many societies continue to function in ways incompatible with human rights discourse. If we restrict intangible heritage listings to forms of heritage that correspond with human rights principles, this will affect not only what can be considered heritage but it may also mean that the form and/or modes of transmission of some forms of heritage would have to be encouraged to change.

There has been, and has to be, an ongoing conversation between national approaches to intangible heritage and the international Guidelines and Conventions developed by UNESCO and associated bodies. One of the motives behind developing international instruments on intangible heritage and intellectual property is to influence national legislation in a positive way. The international debates over intangible heritage can be used as a departure point for national debates about the revision and formulation of heritage legislation and cultural policy, but regional, national and local viewpoints should be fed back into the international debates, especially through UNESCO and WIPO. International organisations like these always have to draft instruments in such a way as to encourage agreement between countries; so regionally specific emphases and concerns must find expression in national legal and financial instruments.

One of the biggest challenges for the safeguarding of heritage, particularly the intangible elements, is not just the development of national cultural policy and legislation but also the better integration of the functions of government departments responsible for culture, heritage and social development. UNESCO has decided not to include intangible heritage in the WHC but that does not mean instruments for safeguarding intangible heritage should be separated from other heritage legislation at a national level. New instruments can provide an important corrective to the expert-centred approaches to managing tangible heritage which do not encourage community interest or support community rights. Several different government departments may be responsible for heritage issues, particularly intangible heritage: Environment, Sport, Trade and Industry, Tourism, Arts and Culture, and so on.

As with built heritage, there are differences in the way one safeguards and manages intangible heritage of different kinds, but these differences should not mask the similar functions and management requirements of all these resources as *heritage*. The general approach to managing heritage should be as consistent and integrated as possible (Smith 2002). Safeguarding intangible heritage will also have to become part of a broader strategy of community development since the safeguarding of transmission mechanisms will be inseparable from national debates around development, land rights and identity politics. The solution is not to ring-fence budgets and instruments for safeguarding intangible heritage but to integrate issues around heritage conservation into all development work and to write national instruments with this in mind. Safeguarding intangible heritage should not be a cheap ticket to development funding so much as one of the ways in which development funding finds appropriate and sustainable channels for use.



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Tunis (for the Arab States)
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