
Promoting and Protecting Intangible Cultural Heritage in the Market: The Role of Heritage-Sensitive Marketing and Intellectual Property Strategies

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Intangible cultural heritage (ICH) practice is often deeply intertwined with markets for craft, traditional medical services, performances and other products and services (Zandieh and Seifpour 2019). Gifts, sales and patronage have supported artists and performers for generations. However, there have also been persistent concerns about possible negative effects of market pressures on ICH practice, or indeed practitioners in the international arena since at least the 1970s. A 1973 letter to the Director-General of UNESCO from the Minister of Foreign Affairs and Religion of the Republic of Bolivia, for example, expressed

1). The HIPAMS team would like to acknowledge the contributions of various artists and community members from West Bengal to the process of developing the HIPAMS model: the Patua Community of Naya (Pingla Block, Medinipur), the Baul Fakiri, the Chau mask makers of Charida (Purulia), and the Purulia Chau dancers.

concern that ‘the international protection of the cultural heritage of mankind’ was primarily ‘aimed at the protection of tangible objects, and not forms of expression such as music and dance, which are at present undergoing the most intensive clandestine commercialization and export, in a process of commercially oriented transculturation destructive of the traditional cultures.’²⁾

One key international forum for discussing these questions today is the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO 2003, hereafter The Convention), which developed out of discussions inspired by the Bolivian letter. The Convention is predicated on the notion that ICH deserves international, as well as national or local, attention because it is an important driver of human development, identity and creativity, but at the same time it is vulnerable to loss and damage (Preamble, UNESCO 2003). According to the Convention, ICH thus requires safeguarding. This involves maintaining its practice and transmission (viability, Article 2.3), as well as its context (its meaning and value) within bearer communities (UNESCO 2020a, paras 109(e), 117 and 120). From the definition of ICH in the Convention, the status of ICH as heritage is rooted in the fact that these are cultural practices and expressions that have meaning and value for bearer communities and practitioners, giving them a ‘sense of identity and continuity’, even as practices necessarily change over time (Article 2.1).

The Convention describes ICH as a driver of sustainable development, linking ICH safeguarding to the Sustainable Development Goals under Agenda 2030, which includes income generation for bearer communities (UNESCO

2) Republic of Bolivia, Ministry of Foreign Affairs and Religion 1973. Letter to the Director General of UNESCO, 24 April 1973. Ref. No. D.G.O.I.1006-79.

2020a paras 185-187). At the same time, the Operational Directives (ODs) of the Convention raise concerns about how over-commercialization or misappropriation of ICH by third parties for commercial purposes can affect the viability, value and meaning of ICH elements to bearer communities (UNESCO 2020a, paras 102, 117, 171). Making and selling heritage products and services for external consumers, who may not value or understand the heritage in the same way as community members, can lead to decontextualization or disadvantage for traditional practitioners, for example. Mass producing items in factories can undermine the meaning and value of ICH-related products. The Ethical Principles of the Convention (UNESCO 2015, paras 1, 4 and 6) thus emphasize the primary role of communities, groups and individuals concerned in deciding not just how to manage change and continuity in ICH practice, and who should benefit from it (UNESCO 2015, para 7), but also in identifying what threats their ICH faces (including decontextualization, commodification and misrepresentation) and what should be done about them (UNESCO 2015, para 10).

In spite of significant concerns about the dangers of engagement with the market, and some suggestions for action, the Convention's texts currently give little practical guidance on how to identify the problem, and what to do about it. As the Evaluation Body has noted, the 'commercialization of an element cannot be described as positive or negative *per se*' (UNESCO 2019 para.64). Thus, in some Committee decisions on nomination files, the organization of festivals associated with the ICH element was identified as evidence of decontextualization and folklorization, or posing a possible threat from commercialization. In others, it was considered an appropriate safeguarding measure; the communities concerned were fully involved and aware of any risks of undue commercialization. The Evaluation Body has concluded that 'it is not

possible to apply a blanket rule' to determine whether festivals, for example, might have a positive or negative impact on safeguarding (UNESCO 2020b para.39). It's not clear how this decision should be made, by whom, using what criteria.

The Operational Directives encourage States Parties to the Convention to use various broad approaches to help bearer communities mitigate any negative impacts of market engagement, including capacity building, legal measures such as intellectual property (IP) rights protection, and research (e.g. UNESCO 2020a, paras 104, 107(m), 173, OD 178(b), and 185-7). Measures for ensuring safeguarding of the ICH are considered particularly important when entering or expanding the market for ICH-related products and services. Yet there is a lack of detailed guidance from a community perspective about what should be done to address problems when they arise in the context of the market. In expanding market opportunities, how can bearer communities maintain the viability of the heritage? How can they most effectively promote and protect their reputation and raise awareness about their art? How can they balance safeguarding heritage skills while promoting their work and innovating to reach new markets? How can they identify and protect their rights and interests when third parties use images of their work without permission or fail to attribute them?

For this reason, the Intergovernmental Committee of the Convention, at its 2019 meeting in Bogota, Colombia, has asked the Secretariat for a report on 'safeguarding measures and good practices that address the risk of decontextualization and over-commercialization of [intangible heritage] elements' (UNESCO 2019) while promoting sustainable and holistic economic, cultural, social and environmental development goals.

Current academic theories and sustainable development planning provide little practical guidance on the relationship between ICH and the market. Relatively little academic analysis has been done on understanding the relationship between heritage and the market (Lixinski 2018, 2020) and how to mitigate risks and maximise benefits for communities wishing to engage with it. In the critical heritage studies literature, the market is usually considered a corrupting force as it may affect the relationship between communities and their heritage (Comaroff and Comaroff 2009; Kirshenblatt-Gimblett 2004, 2006; Bendix 2018) or, at best, a necessary evil (see Bortolotto 2020a). There is general agreement that bearer communities need to be the primary actors. Kim et al. have, for example, argued that if ICH is to contribute to sustainable development through tourism, it has to be accompanied by practitioner consultation, empowerment and ICH safeguarding (Kim, Whitford and Arcodia 2019). Yet while questions such as ‘carrying capacity’ or ‘limits of acceptable change’ (for example, Coccossis 2009; Godwin 2011) have been considered in regard to tangible heritage and tourism, they have not generally been applied to ICH. In understanding the risks of commercialisation, the focus has been primarily on ‘over-commercialisation’ rather than the dangers of ‘under-commercialisation’, or loss of income from too little market engagement (Rinallo 2018; Bortolotto, 2020b).

Bortolotto suggests that ‘embarrassment’ about the tension between ‘sacred’ heritage and ‘profane’ commerce has hampered serious debate on commercialisation of ICH in both policy and academic contexts (Bortolotto 2020a). The idea that heritage, like fine art, is ‘above the market’ lies behind the argument that it is uniquely valuable, and is itself a kind of economic argument. There are other economic considerations in the debate, too. Protecting a new category of goods in the market (traditional products or services) has

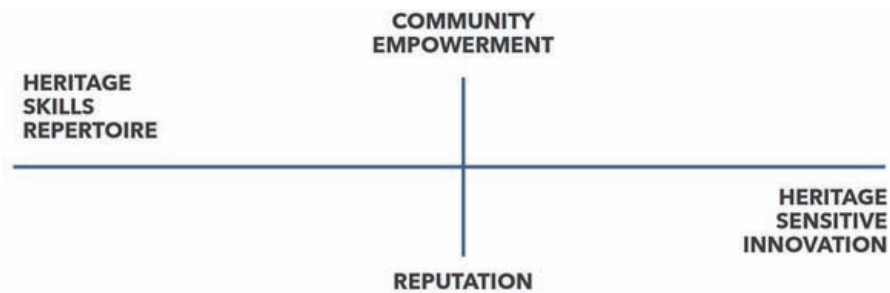
implications for third party commercial interests. For over 20 years, the World Intellectual Property Organization (WIPO) has been hosting negotiations to develop sui generis IP protection for traditional knowledge and traditional cultural expressions at the international level (Drahos 2014; Goswani and Karubakee 2008), in an attempt to address problems such as misappropriation. These talks have not resulted in any agreement, and there has been little formal collaboration between WIPO and UNESCO on these issues since the 1990s (Deacon and Smeets 2018).³⁾

A more theoretically robust and practically oriented conversation on heritage commercialisation can help communities planning sustainable development through ICH. To this end, I was involved in a project funded by the British Academy in 2018-2021, called 'Celebrating local stewardship in a global market: community heritage, intellectual property protection and sustainable development in India', led by Charlotte Waelde (Coventry University, UK) and Ananya Bhattacharya (Contact Base, India). The project worked with three different local communities making and selling ICH-related products or performances in West Bengal, India. The project developed HIPAMS (heritage-sensitive intellectual property and marketing strategies) to maximize benefits and minimize risks of community engagement with the market. HIPAMS were co-created by community artists, an Indian NGO (Contact Base / Banglanatak.com), and an academic team based in Europe. Based on insights from the process the project team subsequently developed a HIPAMS planning toolkit

3) This is not an easy discussion. Lixinski observes that regulation of the protection of traditional culture and its commercialisation are informed by different logics. The background norms for intellectual property law are found in private law, privileging individualism and party autonomy, whereas heritage law has its origins in public law, privileging public interest and the common good (Lixinski 2020).

that could be adapted and applied in other contexts.⁴⁾

Developing HIPAMS involved diagnosing areas of concern identified by community members and then co-creating coherent strategies to address them. The HIPAMS conceptual model developed during the process is based on four interlinked areas of work: community empowerment, heritage skills repertoire and innovation, and reputation. The relationship between these areas can be considered across two axes: a stability and change axis (heritage sensitive repertoire-innovation) and an internal-external axis (community empowerment-reputation).



Considering how collective organisation and action can help bearer communities control the commercialization process is a central strand of the HIPAMS approach. ICH bearers should be empowered to design and implement their own market strategies. In the HIPAMS project, community organizations were thus encouraged to engage in more collective marketing, and to support the development of community art codes providing guidelines for ethical conduct by third parties such as gallery owners, event organizers film makers,

4) See www.hipamsindia.org. The HIPAMS toolkit and other resources are available at <http://hipamsindia.org/research-output/toolkits/>.

and publishers. Increased knowledge about intellectual property rights (such as copyright) provided by community workshops helped artists negotiate relationships with third parties (for example when people wanted to reproduce their designs for commercial purposes). It also helped them build the reputation of their goods in the market (for example through registration of geographical indications).

Reputation of ICH-related products and services has both internal and external value for bearer communities. To ensure ICH safeguarding as well as ongoing production and successful marketing of ICH-related goods and services, both the community of artists and those who buy their products or services need to believe in, or be persuaded of, the cultural significance of the ICH, and its value in the market. This helps in ensuring fair pricing and market reach, as well as for encouraging transmission and practice within a community. In the HIPAMS project, promotional strategies were designed based on a market analysis and discussions about the heritage messages artists wished to convey, and to whom. Digital storytelling workshops were designed to help artists themselves to communicate this heritage information, and in some cases to correct misperceptions of consumers in the market (Rinallo, 2021). Reflecting publicly on the meaning and value of heritage in storytelling messages helped to promote the reputation of the products and services on the market, deepen the quality of heritage information communicated to outsiders, and maintain interest in the tradition within the community.

Ensuring that bearer communities (as a group) can practice the full range of a tradition is more valuable for the long-term safeguarding of an ICH element than ensuring that each product created by an individual artist is in line with

the tradition. Maintaining the skills and knowledge to perform an ICH practice (heritage skills repertoire) was thus a key area of discussion in the HIPAMS process. Bearer communities were encouraged to consider what they thought the 'roots' of their tradition were, how products produced for personal use or the market (the 'fruits' of the tradition) reflected this range of skills and knowledge, and what aspects were potentially being forgotten in the current product mix. Strategies were developed to increase the range of heritage references in market products, which encouraged renewed practice of those skills within the bearer community. Of course, ICH practice is constantly changing and developing; the innovations of today are often accepted by bearer communities and practitioners as part of tomorrow's tradition. The HIPAMS process thus also encouraged a discussion about changes in ICH practice over time, for example exploring historical practices such as the use of natural dyes and decorations as part of an eco-friendly turn in new products.

The HIPAMS project showed how a mix of legal, organizational, promotional and safeguarding tools could be chosen through community dialogue, with support and capacity-building as needed, and combined in coherent strategies. The strategies aimed to increase community control over their engagement with the market, and thereby create more benefit for themselves, both individually and collectively (even in a time of COVID), and also encourage the continued practice and transmission of their ICH. Further to the summary above, the evaluation of the project, available on the website, provides further detail on the success of HIPAMS in doing so.⁵⁾

5) See HIPAMS Project final report, available at <https://hipamsindia.org/wp-content/uploads/2021/05/HIPAMS-Project-End-Report.pdf>

References

- UNESCO, Decisions of the Intangible Heritage Convention's Intergovernmental Committee, Bogota, November 2019, DECISION 14.COM 10. Accessed February 20, 2021. <https://ich.unesco.org/doc/src/LHE-19-14.COM-Decisions-EN.docx>
- Deacon, Harriet and Riëks Smeets. 2018. "Intangible Heritage Safeguarding and Intellectual Property Protection in the Context of Implementing the UNESCO ICH Convention." In *Safeguarding Intangible Heritage*, edited by Natsuko Akagawa and Lauraiane Smith, 33-51. London: Routledge.
- Drahos, Peter. 2014. *Intellectual property, Indigenous People and their Knowledge*. Cambridge: Cambridge University Press
- Goswami, Ruchira and Karubakee Nandi. 2008. "Naming the Unnamed: Intellectual Property Rights of Women Artists from India." *American University Journal of Gender, Social Policy & the Law* 16, no. 2: 257-281.
- Lixinski, Lucas. 2020. "Commercializing Traditional Culture: Promises and Pitfalls in the Convergence of Intellectual Property Law and Cultural Heritage Law." *Annali italiani del diritto d'autore, della cultura e dello spettacolo (AIDA)*, forthcoming.
- Zandieh, Mahdi and Zeinab Seifpour. 2020. "Preserving Traditional Marketplaces as Places of Intangible Heritage for Tourism." *Journal of Heritage Tourism* 15, no. 1: 111-121.
- Lixinski, Lucas. 2018. "Intangible Heritage Economics and the Law: Listing, Commodification and Market Alienation." In *Safeguarding Intangible Heritage*, edited by Natsuko Akagawa and Lauraiane Smith, 52-66. London: Routledge.
- Bortolotto, Chiara. 2020a. 'Intangible Cultural Heritage and the Market: The Embarrassment of Heritage Alienability', unpublished paper.
- Rinallo, Diego. 2018. "Map of ICH Food Commercial Valorisation Practices Across the Alpine Space." AlpFoodway Interreg Alpine Space Project Deliverable D.T2.1.1. Accessed 30 August 2021. https://www.alpine-space.eu/projects/alpfoodway/project-results/wp2_map_ich_commercial_valorisation_practices.pdf.
- Bortolotto, Chiara. 2020b. "Commercialization without Over-commercialization: Normative Conundrums Across Heritage Rationalities" *International Journal of Heritage Studies*, forthcoming. DOI: 10.1080/13527258.2020.1858441
- Comaroff, John and Jean Comaroff. 2009. *Ethnicity. INC*. Chicago: The University of Chicago Press.

- Bendix, Regina. 2018. *Culture and Value. Tourism, Heritage and Property*. Bloomington: Indiana University Press.
- Kirshenblatt-Gimblett, Barbara. 2006. "World Heritage and Cultural Economics." In *Museum Frictions: Public Cultures/Global Transformations*, edited by Ivan Karp, Corinne A. Kratz, Lynn Szwaja, and Tomas Ybarra-Frausto, 161-202. Durham: Duke University Press.
- Kirshenblatt-Gimblett, Barbara. 2004. "Intangible Heritage as Metacultural Production." *Museum International* 56, no. 1-2: 52-65.
- Kim, Soojung, Michelle Whitford, and Charles Arcodia. 2019. "Development of Intangible Cultural Heritage as a Sustainable Tourism Resource: The Intangible Cultural Heritage Practitioners' Perspectives." *Journal of Heritage Tourism* 14, no. 5-6: 422-435.
- Godwin, Luke. 2011. "The Application of Assessment of Cumulative Impacts in Cultural Heritage Management: A Critique." *Australian Archaeology* 73, no. 1: 88-97.
- Coccosis, Harry. 2009. "Sustainable Development and Tourism: Opportunities and Threats to Cultural Heritage from Tourism." In *Cultural Tourism and Sustainable Local Development*, edited by Luigi Fusco Girard and Peter Nijkamp, 47-56. Farnham: Ashgate.
- Rinallo, Diego. 2021. "Heritage Storytelling, Community Empowerment and Sustainable Development." *Pravovedenie*, forthcoming.
- UNESCO. 2003. *Convention for the Safeguarding of the Intangible Cultural Heritage*. Paris: UNESCO.
- UNESCO. 2015. "Ethical Principles for Safeguarding Intangible Cultural Heritage, Decisions of the Intergovernmental Committee for the Intangible Cultural Heritage, Ninth Session, 30 Nov to 4 Dec. Paris: UNESCO, ITH-15-10.COM-Decisions, Decision 10.COM 15.a.).
- UNESCO. 2019. Report of the Evaluation Body on its work in 2019. LHE/19/14.COM/10. <https://ich.unesco.org/doc/src/LHE-19-14.COM-10-EN.docx>
- UNESCO. 2020a. General Assembly of the States Parties to the Intangible Heritage Convention, "Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage". Paris: UNESCO.
- UNESCO 2020b. Report of the Evaluation Body on its work in 2020. LHE/20/15.COM/8 <https://ich.unesco.org/doc/src/LHE-20-15.COM-8-EN.docx>