Copyright and Data Authenticity in the Digital Preservation of Heritage: the Case of OAPI States

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ABSTRACT

Digitisation is a sustainable means of heritage[1] preservation. It protects valuable heritage resources from deterioration and provides worldwide access to the diverse cultures of the world's heritage, while ensuring their safety for future generations. Digitised heritage can derive either from digitally created documents or from digital surrogates of similar documents. In OAPI States, ministries in the field of culture, substitute and for, tourism and several cultural institutions have adopted digital heritage as a tool for safeguarding the communities' cultural patrimony. Data authenticity in heritage digitisation raises some concerns based on the fact that digitisation as a tool to express the content of heritage products affects the entire spectrum of heritage preservation. Issues arise from the multiple applications of digital technologies on the heritage data used. From converting the data used, to processing it with a different shape, character or design, there is a long list of ways in which the authenticity of a digitised heritage work could be affected. Digital technologies could negatively affect the information environment by allowing the processing of inauthentic data. In this context, Mira Burri describes the process of the digital reduction of material to zeroes and ones through which the digital representation radically modifies the characteristics of the content. One click of the mouse can create perfect copies, transform, alter, or create multifaceted adaptations of the heritage data; this constitutes a tremendous threat to the data's authenticity. If no appropriate legal boundaries are set, this invasive *tsunami* of new possibilities could deceive the public about the authenticity of heritage data from OAPI communities. This paper gives a pictorial overview of traditional cultural expressions in central and West Africa and scrutinises the sustainability of copyright as a means to enhance the authenticity of heritage data in the course of its preservation in the digital realm.

First, this paper analyses the authenticity of heritage data under 'moral rights' protection in the digital field. Light is shed on the risks related to the digitisation of heritage when no proper intellectual property measures regarding the origin of the work in the digital realm are in place. Then, the paper considers how adequate digital copyright protection could constitute a way to protect the authenticity of digital heritage and encourage the use of digitalisation in the preservation of cultural heritage in general. The paper concludes by making some suggestions about how to balance the risks of digitising heritage in a global world. An adequate system of copyright law could make use of the new dynamics of the digitally networked environment to promote the authenticity of heritage, and also to promote the mobilisation of cultural heritage through the use of digital technologies. Finally, the establishment of a protocol for the digitisation of heritage - with the goal of preserving authenticity - is envisaged as a means to serve the same purpose.

Keywords

digitisation, digital copyright, tradition bearers, traditional rights holders, 'moral rights', governance, *Berne Convention*, codes of conduct, customary laws, intellectual property, OAPI States

Introduction

The processes of globalisation, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures. Even though digital technologies have enabled the cultural patrimony of OAPI States[2] to be promoted and exploited commercially, and have helped sustain cultural diversity, they nevertheless imperil the very existence of cultural heritage in the States. The digital realm has tremendous potential for the sharing, transfer and reproduction of data, but it has also exposed heritage data to the related risks of mutilation and unfair attribution. This constitutes a significant challenge to heritage authenticity as the bedrock of human capacity and a foundation of cultural diversity. Intellectual property (IP), as the branch of law protecting the creation of works of the mind, plays, under the umbrella of copyright law, a sustainable role in preserving the originality of cultural expressions. It is therefore important, as part of our analysis, to envisage how adequate copyright protection for digital cultural materials could prevent the dissemination of inauthentic data; firstly within the system of 'moral rights' established under the *Berne Convention*, and secondly in the field of digital copyright with specific tailored legislation.

An analysis of the applicability of these two regimes in OAPI States will be necessary to envisage maintaining the authenticity of heritage data in the region. This paper will discuss and provide possible solutions to the unprecedented challenges faced by the copyright system in the enforcement of heritage copyright in the digital realm, be it economic or moral. Digitisation in itself raises fundamental questions about the recognition and proper protection of traditional cultural expressions and traditional knowledge under an adequate legislative system. This paper will therefore explore the issue of the suitability of the copyright regime and the use of the term 'folklore' in OAPI intellectual property law to enhance protection of traditional cultural expressions and traditional knowledge.



Plate 1
Masks from West Cameroon.
Photo: Cameroon National Festival of Arts and Culture, November 2016. Yaoundé, Cameroon.



Plate 2
Traditional performers in West Africa.
Photo: Ministry of Culture and Tourism, Enugu State, Nigeria. June 2013.



Plate 3
Traditional musical instruments (wooden flute, drums, gongs) in West Africa.
Photo: Ministry of Culture and Tourism, Enugu State, Nigeria. June 2013.

I. Overview of traditional cultural expressions in Central-West Africa

Some of the cultural expressions that constitute ICH in Central-West Africa can be seen in the illustrations accompanying this paper.

II. 'Moral Rights' as a tool to enhance the authenticity of heritage data in a digital framework.

Digitisation allows the movement and dissemination of heritage data through digital channels and the internet. It is important that, as the data moves from the terrestrial to the digital realm, its authenticity is preserved. Intellectual property protection has the advantage of enhancing the recognition of the author and the control over created works under digital copyright. This section reviews 'moral rights' as a tool to enhance authenticity in digital copyright laws in OAPI States.

A. The concept of heritage in OAPI States – aspects of heritage digitisation

OAPI is the 'Organisation Africaine de la Proprieté Intellectuelle' which includes almost all the French-speaking countries of Africa – Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Guinea Bissau, Gabon, Mali, Mauretania, Niger, Senegal and Togo. Matters related to the intellectual property of those states are governed by the *Bangui Agreement*, which acts as the regional code of intellectual property law. [3]

The present paper considers the term 'heritage' in its intangible aspect, which means the *practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their cultural heritage.*

Digitising ICH elements helps create a repository of cultural and historical tangible heritage, and therefore allows its immediate preservation for coming generations. Many kinds of ICH related works could be digitised, including oral traditions, stories, rituals, and festivals. Communities' languages could also be digitised since they represent an oral form of ICH.[4] Social practices, rituals, and festive events constitute another category. The ICH domain also contains a combination of musical works (songs, lyrics, etc.), artistic works (paintings, comics, etc.), and dramatic and choreographed works (plays, dances, etc.), as well as crafts, arts, traditional fashion and manufacturing methods, which could all be digitised.[5] The digitisation of ICH is one of the safeguarding measures prescribed by the UNESCO 2003 *Convention*. Digitising ICH ensures the viability of intangible cultural heritage as part of the world's heritage.



Plate 4
Traditional dancers in West Africa.
Photo: Ministry of Culture and Tourism, Enugu State, Nigeria. June 2013.

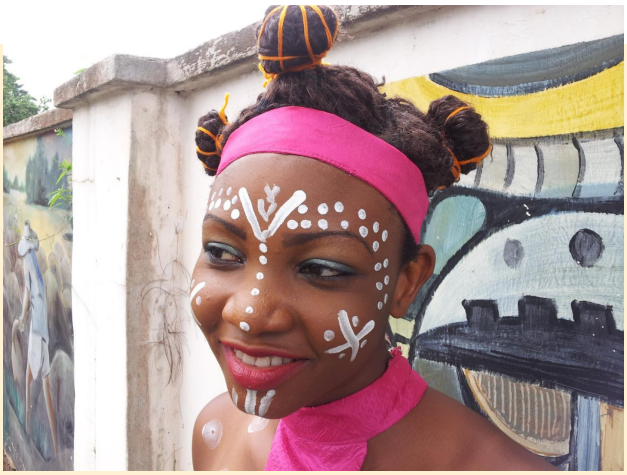


Plate 5
Traditional hair style.
Photo: Ministry of Culture and Tourism, Enugu State, Nigeria. June 2013..

Digitising ICH supports the computerisation and distribution of ICH material through the internet. There are many advantages, among which are the advertisement of national cultural patrimony, cultural and economic empowerment, and the potential for the development of tourism. However, this transformation into a digital format means that ICH is not only a cultural product, but also becomes a source of knowledge. This raises concerns in relation to the authenticity of data when it is accessed and used by non-custodians. One example in the OAPI digital heritage collection is the private sector initiative in western Cameroon under the leadership of the National Ministry of Culture. Several digital projects have been developed to preserve forms of intangible cultural heritage heritage rooted in the western communities. One of the missions of the Ministry of Culture in Cameroon is to protect, preserve, enrich and promote the nation's cultural, artistic, and cinematographic heritage.

B. Limited recognition of ICH as category of right under the *Bangui Agreement*

Even though the *Bangui Agreement* has integrated the protection of cultural heritage in its dispositions, the recognition of these categories as creations is nevertheless not appropriate. The *Bangui code* includes under the term 'Expressions of folklore', all the production of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognised as meeting the expectations of such a community.[6] These include folk tales, folk poetry, folk songs and instrumental music, folk dancing and entertainments, also the artistic expressions of rites and productions of folk art.[7] What the regional intellectual code protects here is not the creativity *per se*, but the cultural heritage.[8]

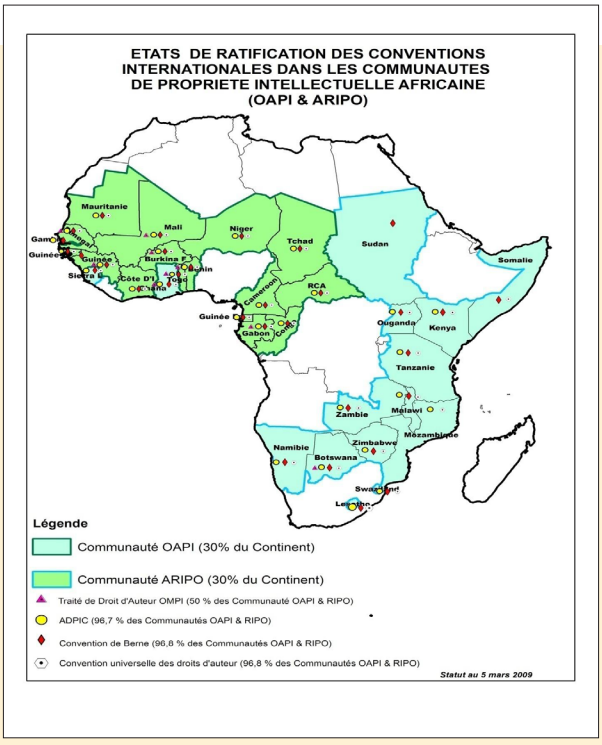


Figure 1
State of ratification of international copyright conventions by OAPI States, © Caroline Joelle Nwabueze



Plate 6
Traditional designs from Igbo Land, Nigeria.
Photo: Ministry of Culture and Tourism, Enugu State, Nigeria. June 2013.

Intellectual property is supposed to reward creativity, which implies proper recognition of all the elements of creativity represented in the cultural patrimony. The features of the traditional mask in Western Cameroon (See Plate 1) could, for example, be considered individually and assigned a particular IP protection under design law. Equally, the art of weaving traditional costumes for dancers could be recognised as such.[9] This recognition of different categories of elements by the *Bangui Agreement* as the regional code of intellectual property will promote creativity in traditional communities, beautify the traditional cultural sector, valorise the recognition of intangible heritage and enhance economic developments, as traditional rights holders will have economic returns from their creativity by virtue of IP rights enforcement.

Plate 6, for example, shows a textile dyed using traditional designs, traditional dancing instruments tied around the waist, and the dance performance itself. It is unfair to have those three elements of creativity protected under the broad category of 'Expression of Folklore'. The performance could be protected as a related right, with the process of traditional textile dyeing and the techniques for making traditional dancing instruments protected under patent law. The name of the dance could be used as a certificate mark – as, for example, Korean ramie is protected.[10]

C. Unprecedented challenges faced by digital heritage in the digital realm and the online environment

In its intangible aspect, cultural heritage, be it practices, representations, expressions, objects, artefacts, etc. is usually transmitted from generation to generation by communities, using traditional means. Such methods of dissemination create significant challenges, including the risk of the expression disappearing. It is in this sense that digitisation has been seen as a means to disseminate intangible cultural heritage products in a faster and more effective way. However, digitisation could also endanger the digitised heritage by allowing inauthentic content.

(i) Significant features of digitisation in the field of heritage preservation: easy capture/spread of heritage data

Digitising ICH preserves archival materials and supports the development of metadata standards. However, digitisation also increases the instant spread of ICH-related information and allows easy appropriation through downloading.

New technologies and the internet are of increasing interest for safeguarding cultural heritage. Digitised ICH is used through the ICH digital library, ICH archives, recordings in electronic form, digital archives of craft techniques, digital archives in collecting repositories, cultural websites which

upload and broadcast ICH data, etc. Also, digitisation facilitates the creation of digital copies of ICH expressions through downloading, scanning, ripping, or other means.

(ii) The easy manipulation/modification of digitised traditional documents and records

With digitalisation comes the risk that some parts of ICH will be distorted or manipulated. Digitisation can be a threat to ICH. The cultural data is exposed and easily used, which may affect its authenticity because of the possibility that it can be altered, reworked, or reused as it spreads round the world. Consequently, the ease with which digitised ICH can be transmitted and reproduced could result in the immediate global availability of inauthentic heritage materials. Digitising heritage may therefore increase the amount of inauthentic ICH on online cultural websites, digital databases, digital ICH archives, etc. It is highly feasible that heritage data will be easily and frequently copied through the use of digital tools. This could generate a big business in making illegal copies of digitised heritage materials in countries where intellectual property safeguards are weak. Parts of several digitised ICH products could be combined and used to make new cultural products, which although not authentic, would give rise to the possibility of new innovations.[11] This capacity for infinite reproduction, and therefore for the dissemination of false copies, frustrates the maintenance of the authenticity of heritage data in digital repositories.

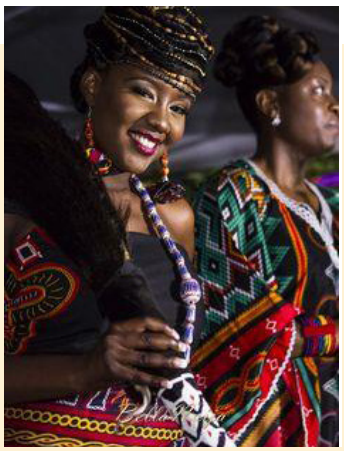
Intellectual property protection has the advantage of enhancing the recognition of the author and the control over created works under digital copyright. In this case, the existence of digital cultural materials with adequate copyright protection could prevent the dissemination of inauthentic data, especially when the cultural heritage bearers' rights are well-identified in the digital realm. Along with providing authors of works of art with an incentive to create, IP also protects the integrity of the work, together with the reputation and right of accreditation of the original author of the work.[12]

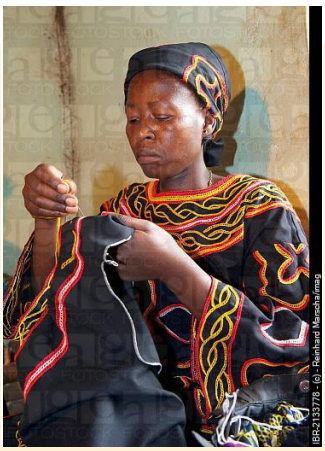
D. Security granted to ICH digitisation under the *Bangui Agreement*

If the internet constitutes a fertile ground for traditional rights holders, museums and cultural institutions to communicate their ICH to the public worldwide, it equally entails the potential for digital abuses. New issues arise almost as fast as technology develops, and new online technologies require careful application of rules written at a time when such technologies were yet unimagined.[13] The existing *Bangui Agreement* laws on digital copyright in general date back to 1999, and as such, do not adequately provide for digital infringements of ICH on the internet. The regional IP code must be tailor-made and cover the different types of ICH infringements offered by contemporary information communication technologies,[14] including illegal *records corresponding to digital objects from*



Plate 7
A musician plays traditional African music during the closing ceremony of French RECAMP-concept (reinforcement of African peacekeeping capacities) in Douala, 23 November 2006.
Source: DefenseImagery.mil, 061123-F-0560B-482 Author: U.S. Air Force by Staff Sgt. Jason T. Bailey (Released)





Plates 8 and 9
Toghu cloth is the traditional cloth worn in the Northwest region of Cameroon.
Source: https://za.pinterest.com/pin/447897125413361081/

cultural databases/repositories, infringement on google search words by specialised users regarding ICH bibliographical information, counterfeiting digital contents originating information sources such as SBN, external digital libraries, online cultural catalogue, etc. The list of ICH misuse under ICT is long... (See http://ec.europa.eu/information_society/newsroom/image/document/2016-43/2013-2015_progress_report_18528.pdf)

Plates 7, 8, and 9 represent some elements of the ICH of Cameroon that have been digitised and made available online.

III. The WIPO Copyright Treaty protection of the integrity and paternity of works in the digital realm

The *Berne Convention* (Article 6) grants to authors of works the right to authorship and the right to integrity.[15] 'Moral rights' so defined are subsequently divided in two groups:

- The right to claim authorship of the work or the right of paternity;
- The right to object to any distortion or modification of the work, or other derogatory action taken towards the work, which would be detrimental to the author's honour or reputation, otherwise called the 'right of integrity'.[16]

These two rights form the fundamental counterparts of moral rights under the copyright regime, and ensure the authenticity of the work in relation to its author. Reconciling copyrighted and digitised ICH in the field of moral rights could critically enhance the authenticity of ICH data. Moral rights enhance acknowledgement to the author/tribe, and therefore, give credibility, accuracy, recognition, and overall quality to the content being developed by the licensee.[17] In 1994, when the internet was truly in its infancy Paul Sapho, in his article entitled, 'It's the Context, Stupid,' stated that:

> *The rarest and most valuable commodity in the internet environment would not be the content or the means by which to distribute it, but instead would be the contextualisation of the content. Due to the massive amount of content available, consumers will hunger for any means by which they can sort through, gather, and evaluate the content that they have been able to amass. The future belongs to neither the conduit or content players, but those who control the filtering, searching and sense-making tools we will rely on to navigate through the expanses of cyber-space.*[18]

A. Situation under the *Bangui Agreement*

It is important that the value of those rights be represented under OAPI States legislation to enhance the authenticity of heritage data in the course of preserving those works.[20]



Plate 10
Traditional sculpture from Cameroon.
Photo: Cameroon National Festival of Arts and Culture, November 2016, Yaoundé, Cameroon.

For the moment, the copyright protection granted by the *Bangui Agreement* to ICH has remained terrestrial, while the infringement has gone virtual. This unsatisfactory situation has led some Member States to adopt some digital laws to address the rising number of infringements in the digital sector – for example, the Cameroonian law on electronic commerce.[19] The rights granted by the *Bangui Agreement* under Copyright law are too weak to counter digital infringement. Communication of a work to the public for example is limited to:

> *... making a work accessible to the public by means other than the distribution of copies. Any process required to make a work accessible to the public, and which so permits, shall be a "communication" and a work shall be deemed "communicated to the public" even if nobody in the public for which the work is intended actually receives it.*[20] (*Bangui Agreement*, Article 2 (xii) Annex VII)

Copyright must evolve with digital advances. Evolution and equilibrium capture the foundations of copyright - the old supporting the development of the new, and of the challenges that accompany any growing process.[21] Some countries, like Lithuania, have decided to make electronic resources available online for public access collected automatically by a harvesting method, while in Slovenia, *the Common Technological Requirements* define what kind of web content will be transferred and preserved.[22]

Digital Copyright could play a fundamental role in sustaining authenticity through the digital dissemination of cultural heritage materials. The WIPO *Copyright Treaty* (WCT - otherwise called the WIPO digital treaty),[23] grants to authors of works rights applicable for the storage and transmission of works in digital systems, the limitations on, and exceptions to rights in a digital environment and technological measures of protection, as well as rights management information. This treaty has been ratified by nearly all the States Parties to the *Bangui Agreement,* the regional code for intellectual property in OAPI.[24] Nevertheless, the treaty refers to the bedrock of copyright in the international framework, the *Berne Convention*, for all moral rights-related aspects of the work in the digital and online environment.[25] Article 6bis of the *Berne Convention* specifically legislates on the right to claim authorship of a work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work. The *Berne Convention* therefore ensures the honour and reputation of the work (and by extension that of the author) in the digital field, protecting it against any prejudicial action that might infringe its authenticity.

B. The shadow of the *Berne Convention* in OAPI States' copyright legislation.

Even though cultural works are intangible goods, digital technology and the internet make it difficult to trace copyright. However, the advance of digital technology has increased the importance of copyright. The OAPI regional community of intellectual property laws has legislated on this question. The *Bangui Agreement*, which is the regional community law of States members of the African Organisation of Intellectual Property, specifically mentions that rights relating to the fields of intellectual property shall be independent national rights subject to the legislation of each of the member States in which they have effect.[26] This implies that States' national copyright laws are adequate to deal with the issue of moral rights.

The national copyright legal framework of most OAPI States grants moral rights to the owner of a work. Moral rights, from an intellectual property law perspective, enable one to distinguish the source of the item in the digital realm. They follow the instructions in the UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* (2003) that safeguarding must always be developed and applied with the consent and involvement of the communities involved.[27] Under the right of paternity and the right of integrity, moral rights thus have the capacity to prevent individuals from misusing digitised heritage. The requirement for the author's prior approval ensures the authenticity of works. In certain cases, institutional intervention to safeguard a community's heritage may be undesirable since it may distort the value such heritage has for its community. The 'Carpets Case' - *M*, Payunka, Marika & Others v Indofurn Pty Ltd* [28] is an example. In this case, imported carpets reproducing the copyright works of indigenous artists were found to be infringements of each of the indigenous artist's works. The artistic works embodied pre-existing cultural clan images that were, in some instances, altered by the carpet manufacturer, thereby distorting their cultural message. The artists brought a copyright action against the company which had imported the carpets, Indofurn Pty Ltd, successfully winning their case.[29] The protection against moral rights violations is equally evident in OAPI States copyright legislation. For example, the attached pictures representing the traditional statues represented on the website of the Cameroonian National Festival of Arts and Culture under the ministry of tourism,[30] are represented with proper incorporation of the community / tribe names from which the objects originate.

Under Cameroonian copyright law, for example, moral implications are linked to the person of the author, and are perpetual, inalienable and cannot be proscribed. The law punishes as forgery any infringement of moral rights through violations of the right of disclosure, as well as the right of authorship or the right to respect of a literary or artistic work.[31] The same applies to any infringement of the right of authorship and of the right of integrity of a performance.[32] The country's copyright law confers on the author of a work the right to decide on disclosure and to determine the procedures and conditions of such a disclosure,[33] as well as the right to defend the integrity of his/her work by objecting, especially to its distortion or mutilation.[34]

Under Gabon copyright law, moral rights are granted to the author of a work and consist of the right of the author to decide on the disclosure of his/her work, as well as to determine the mode of disclosure, to claim authorship and defend the integrity of the work.[35]

Under Burkina Faso copyright law, the author retains the copyright of his/her work, including (i) the right to disclose the work and to decide the procedure and conditions of this disclosure; (ii) the right to claim authorship over the work; and (iii) the right to respect for the work.[36]

C. Policy formulation and digital abuses in OAPI states

Digital technology and the internet revolution present one of the most difficult problems regarding the implementation of intellectual property rights.[37] Information and communication technologies (ICT) and the internet require there to be urgent changes in framing intellectual property law and policy for the 21st century. There is a failure in policy formulation in OAPI States regarding the preservation of cultural heritage in the digital realm, and on the internet. This has implicated a largely deficient intellectual property law, firstly for the IP moral right in itself, and secondly concerning the very recognition of heritage-related works.

(i) Lack of digital protection in the traditional copyright protection of cultural heritage

With digital and online media, copyright works are freely accessible, malleable and transferable at a speed unknown in the history of copyright use, thereby undermining the structure of copyright law in relation to the copyright owner's control vis-à-vis the exploitation of his/her work.[38] The moral rights related to traditional cultural works were not specifically formulated for the digital realm. The traditional structure of copyright law in the States has not factored in the tremendous levels of access and dissemination of heritage works through digital and online media. Those rights have mainly referred to terrestrial methods and have not taken into account the digital framework. In France, for example, internet websites are protected by the intellectual property code against works that are not original. Under the French code, a website which does not fulfill the requirements of originality does not constitute a protectable work.[39] In the case *Design Sportswears et MmeY. / Luna*[40] the French high court has reaffirmed the fact that the mention of a name on a

particular work presumes authorship. There have been numerous attempts to include ICT-related infringements in the protection of works in OAPI. The Gabon copyright act for example, limits its scope to reproduction 'by all means':

> *The exclusive right to authorise exploitation of his work, afforded to the author, shall cover:*
> - *recitation, performance and public execution of his works by all means or processes, known or as yet to be discovered;*
> - *public transmission by any means of the recitation, performance and execution of his works;*
> - *diffusion of his works or their public communication by any other means serving to diffuse by wireless means the signs, sounds or images;*
> - *public communication, either by wire or by wireless means, of the broadcast work where communication is effected by an organisation other than the original organisation;* [41]

The ICT/internet revolution has affected traditional copyright law. For example, the US *Digital Millennium Copyright Act*[42] treats the circumvention of technological protection measures as infringement of copyright. With the increase in digital abuses, national legal systems are compelled to introduce additional standards of protection on the internet and similar networks. The law must be rephrased accordingly in order to counteract abuses in the field of digital copyright: it is important for OAPI nations to measure the new technological subject matter against new technological uses and to include them in copyright protection. In the meantime, some countries in OAPI are nevertheless equipped with laws on ICT and the internet which may be used in the case of online / digital infringement.

(ii) The existence of specific ICT/internet tailored legislation

Some of the OAPI nations have laws and decrees, which deal with communications and telecommunications. Electronic commerce has been regulated in the Republic of Cameroon in Central Africa,[43] as have cyber security and cyber-crime.[44] The country's authorities specifically regulate the modalities of protection for electronic communications' consumers.[45] This decree clearly states that when it comes to electronic services, the consumer is entitled to have his or her protection kept private. According to section 5(1) of the Cameroonian e-commerce law, any electronic advertising that is visible through an online service shall clearly mention the actual person or corporate body for whom the advertisement is made.

The country of Senegal is also equipped with a cyber-crime law.[46] The preamble describes ICT and the internet as tools to enhance commercial transactions and good governance, while at the same time they may encourage reprehensible acts that damage the interests of both private individuals and the general public. Senegalese law criminalises - among other offences specific to ICT - interference with the rights of the individual relating to the processing of personal data.[47]

Even though those general laws can be used in enforcement proceedings against digital copyright infringement concerning digitised heritage, their scope is too broad in terms of the sustainability of intellectual property rights. At the international level there have been many approaches, with WIPO treaties streamlining the existing copyright framework in terms of the exclusive rights, anti-circumvention measures and the protection of rights-management systems within the digital and online environment. The result has been an expansion of the scope of copyright to satisfy the demands of the digital environment.

The existing copyright framework in OAPI States makes it difficult for ICH copyright holders to enforce a variety of digital and online-based actions that are now prevalent in the cultural industry. It is important for OAPI to address these challenges via the channel of the *Bangui Agreement* and States' governmental authorities under their national copyright systems.

IV. The inadequacy of copyright frameworks to protect heritage data in OAPI

Professor Adebambo Adewopo has made it clear that WIPO represents a new era in the international phase of IP for a number of reasons that are critical to the development of today's imperatives.[48] WIPO's Traditional Knowledge Division has engaged international attention regarding the protection of traditional cultural expressions. WIPO thus plays an important role in the normative development of traditional cultural expressions. The WIPO

Intergovernmental Committee for the Protection of Traditional Knowledge created in 2000[49] has been given a mandate by the Assemblies of Member States of WIPO to continue intensive negotiations geared towards the establishment of international legal instruments that will ensure the effective protection of genetic resources, traditional knowledge, and traditional cultural expressions.[50]

A. The incompatibility of heritage and copyright

Copyright forms a bridge providing several benefits to heritage bearers, including the right to disclosure, reproduction, dissemination, and paternity. This helps communities maintain control over the authenticity and integrity of their ICH. However, the authors of intangible heritage are usually unknown or inaccessible. Even when they are known, there is a basic difference between the origins of heritage and the copyright of a creative process when it comes to protection. Meanwhile, copyright categories, such as authorship, originality and creation do not fit well into this context.[51] It is basically an author-centric and individual-originality regime, as opposed to an impersonal and community-based one. The creator of ICH is often a community, and the creative contributions have come from successive generations. The individual-creativity copyright standard is confronted by a community based form of property-inheritance,[52] while individual authorship is the opposite of collective participation. Copyright is traditionally concerned with the creations of individuals rather than the cumulative creations of an ethnic group or region.[53]

B. WIPO-IGC Negotiations-based Texts and national legal systems

In order to remedy the numerous problems in the current legislative framework protecting tradition-based works, WIPO-IGC *Current Negotiations-based Texts* are taking into consideration key points about the protection of traditional works, including:[54]

(i) what to protect?
(ii) why protect?
(iii) who will benefit?
(iv) how to protect?

Two solutions have been envisaged in the course of the negotiations:

(i) positive protection in acquiring intellectual property rights in order to meet the objective of protecting traditional works;

(ii) defensive protection to prevent others from acquiring IP rights in TK/TCEs.

The African Organisation of Intellectual Property has participated actively in WIPO sessions. Basically, OAPI States recognise that ICH is a source of tradition-based intellectual creations which may have economic value, and therefore their intellectual property rights should be protected. It is important for OAPI as an organisation, and the States Parties as guardians of their communities' heritage, to implement and adopt an appropriate regime for the management of traditional cultural expressions. This has become an urgent need for tradition bearers' rights, especially in a context where the *Bangui Agreement* and States Parties are still dealing with the protection of traditional works under copyright laws which are incompatible with the very nature of such works.[55] To help solve the numerous issues raised by the preservation of digitised heritage, some countries are already working on legal reforms to cover digital preservation. The UK *Gowers Review*, the US Section *108 Study Group Report* and recent changes to Australian copyright laws are examples of this.[56]

C. Obstacles related to the accessibility of materials

Cultural institutions have many difficulties in accessing ICH material, from the tracing of the author(s) to the accessing of heritage data.

(i) Difficulties in tracing the author

The advance of digital technology has increased the importance of copyright. At the same time, the digital revolution has made copyright infringement much easier [57] even though cultural works are intangible goods. And the internet makes it hard to trace copyright. Technological measures could control access to content, and the copying of content. Also, in the course of preservation activities, and in order to ensure the authenticity of materials, cultural institutions have a responsibility to trace the authors of works. This implies that they must inquire as to whether the work is in the public domain, whether the author is known or unknown, etc. There are several issues related to this difficulty. For example, sometimes it is impossible to identify the ICH bearer of the materials to be digitised; in law, in some countries certain ICH materials are part of the public domain; in the case of orphan works, numerous difficulties arise in relation to work/author authenticity due to the impossibility of identification.

(ii) Difficulties in accessing ICH data information: communities' systems 'freeze' preservation and access

Access is an important issue in preserving institutions' and holders' rights. The geographic location sometimes represents a fundamental impediment to acquiring heritage data from communities in remote areas. Sacredness/secrecy rules surrounding some forms of ICH may also restrict access. An example of this is described by Gaura Mancacaritadipura, a UNESCO cultural heritage expert in Indonesia, when he talks about *Angklung Buhun,* a type of traditional bamboo musical instrument. This instrument is played by the Baduy people of Kanekes village in Banten Province, Indonesia. According to traditional law, outsiders are forbidden to enter Kanekes village. Therefore, to interview the Baduy people who play *Angklung Buhun* and to record their playing as part of a nomination file of *Indonesian Angklung* for inscription on the UNESCO *Representative List of Intangible Cultural Heritage of Humanity*, the nomination research team had to invite some of the villagers to meet them outside Kanekes village, and get their permission to record their *Angklung Buhun* music and then to do the recording away from the village.[58]

In practice, local communities have become more and more reluctant to allow access to their cultural heritage. This constitutes a real obstacle to the authentication of digital heritage.

(iii) The issue raised by shared heritage

Trans-boundary 'shared' heritage is another issue that arises in the course of the digital preservation of cultural expressions in OAPI States, especially in a social context where the communities in several OAPI States share the same cultural heritage background; this includes language, performances and customs. There are identical or similar expressions of the traditional culture of indigenous peoples or communities crossing the borders of two or more countries. There is an example on the West African Coast where textiles such as *Bogolan* are woven in the border regions of Burkina Faso, Mali, and Cote d'Ivoire.[59] According to the UN *Declaration on the Rights of Indigenous Peoples,* contracting parties should take effective measures to recognise and protect the exercise of indigenous peoples' rights to maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions and their associated IP rights.[60] Benoît Müller suggests several legal measures which could help authenticate the origin of the heritage in such a case, including:

(i) National copyright or *sui generis* laws;
(ii) Bilateral or regional *sui generis* or *ad hoc* agreements;
(iii) Traditional systems of values and customary activities;
(iv) Rules governing the rights and obligations between indigenous communities and their people;
(v) All forms of IP protection are complementary and subject to a strategic utilisation by their beneficiaries.[61]

V. The imperative need of a governance model: balancing interests

Access is an issue both for institutions trying to safeguard ICH, and for the tradition bearers. There is a need for a balance between their interests.[62] To support this, several countries have opted for an amendment of copyright and related laws. *Sui generis* regimes have been enacted and offer an intermediate system of protection. The standards of intellectual property protection and enforcement granted to digital heritage need to be constructively reviewed in the light of prevailing realities including the particular nature of the data, communities' customary rules about issues of sacredness / secrecy and the future development of the law in itself. A governance model should accompany the production, use and sharing of digitised cultural products in order to maintain integrity as regarding their origin, but also to build up cultural diversity. Governance implies the management of intellectual property of the product(s), but also the ongoing community relations within the virtual world.[63]

Balancing conflicting interests could help support data-authenticity while granting outsiders access to digitised heritage collections. Also, guidelines which recommend implementing communities' rights to management through customary laws could be a sustainable stepping stone in the process of authenticating digitised heritage data. Copyright law encourages a balance between the author's IP rights to ownership and the public right to have access to advances in the field of culture.[64] The individual contribution on the one hand and public interest in ICH on the other, should be recognised and rewarded through copyright protection. The right of members of the public to access advancements in the field of culture should also be protected as part of the right to freedom of information,

therefore there have to be some limitations to the copyright protection of ICH bearers. Individual bearers' rights in the digital world need therefore to be balanced with limitations and exceptions in order to enhance the public right to cultural information.

The necessary complement of protocols and codes of conduct

The community of rights' owners largely depends on the formulation of public IP enforcement machinery. It is therefore important that the law takes the communities' wishes into account. The management of the interests of hundreds of communities cannot be taken into account in a single document, so it is important to consider drafting protocols and codes of conduct for the management of digitised heritage.

A. Digital preservation best practices.

According to the *International Study on the Impact of Copyright Law on Digital Preservation,* an independent report related to the copyright and related laws of Australia, the Netherlands, the UK and the US, a number of different preservation projects exist around the world and address copyright concerns in various ways.[65] Some simply focus on materials in the public domain to avoid copyright problems. Others, such as the Internet Archive, take advantage of existing exceptions like 'fair use', while others like Portico and Koninklijke Bibliotheek's e-Depot rely on cooperative arrangements with rights' holders.[66]

Unfortunately, such practices cannot solve all the copyright issues concerning the digital preservation of heritage, in the sense that they only represent a partial approach to the management of digital cultural works.

B. IP guideline legislating relationship holders-users of digitised heritage

In the face of numerous limitations and partial solutions, legal reform is necessary to protect these cultural products from unauthorised duplication and distribution. Some countries have opted for digital rights management as a form of copy protection. Such systems tie the 'ownership' of digital goods to a particular user account or to a certain device which is then verified by a connection to a remote server on the internet.[67] In Nigeria, for example, the Optical Disc Legislation has been used as a new tool to combat digital piracy. The legislation prevents replicating plants which churn out optical discs into distribution channels.[68]

Limitations imposed by the sacredness and secrecy of certain elements will affect their preservation and access to them. On the other hand, a monopoly will encourage freeloaders,[69] and 'freeze' the ICH element, preventing such heritage being shared.

Drafting contracts with communities on the topic of heritage management has been criticised for being one-sided in the sense that communities are often deprived of knowledge related to their natural resources, which opens door to various abuses.

To remedy this and secure the integrity of heritage data, protocols or guidelines should be drafted and enacted by the communities themselves, prescribing codes of conduct for access to and use of digitised ICH. Trademarks could be another tool to ensure heritage authenticity under customary laws. ICH bearers could use trademarks to designate the origin of their goods.[70] The adoption of the trademark standard in digital heritage collections would protect cultural institutions, stakeholders, and the public in general against the risk of confusion as to the origin of heritage.

Conclusion

A significant part of the profitable investment in the field of traditional works resides in the areas of tourism, the advertisement of cultural patrimony, and digital heritage, all considered as the bedrock of the future for many OAPI nations. The culture industry depends largely on an enforceable copyright system and effective IP management of communities' rights. The twenty-first century is facing the unprecedented challenge of a world confronted with the emergence of a new information environment in which individuals are free to take a much more active role than was possible in the information economy of the twentieth century.[71] The web, as a new communication platform, implies increased user-autonomy and increased user-participation. Those phenomena affect the digital preservation of cultural heritage. From a protection and management perspective, the inability to revise IP law to take into account communities' interests is not consistent with the realisation of the importance of IP in the region. The introduction of an adequate copyright law in the context of cultural heritage and the digital environment will be of immense importance.

ENDNOTES

1 The term 'heritage' in this work refers to intangible cultural heritage as understood under the UNESCO *Convention for the Safeguarding Intangible Cultural Heritage,* 2003.
2 OAPI, the 'Organisation Africaine de la Proprieté Intellectuelle' which includes almost all the French-speaking countries of Africa – Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Guinea Bissau, Gabon, Mali, Mauretania, Niger, Senegal and Togo.
3 Article 3 (1) *Bangui Agreement.*
4 Ibid, Article 2 (xx) Annex VII.
5 Ibid.
6 See Nwabueze, J., 2013. 'The Role of Intellectual Property in Safeguarding Intangible Cultural Heritage in Museums' in *International Journal of Intangible Heritage*, Vol. 8: p. 184
7 Article 2 (1) *Berne Convention.*
8 *Bangui Agreement,* Article 2 (xx) Annex VII.
9 Nwabueze, op cit.
10 Ibid.
11 See Weitzman, M. L., 1998. 'Recombinant Growth' in *Quarterly Journal of economics,* 113: pp. 331-660.
12 Pantalony, Rina Elster, August 2007. *WIPO Guide on Managing Intellectual Property for Museums.*
13 Better Business Bureau, National Advertising Division (2013).
14 See for example, European Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation available from: http://ec.europa.eu/information_society/newsroom/image/document/2016-43/2013-2015_progress_report_18528.pdf [Accessed 21 April 2017]
15 Article 6, *Berne Convention.*
16 See *Understanding Copyright and Related Rights*, WIPO Publication.
17 *WIPO Guide on Managing Intellectual Property for Museums:* p. 87. See also *Like Light Through A Prism: Analyzing Commercial Markets for Cultural Heritage Content,* 1999. Canadian Heritage Information Network: p. 10. Available from: http://www.chin.gc.ca/English/Intellectual_Property/Commercial_Markets/index.html.
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20 Frankel, S. and Gervais, D., 2014. *Evolution and Equilibrium of Copyright in the Digital Age,* Cambridge: p. 3.
21 European Commission Recommendation, op cit: p. 80.
22 Ibid.
23 *WIPO Copyright Treaty,* 20 December 1996.
24 See Figure 1.
25 Article 3 of *WCT* specifically mentions that Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the *Berne Convention* in respect of the protection provided for in the treaty.
26 *Bangui Agreement,* Title I, Article 3 (1).
27 UNESCO 2003 *Convention,* Article 15.
28 The Carpets Case: M*, Payunka, Marika & Others v Indofurn 30 IPR 209 at 210. Cited by Terry Janke in *Minding 'Culture:* Case Studies on Intellectual Property and Traditional Cultural Expressions, WIPO Publications. p. 13
29 Janke, T., 2003. *Minding Culture, Case studies on Intellectual Property and Traditional Cultural Expressions*: p. 9.
30 http://www.minculture-cameroun-gov.com/ [Accessed 21 April 2017]
31 Law No. 2000/011 of December 19, 2000 on *Copyright and Neighbouring Rights,* Article 80(c).
32 Ibid. Article 80(d).
33 Ibid. Art.14 (1)(a).
34 Ibid. Art.14 (1)(d).

35 Gabon Law No.1187 of July 29, 1987. *Instituting Protection for Copyright and Neighboring Rights*, Article 25.
36 Burkina Faso Law No. 032-99/AN on the *Protection of Literary and Artistic Property*, Article 9.
37 See Ginsburg, J. S., 2004. 'The new right of making available to the public' in Vaver, D. and Bentley, L. (eds.). *Intellectual Property in the New Millennium, Essays in Honour of William R. Cornish*, Cambridge: p. 630.
38 Adebambo, A., 2012. *According to Intellectual Property: A Pro-development vision of the law and the Nigerian intellectual property and policy reform in the Knowledge era.* 5th Inaugural Lecture, Nigerian Institute of Advanced Legal Studies, Lagos: p. 60.
39 See Cahein, M., *Droit d'auteur et Internet,* available from : http://www.murielle-cahen.com/publications/p_protection-auteurs.asp [Accessed 21 April 2012]
40 *Cour de Cassation,* Chambre Commerciale, arrêt du 6 Septembre 2011.
41 Gabon Law No.1187, Article 29.
42 US Digital Millennium Copyright Act [DMCA) 1981, Pub. L. No. 105-304, 112 statute 2860.
43 Law N° 2010/021 of 21 December 2010 governing electronic commerce.
44 Ibid.
45 Decree N° 2013/0399/PM of 27 February 2013.
46 Senegalese Law No. 2008-11 on Cyber-crime.
47 See Section B, Article 431-23, citing as an offence under the law *anyone who arranges the processing of personal data relating to a natural person in spite of an objection by that person, ... where the processing is for marketing purposes...*
48 See Adebambo, A., *A Pro-development vision of the law and the Nigerian intellectual property and policy reform in the Knowledge era* and endnote 5.
49 The first session was held in 2001.
50 See WIPO-IGC Mandate for 2012 and 2013 as decided during the Assemblies of the Member States of WIPO Fortieth (20th ordinary) Session September 26 to October 5, 2011 in Geneva, Switzerland. Available from: http://www.wipo.int/tk/en
51 See Fiscor, Dr Mihaly, Director of the Centre for Information and Technology and Intellectual Property (CITIP), Budapest, *The Protection of Traditional Cultural Expressions*. WIPO National Seminar on Copyright, Related Rights, and Collective Management. Organised by WIPO in cooperation with The Ministry of Culture.
52 The UNESCO 2003 *Convention* defines ICH as 'transmitted from generation to generation' not 'created' in the Copyright sense.
53 See Nwabueze, J., 2010. *The Protection of Traditional Cultural Expressions in OAPI States*. WIPO-ILO-University of Turin, L.LM Intellectual Property Thesis.
54 For example, the WIPO-IGC text of negotiations on TCE issues relevant to *sui generis* systems of protection include: 'Definition of the subject matter' (Article 1 of the *Draft Provisions*), 'Formalities'(Article 7), 'Illegal acts' (Article 3), 'Exceptions and limitations' (Article 5), 'Beneficiaries' (Article 2), 'Management of rights' (Article 4) and 'Transitional Measures' (Article 9).
55 See in this sense, Nwabueze, Caroline Joelle, Ph.D. Thesis, *Harnessing Intellectual Property Law to protect Traditional Artistic Works applied to Industry: Case study of craftsmanship in OAPI States.* Chapter 3 refers to the fact that within the OAPI region, protection is granted to traditional works on two grounds: firstly, they are protected, using copyright law, as folklore; and, secondly, they are protected as cultural heritage.
56 July 15, 2008 WIPO workshop on digital preservation and copyright. Available from: www.wipo.int
57 Akester, Patricia and Lima, Francisco, 2005. *The Economic Dimension of the Digital Challenge: A Copyright Perspective*. I.P.Q: No1 Sweet and Maxwell Ltd and Contributors: p. 69.
58 Mancacaritadipura, G., 2012. *Intangible Cultural Heritage and Intellectual Property Rights,* paper presented at the UNESCO Conference on ICH, Indonesia.
59 See Nwabueze, J., LLM thesis, op cit.
60 Article 31, UN Declaration.
61 See Muller, B., 2015, June. *Transboundary Shared Traditional Cultural Expressions,* WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva.

62 See Muir, A., 2008, July 15. *Digitisation Preservation and Copyright,* WIPO International Workshop.

63 Humphreys, S., 2008. 'The concept and conditions of governance in massively multiplayer online games' in *Governance of Digital Game Environments and Cultural Diversity:* p. 113

64 See in this sense, Lucky Belder, op cit.: p. 219.

65 July 15 2008 WIPO workshop on digital preservation and copyright. Available from: www.wipo.int

66 Ibid.

67 Ibid.

68 See the Copyright (Optical Discs Plants) Regulation 2006 regulating the production of optical discs.

69 See Reichman, J. H., 1996-7. 'From Free Riders to Fair Followees: Global Competition under the TRIPS Agreement' in *International Law and Politics,* Vol. 29: p. 11.

70 See Bottero, N., Mangani, A., and Ricolfi, M., 'The Extended Protection of "Strong" Trademarks' in *Markette Intellectual Property Law Review,* Vol. 11: p. 2.

71 Benkler, quoted by Mira Burri, 'User created content in virtual worlds and cultural diversity' in *Governance of digital game environments*, op cit., p. 98.

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