

Presidential Traditional Cultural Expressions Task Force Report

DRAFT 12/22/10 – Review to be considered during ALA Midwinter

Traditional Cultural Expressions Task Force Members

Although the majority of TF members participated in discussions related to the report and most all contributed to its content, there was not unanimous support for all statements contained in the report and there remains reservations by TF members for aspects of this report.

Co-Chairs:

Maggie Farrell, International Relations Committee (IRC)
Vivian Pisano, Office for Information Technology Policy (OITP) Advisory Committee

Members:

Gladys Smiley Bell, Black Caucus of the ALA (BCALA)
Christian Dupont, Association of College and Research Libraries (ACRL)
Janice Greenberg, REFORMA
Ramona Holmes, Office for Information Technology Policy (OITP) Advisory Committee
Charles Kratz, Representative of the ALA President
Mengxiong Liu, Chinese American Library Association (CALA)
Trina Magi, Intellectual Freedom Committee (IFC)
Anchalee "Joy" Panigabutra-Roberts, Asian Pacific American Librarians Association (APALA)
June Pinnell-Stephens, Committee on Legislation (COL)
Loriene Roy, American Indian Library Association (AILA)
Bradley Schaffner, International Relations Committee (IRC)
Fred Stielow, Joint Committee on Archives, Libraries, and Museums (CALM)
Linda Wynne, American Indian Library Association (AILA)

Staff:

Michael Dowling, Director, International Relations Office (IRO)
Alan Inouye, Director, Office for Information Technology Policy (OITP)
Marijke Visser, Assistant Director, Office for Information Technology Policy (OITP)

Table of Contents

Introduction.....	3
Background.....	4
Definitions and Issues.....	6
Role of Libraries.....	7
Collecting and Acquiring.....	8
Organizing.....	9
Access To/Using.....	10
Stewardship.....	11
Preservation.....	12
Conclusion.....	13

Recommendations.....14
Appendix A – Definitions.....15
Appendix B – Selected Background Resources.....22
Appendix C – Acronyms.....23

DRAFT

Introduction

Libraries strive to serve and support their communities as well as provide access to the world's information. Our values as librarians and ALA members are stated in the ALA Code of Ethics and related codes and policies. In offering services and curating collections, librarians strive to adhere to the values embodied in our codes and honor their communities.

As librarians collect, digitize, and provide access to materials that reflect a variety of societies, histories, and traditions, they may want to seek guidance in how to responsibly manage these materials. Libraries should be aware that some of these materials may raise cultural sensitivities because of their origin or association with traditional or indigenous societies and with other cultural and ethnic groups. Libraries also need to be aware that their activities and attitudes toward cultural materials and TCEs can be offensive to the originating Traditional Group (TG). It is critical that libraries respect and honor not only the materials but the Traditional Group associated with the materials.

Traditional Groups make invaluable contributions to the world's artistic, cultural and practical, including medical, knowledge. The World Intellectual Property Organisation (WIPO) has been seeking methods to extend rights and protections on these living legacies to their originating TG. Following from the principles of economic justice and human rights, WIPO proposes granting a new form of collective intellectual property right. The protections would extend rights for commercial to social purposes. The controls resulting from the proposed protections would operate in a manner somewhat parallel to controls afforded under "artistic rights" extension in the European Union.

Traditional Cultural Expressions (TCE) are defined as, but not limited to narratives, poetry, music (living performances), art, designs, names, signs, symbols, performances, architectural forms, and handicrafts. As expressions of knowledge, creative thought and intellectual activity, they transmit core values and beliefs of the communities that produce them. TCEs may also refer to the special knowledge held collectively by the TG and can extend into traditional medicines and environmental practices with significant economic potential. The protection of TCEs is related to the promotion of creativity, enhanced cultural diversity, and the preservation of cultural heritage.

Cultural materials, for this report, refer to tangible elements that capture and help to document TCEs and the outputs of traditional knowledge. Although the Internet is blurring the lines, cultural repositories have traditionally split the definition of cultural materials in two sub-categories:

- **Primary Resources:** Museum objects and archival records from the time of the TCE--including media, photographs, and field notes.
- **Secondary Resources:** Published books, films, or other outputs that make use of the TCEs and/or primary resources. These products are the key arena for libraries.

TCEs are often confused with their capture in films or other forms of familiar documentation which may be found in a library. Libraries typically deal with cultural materials - the tangible expressions of cultures in formats including print and digital cultural materials. These expressions are manifestations of or documentation pertaining to TCEs while TCEs are not usually held within libraries. Libraries will primarily engage the concept, usually not the actual TCE in their roles as collectors and managers of published documentation. Librarians who work with manifestations of TCEs desire to understand what considerations might be required and what are our library responsibilities while holding to the principles and codes defined by ALA.

The purpose of this report is to alleviate the confusion regarding what are TCEs and cultural materials so as to clarify the many contributions that librarians can make to libraries and communities for cultural materials while identifying issues that need further clarification and study for both cultural materials and TCEs. Librarians need to be aware of TCEs as WIPO, Library Copyright Alliance (LCA), ALA, and other organizations address the role of TCEs and develop new frameworks for understanding the legal, cultural, and ethical implications of caring for TCEs. Although this report is not a policy document, it will initiate a discussion forum that may lead to a greater understanding of cultural materials within libraries and will inform our profession in the care of cultural materials. The Task Force reaffirms the values of librarianship and provides guidelines that will assist librarians in their responsibilities regarding cultural materials. This report may also inform archives and museums as to the role of libraries in the management of cultural materials and contribute toward a common understanding that will aid further dialogue regarding cultural materials and TCEs.

Background

Beginning in 2006, the Office of Information Technology Policy (OITP) became involved in the issue of TCEs through its role of monitoring the activities of WIPO which was and continues to study whether TCEs should be protected by copyright or other intellectual property law. OITP, as the ALA member of LCA, worked with experts, library leaders, Native peoples, representatives of American Indian library groups, as well as representatives from the museum and archives community and ALA's Intellectual Freedom and Diversity Committees to study the issue at a convening sponsored by the MacArthur Foundation, November 12-14, 2008. OITP also worked with the International Federation of Library Associations (IFLA) Copyright and Other Legal Matters (CLM) Committee that were also tracking WIPO's interests in TCE. At the conclusion of the meeting, participants recommended that LCA continue tracking WIPO developments and prepare to advocate for libraries. ALA leaders and other members recommended that ALA develop a policy statement regarding TCEs, to provide a framework for future advocacy. In April 2009, OITP assembled a writing committee with librarians representing IFLA, the Diversity Council, AILA, the ALA Committee on Rural, Native, and Tribal Libraries of All Kinds, IFC, an archivist from the National Museum of the American Indian and a folklorist from the Library of Congress who is a member of the US delegation to WIPO. The writing team consulted with members of their

representative groups for feedback. The writing team developed a draft statement of principles, discussed the drafts at 2009 Midwinter and Annual conferences, and presented the final draft, *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*, version 7, for adoption at the 2010 ALA Midwinter meeting. Because a number of external and internal groups raised issues with the document, the Chair of the Committee on Legislation, who brought the matter to Council, withdrew the draft principles from Council consideration until these issues had been addressed.

ALA President Camila Aire formed the Presidential Task Force composed of 11 representatives in April 2010 and the Task Force continued under the presidency of Roberta Stevens. The Presidential Task Force was charged with the following tasks:

- Review the background and development of the current version (7.0) of the document *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*
- Examine the current document and other relevant material
- As necessary, propose any revisions to the document
- Bring forward a recommended revised draft document for approval by the ALA Council at ALA Midwinter 2011.

The membership of the Task Force represented a variety of stakeholders throughout the American Library Association. This included divisions, committees, offices and members of ethnic library organizations affiliated with ALA. Each member of the Task Force was an active participant in discussions and the preparation of this report. Task Force members also consulted with their representative units to build transparency into our discussions and work. A complete listing of Task Force members is included at the beginning of this report.

The Task Force was formed in April and May 2010 and held its first meeting during ALA Annual Conference in June 2010. Immediately, the Task Force adopted a set of working protocols that guided the discussion and its work. The protocols reiterated respect and openness to a variety of perspectives that are fundamental values within our profession. The initial meeting consisted of a background review of ALA activities to date and efforts related to the WIPO and IFLA discussions. The Task Force reviewed the charge, previous documents, and a bibliography of relevant readings. Throughout the summer and fall, the Task Force met via conference calls with continuing email discussions. The Task Force focused on the definitions of Traditional Cultural Expressions - determining just what is a TCE is a complex issue. What do we mean by “traditional” and what fits into the definition of “cultural?” Are expressions the same as materials? A broader discussion of definitions follows that will guide ALA in determining what falls under the classification of TCEs.

The Task Force reviewed the document *Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect*, version 7.0. After lengthy discussions, the Task Force determined that it was not possible to develop a policy

statement that would fully encompass all of the issues related to TCEs. However, ALA clearly needs guidelines and an understanding of the issues surrounding cultural materials and TCEs. The Task Force determined that our contribution to ALA would be to reiterate the values of our profession, articulate the need for respect, and to provide guidelines that assist librarians in their responsibilities regarding cultural materials that may also inform an understanding of TCEs. In addition, we identified issues and concerns that require further understanding and analysis; these issues and concerns form the basis of the recommendations that are included with this report. In many respects, this document provides ALA members with opportunities to continue to discuss and explore this important topic. Education on cultural materials and TCEs is essential to develop policies and procedures that honor these important resources within library collections. The Task Force is confident that the ALA membership will gain a greater understanding of TCEs and the role of cultural materials within libraries.

Task Force members participated in numerous discussions that inform this report although not all Task Force members agree with every concept presented and there are concerns this report does not address the many issues related to cultural materials. The Task Force appreciates the efforts of many to articulate the issues surrounding cultural materials and TCEs within libraries. It is hoped that this report opens the dialogue for ALA to address the many issues and perspectives surrounding cultural materials within our libraries.

Definitions and Issues

Perhaps the most challenging aspect in discussions surrounding TCEs, cultural materials, and cultural resources is the definition of terms and associated meanings. Before principles and guidelines can be discussed and developed, it is critical for terminology to be consistent. Inconsistencies in definitions of terms has probably led to further confusion about TCEs and cultural materials leaving librarians wondering whether existing collections may be subject to proposed intellectual property philosophies regarding TCEs. The Task Force believes that ALA-led education on TCEs and cultural materials for the profession is required and, as our collective understanding of the terminology, issues, and best practices increases, so policy development will emerge. A detailed discussion regarding terminology and definitions is contained in Appendix A.

Librarians are joined by archivists in defining TCEs and cultural materials. The Task Force met informally with leaders within the Society of American Archivists (SAA) to discuss common issues. The Task Force also has members who are also archivists and/or work within archives. SAA is struggling with similar issues regarding TCEs and have formed a Cultural Properties Working Group in addition to their Intellectual Property and Native American Protocols Forum Work Groups. Although this report is directed toward libraries, it may be relevant to the archival and museum communities.

Libraries typically collect cultural materials and only rarely TCEs. Cultural materials are tangible elements that capture and help to document TCEs and the outputs of traditional knowledge. It is this area that is of concern for libraries and the focus for the report. This report provides guidelines and principles related to the management of cultural property and documentation of cultural materials and outlines considerations for libraries in handling cultural materials and TCEs.

Underlying responsibilities and activities, it cannot be stressed enough that respect for materials and the originating TG is essential. Failure to honor these materials proliferate attitudes of superiority of one group over another that is in direct conflict with our librarianship values. The Task Force reaffirms the ALA Principles for Digitized Content approved by ALA Council (50.15.2) that states: *The library and cultural heritage communities must understand the origination of materials in digital collections, respect the ownership of these materials, and be attentive to issues surrounding cultural asset exploitation and repatriation.* This principle applies as well to cultural materials and TCEs.

Role of Libraries

Libraries will continue to provide and support broad access to much of the world's intellectual creativity and cultural accomplishments. This practice of librarianship is reflected in eleven Core Values endorsed by ALA. Among the core values are access, diversity, intellectual freedom, preservation, service, and social responsibility. Together, these values address librarians' responsibility to meet the information needs of library users of all kinds by providing equitable access to a wide range of resources and services, and by supporting individual expression as a tenet of intellectual freedom.

The five concept areas addressed in this document are central to the topic of collecting, organizing, access to and using, stewardship, and preserving cultural materials. They represent the relationship between libraries and cultural materials as a holistic cycle. This cycle begins with the understanding of the cultural meaning and context in which these expressions are created. Library activities relating to cultural materials should appreciate and value these meanings and contexts within the overall mission of the library to serve as a forum for free expression and access to ideas for all people of the community the library serves.

Cultural materials are not only complex in definition but complex in their historical backgrounds and unique situations. At this time, given that cultural materials and TCEs require individual consideration and a balance between the responsibility to protect materials and access to materials, a comprehensive policy for ALA is not appropriate. A single policy will either be so generic that it will have limited guidance or so detailed for each case that it would mirror AACRII. Meanwhile, WIPO has been working on intellectual property definitions and ALA has been a partner in the discussions forwarding the issues of property concerns. Librarians will continue to develop their

understanding of cultural materials and TCEs and how they contribute to global knowledge and understanding.

ALA has a long-standing commitment to intellectual freedom principles as expressed in its [Core Values of Librarianship](#), [Code of Professional Ethics for Librarians](#), [Library Bill of Rights](#), and interpretations and policies published in the [Intellectual Freedom Manual](#). The Task Force affirms these fundamental principles, and notes that no statements in this report should be construed to supersede or override them.

There are many ways that librarians can collaborate with and support cultural groups in the collection, access and use, organization, stewardship and preservation of cultural materials. There also remain issues in which value conflicts emerge in each of these areas. This report examines each of these areas.

Librarians have a responsibility to protect materials and assist communities with protecting and preserving their materials and there is much that librarians can undertake that honor the materials while respecting the fundamental principles of our profession. Collaboration with communities is critical in the life cycle of cultural materials and libraries should consider themselves partners with associated communities in the management of cultural materials. Library users and the community at large are enriched with connections to the heritage of cultural materials and greater understanding among all constituencies is developed regarding the libraries' collections. It is the Task Force's hope that this report will provide guidance for libraries while legal and intellectual property considerations are resolved for materials of indigenous and traditional communities.

Collecting and Acquiring

Because culturally sensitive materials play an integral role to the communities that create them, libraries should manage and care for these items in a manner that values the unique qualities and concerns of their creators.

Opportunities for Collaboration and Support

- Libraries may collaborate with traditional groups to select resources for the library that provide respectful and authoritative information about the group and its traditions and cultural expressions.
- Libraries may consult with the cultural community to determine the nature and scope of material that is appropriate for digitization or preservation of another type, either by the library or by the community with the library's support.
- A library fulfills its role to serve as the community's source for information about all sides of all the issues faced by all people the library serves.
- A library promotes the recognition of and respect for the library's resources concerned with traditional expressions of cultural communities, particularly those within the library's area of service.
- Libraries may develop specific selection criteria for the library's collection development policy in consultation with the cultural community.

- Libraries may develop collections that help preserve the cultural heritage of traditional groups in consultation with the cultural community that help the rest of the community appreciate this heritage.
- Libraries may seek partnerships with museums and archives that have responsibilities and expertise with related Cultural Materials, TCEs, and Traditional Groups.

Issues and Concerns

- Respecting the wishes of the cultural community to restrict access to sacred or sensitive resources in the collection while protecting the library's responsibility to provide equitable access to all library resources for all library users.
- Recognizing the possibility that some resources may best be returned to or held in the cultural community, particularly if the resource was illegally or inappropriately obtained from the community.
- Protecting the rights of all people, including members of traditional groups, to have unfettered access to all library resources.
- Selecting materials written, produced, illustrated and/or directed by indigenous peoples.

Organizing

Libraries actively use a variety of technical means to preserve and provide access to intellectual content. In a spirit of reciprocal curation of cultural materials that encourages understanding and respect for traditional cultures, librarians should, when possible, collaborate or share their expertise with Traditional Groups (TG) that may be willing to engage with them in preserving and providing access to their cultural heritage, including TCEs. By so doing, libraries can promote diversity and cultural sensitivity through the description, preservation and facilitation of access to cultural materials and TCEs.

Opportunities for Collaboration and Support

- Libraries and TGs may collaborate in the development of information systems to organize and provide original descriptions of cultural materials and TCEs based on the TG's system of traditional knowledge or other cultural knowledge systems.
- Within such collaborations, libraries and the communities should strive to ensure that thesauri, subject lists, name lists, and other organizing tools are designed to minimize and ideally eliminate cultural biases.
- Librarians, especially those from TGs who are knowledgeable concerning traditional and cultural knowledge systems, may create cataloging descriptions and other forms of metadata for cultural materials and TCEs.
- Libraries may reach out to TGs that desire guidance regarding rights management and help them to appropriately document any particular rights they may wish to exercise with respect to the creation and use of descriptive cataloging and metadata records within the administrative portion of such records.

- Libraries may assist, or collaborate, with the communities to preserve cultural materials and TCEs in a variety of ways, including the creation of surrogates (i.e., derivative copies created for preservation and access purposes, for example, reprographic, photographic or digital facsimiles), as well as the migration of such surrogates from one medium to another to help ensure perpetual access and preservation.
- The creation of any derivative works strongly suggests consideration be given to the originating TG. Since such materials can engender separate copyrights, it is important for libraries to collaborate with the TG in the creation and usage of any descriptive cataloging, metadata, or surrogates that may be articulated in their mutually acceptable agreements.
- Libraries may assist or collaborate with TGs to establish provenance of cultural materials and TCEs as well as determining “chain of custody” protocols to govern their administration.

Issues and Concerns

- Creating or using information organization and access systems based on traditional and other cultural knowledge systems may result in conflicts with subject headings and thesauri developed by North American and other international library organizations.
- Providing broad access without infringing upon cultural or property rights.
- Repatriating inappropriately or illegally acquired materials held in library collections to TGs.
- Willingness to partner with TGs without prescribing the future of their cultural materials and TCEs.
- Promoting recruitment, retention and leadership training for librarians and library staff from indigenous and cultural groups to provide leadership and support in organizing cultural materials and TCEs.

Access to/Using

The primary goal of libraries is to provide access to its collections and the world’s knowledge including cultural materials.

Opportunities for Collaboration and Support

- Libraries may assist cultural communities by making cultural materials within library collections accessible and easy to find.
- Libraries may assist cultural communities’ efforts to make cultural materials more accessible by creating digital collections of such materials.
- Libraries may provide expertise and support to cultural communities that choose to preserve their own cultural heritage and make it more accessible and easy to find.
- Libraries with traditional groups in their collection scope and/or service populations may provide forums for performances of traditional cultural expressions.

- Cultural materials that are fragile or rare may require special attention so that access and use do not jeopardize their preservation and existence. Library policies may limit or control access in order to protect materials, as long as those restrictions are applied equally to all users.
- Libraries may make every effort to educate their patrons on the ethical use of documentary materials that reflect traditional knowledge and traditional cultural expressions.

Issues and Concerns

- Librarians have a responsibility to meet the information needs of library users of all kinds by providing equitable access to materials and services. Libraries may be asked to restrict access to materials (either physical or digital) based on demographic characteristics, membership in a cultural group, or other attributes. To do so would be in conflict with ALA policy *Restricted Access to Library Materials: An Interpretation of the Library Bill of Rights*, which states: “Libraries are a traditional forum for the open exchange of information. Restricting access to library materials violates the basic tenets of the Library Bill of Rights” libraries should avoid accepting donor agreements or entering into contracts that impose permanent restrictions on special collections.”
- Libraries may be asked to place limits on who can attend a library-sponsored event. Placing such limits would be in conflict with ALA policy *Library-Initiated Programs as a Resource: An Interpretation of the Library Bill of Rights*, which states: “Library-initiated programs are offered free of charge and are open to all.”
- Libraries might house cultural materials that are expressions of private or sacred knowledge where access to such information might be perceived by traditional people as harmful or unethical.

Stewardship

As with all library collections, the oversight of cultural materials requires careful, responsible and respectful stewardship. Such oversight includes an obligation to provide the proper processing and care for these items. Effective stewardship ensures that these collections are made available to current and future generations of library users.

Opportunities for Collaboration and Support

- Libraries may seek opportunities to consult with traditional and indigenous communities concerning the identification, treatment and use of cultural materials held in their collections in order to provide the necessary social and cultural context for the use of these materials.
- Libraries may utilize technology to preserve and provide access to intellectual content. Library staff should share this expertise with those communities who choose to preserve and access cultural heritage.
- Libraries need to be sensitive to the impact that digitization and other reformatting can have on cultural materials and consider if it is fitting to take such

action with these objects. When appropriate, libraries may consult with the cultural and/or indigenous community, regarding such actions.

- Library staff may engage in continuing education to stay abreast of issues surrounding the stewardship of traditional knowledge and cultural materials.
- Libraries need to respect the rights and needs of all of their users.

Issues and Concerns

- Digitizing cultural materials and the products of TCEs will expose the content to the world beyond the boundaries of the library. Librarians must consider the consequences of such actions.
- Depending on the material, it may be difficult or impossible to consult with the appropriate cultural and/or indigenous community regarding the processing, care and preservation of certain items.
- Regarding access, the view of a traditional/cultural community may conflict with the views and policies of the library.
- Libraries might house cultural materials that are expressions of private or sacred knowledge where access to such information might be perceived by traditional people as harmful or unethical.

Preservation

Because preserving and providing access to cultural materials is a significant and complex activity, libraries can provide support and expertise to those communities that choose to preserve their own cultural heritage. Libraries that preserve cultural materials, in turn, should consult with traditional communities.

Opportunities for Collaboration and Support

- Libraries may assist traditional groups and cultural communities by preserving and safeguarding cultural materials in both print and digital formats within library collections.
- Libraries should consult with the traditional groups and cultural communities to determine the nature and scope of cultural materials appropriate for preservation.
- Libraries may provide expertise and support to traditional groups and cultural communities who choose to preserve their own cultural heritage.
- Libraries may assist traditional groups and cultural communities to promote the awareness of preservation of cultural materials.
- Libraries should collaborate with the traditional groups and cultural communities if they plan to display or exhibit the preserved cultural materials.
- Libraries may support the traditional groups and cultural communities by developing short-term and long-term preservation strategies and policies.

Issues and Concerns

- Long-term preservation of print and digital cultural materials across generations.
- Uncertainty of the authenticity of cultural materials in digital format.
- Format of collaboration between the libraries and the traditional groups and cultural communities.
- Funding required to support preservation initiatives.

- Communication with traditional communities on public access to materials displayed in physical or virtual formats.

Conclusion

Librarians have a social responsibility to provide and promote public access to information. We recognize the distinctive needs and concerns of the cultural communities we serve while embracing and respecting the diversity of all peoples. The special sensitivity and care cultural materials require are supported by the fundamental tenets of librarianship and this report serves as a reminder of our core library values to safeguard and provide access to materials without sacrificing individual liberty or respect for cultural differences.

Embracing these guidelines will advance the role of librarians as stewards of knowledge and cultural heritage. The guidelines will establish the library's voice advocating for reason and respect in national and international discussions concerning protection of and access to unique creative works of indigenous and traditional communities. This report also identifies areas requiring further study and understanding of the issues that will assist ALA in future policy formation.

Recommendations

(Numbering is provided for ease of discussion and do not reflect importance or priorities.)

1. Refer to OITP the ongoing monitoring of national and international policy developments relating to TCE and share this information with ALA leadership, constituencies, and membership.
2. Various divisions, committees, and units take responsibility to alert OITP of developments and issues regarding cultural materials and TCEs.
3. Appropriate ALA constituents - such as IFC/IFRT, CALM, ACRL/RBMS, representatives of ethnic library associations affiliated with ALA, and others - designate representatives to serve as liaison to OITP in its role as ALA liaison to WIPO on TCEs.
4. ALA post this report on the ALA/TCE website and use this website as a communication and education tool to keep ALA members current in the developments of issues related to TCEs and cultural materials.
5. ALA undertake a series of educational programs to promote understanding of cultural materials and TCEs and the responsibilities in the acquisition, management, oversight, preservation, and care of materials of indigenous and traditional communities. Stakeholders are also responsible for developing educational opportunities that relate to the focus of their unit in the understanding of roles of libraries for cultural materials and TCEs.
6. ALA partner with Society of American Archivists (SAA), the American Indian Library Association, and other associations in advancing the discussions on issues, policies, and guidelines for cultural materials and TCEs.
7. ALA Office of Diversity and all ALA units continue to promote diversity within libraries by supporting libraries' recruitment, retention and leadership training of librarians and library staff from cultural communities as leading to greater understanding and management of cultural materials.

Appendix A Definitions

ALA TCE Taskforce Terminology/Definitions

Prepared by the definitions subcommittee:
Christian Dupont, Janice Greenberg, Anchalee (Joy) Roberts,
June Pinnell-Stephens, and Fred Stielow

An understanding of key terms is necessary unpinning for the work of ALA's TCE Taskforce. In keeping with the Taskforce's charge, definitions draw on WIPO's general documentation and the particulars of its Intergovernmental Committee, *REVISED PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE (Revised Provisions)*, http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce-provisions.pdf, which in turn flows from WIPO/UNESCO's 1982 Model Provision for National Laws, <http://www.wipo.int/export/sites/www/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>.

Given WIPO's often admittedly vague terminology, the following is a glossary of terms as agreed upon by the ALA TCE Taskforce:

- **Cultural Property** deals with the physical ownership of the material culture artifacts of a Traditional Group. These matters are normally tied to UNESCO's 1970 Cultural Properties Act and involve nationalistic ownership principles and claims, which can range to ancient times. They can call forth specialized legal doctrines like "replevin" (which, in archival contexts, generally refers to governments recovering public documents from private owners), "repatriation" (which, in cultural property contexts, refers to the recovery and return of stolen or otherwise misappropriated documents and artifacts, such as Nazi-seized art or Native American remains), and archaeological "parage" (i.e., sharing of inherited property). Ownership of Cultural Property can present overlapping concerns, but should be understood as differing substantively from WIPO's focus on Intellectual Property rights.
- **Intellectual Property (IP)/Copyright Issue:** WIPO's IP interests flow from Human Rights principles. These involve extending Copyright protections as a collective and living right for Traditional Groups over their TCE's. The resulting protections extend from commercial to social purposes and in a manner somewhat parallel to the controls afforded under "artistic rights" extension.
- **Traditional Cultural Expressions** in WIPO's lexicon involves four types of "folkloric" transmissions by words (verbal), musical sounds (musical), of the human body (by action), and as incorporated in a material object (tangible expressions).
 - **Verbal, Musical, Action Expressions:** Involve IP concerns for the living performances. These should not be confused with the audio or video capture of such events.
 - **Tangible Expressions/Material Culture Artifacts** are subsets of TCE's "such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical

instruments; and architectural forms.” These call forth an extremely complex mixture of physical and cultural property rights in addition to intellectual property considerations.

- **Traditional Expressions** refers to the special “knowledge” held collectively by the Group and its leadership. WIPO’s model law treats these in a separate category from TCEs.
- **Traditional Groups:** This term is loosely construed to refer to a range of indigenous people maintaining a traditional culture—often those who have been subjected to colonial rule. For the United States, we may largely concentrate on Native American tribal groups – though we must recognize that the context for Native American concerns differs substantially from other traditional groups/cultures insofar as Native American tribes are recognized by U.S. laws and treaties as sovereign governments (for example, the [Native American Graves Protection and Repatriation Act](#) (NAGPRA) provides a specific legal framework for resolving repatriation and other cultural property claims).

In addition to the above terms, which are directly related to our charge to consider traditional cultural expressions, or TCEs, members of our definitions subcommittee also thought it important to consider these terms in relation to the concept of “ethnic groups,” which consists of communities of diverse ancestries.

- **Ethnic groups:** according to the categories used by the United States Census Bureau, ethnic groups in the United States include American Indian/Alaska Native, Asian, Black/African American, Hispanic/Latino, Native Hawaiian/Other Pacific Islander, and White.

Additional Background - Definitions from WIPO Documentation

Extract from WIPO *Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, <http://www.wipo.int/tk/en/tk/ffm/report/index.html> :

Expressions of Folklore

WIPO uses the term “expressions of folklore” in the sense in which it is used in the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982 (the “Model Provisions”). Section 2 of the Model Provisions provides that “expressions of folklore” are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

Only “artistic” heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of “expressions of folklore.” On the other hand, “artistic” heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the

“expressions,” namely expressions by words (“verbal”), expressions by musical sounds (“musical”), expressions of the human body (“by action”) and expressions incorporated in a material object (“tangible expressions”). The first three kinds of expressions need not be “reduced to material form,” that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions also give examples of each of the four forms of expressions. They are, in the first case, “folk tales, folk poetry and riddles,” in the second case, “folk songs and instrumental music,” in the third case, “folk dances, plays and artistic forms of rituals,” and in the fourth case, “drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms.”

WIPO is aware that the term “folklore” is believed to have a pejorative meaning by many persons, particularly in certain regions. As this is, however, the term that has been used at the international level for many years, WIPO has retained it for the present.

Heritage

The term “heritage” appears within the context of, for example, the “heritage of indigenous peoples”. WIPO understands “heritage of indigenous peoples” (and other peoples) to refer broadly to the items described in paragraphs 11 and 12 of the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, 1995, elaborated by the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Dr. Erica Irene Daes. This document is currently under revision. However, paragraph 12 currently provides that: “The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples’ heritage on film, photographs, videotape or audiotape.”

Indigenous Knowledge

“Indigenous knowledge” is understood in at least two different ways. First, it is used to describe knowledge held and used by communities, peoples and nations that are “indigenous”. The notion “indigenous peoples” has been the subject of considerable discussion and study. The description of the concept “indigenous” in the Study of the Problem of Discrimination Against Indigenous Populations, prepared by Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. J. Martínez Cobo, is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. The Study understands indigenous communities, peoples and nations as “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 countries, 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 identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems”. In referring to this description of “indigenous peoples”, the National Institute for the Defense of Competition and Intellectual Property Protection of Peru (INDECOPI), in its comment on the

Draft Report, queries its acceptability: “It would be interesting to know the opinion of the historians and to know if it is acceptable, for example, the definition that is made to the term ‘indigenous’”. Another comment also queried the limitation of the description to “pre-invasion” societies.

In this sense, “indigenous knowledge” would be the traditional knowledge of indigenous peoples. Indigenous knowledge is therefore part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous. That is to say, indigenous knowledge is traditional knowledge, but not all traditional knowledge is indigenous.

On the other hand, “indigenous knowledge” is also used to refer to knowledge that is itself “indigenous”. Dictionaries define “indigenous” as:

“originating or occurring naturally (in a country, region etc.); native; innate (to); inherent (in)”; and “(Esp. of flora and fauna) produced naturally in a region; belonging naturally (to soil etc.)”.

Or, as one of the comments on the Draft Report put it: “‘(I)ndigenous’ means belonging to, or specific to, a particular place.”

In this sense, the terms “traditional knowledge” and “indigenous knowledge” may be interchangeable.

Intellectual Property

Intellectual property (IP) refers to property rights in creations of the mind, such as inventions, industrial designs, literary and artistic works, symbols, and names and images. The notion “intellectual property” is defined in the Convention Establishing the World Intellectual Property Organization (WIPO), 1967/14 to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, sound recordings, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and,
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

IP is generally divided into two main categories:

- The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications (indications of source or appellations of origin), and the repression of unfair competition.
- Copyright includes literary and artistic works, such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. Related rights (also referred to as “neighboring rights”) include the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts.

Additionally, plant varieties are protectable under the IP-related system of plant breeders' rights.

As the definition in the WIPO Convention indicates, "intellectual property" is not confined to the specific examples of intellectual property just mentioned. The phrase at the end of the definition in the WIPO Convention ("all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields" (article 2(viii)) makes it clear that "intellectual property" is a broad concept and can include productions and matter not forming part of the existing categories of intellectual property, provided they result "from intellectual activity in the industrial, scientific, literary or artistic fields."

Traditional Knowledge

"Traditional knowledge" is one of several terms used to describe broadly the same subject matter. Other terms in usage include "indigenous cultural and intellectual property", "indigenous heritage" and "customary heritage rights".

WIPO 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.

"Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the broad sense.

Given this highly diverse and dynamic nature of TK it may not be possible to develop a singular and exclusive definition of the term. However, a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of IP. For example, article 2.1 of the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention"), does not include an exclusive definition for the meaning of "literary and artistic works," but rather provides a non-exhaustive enumeration of subject matter in order to demarcate the categories of creations which are protected under the Convention. Certain other international agreements in the field of IP do not define a singular term which describes the totality of protected subject matter.

WIPO's description of the subject matter naturally reflects its IP focus. WIPO's activities are concerned with the possible protection of traditional knowledge that is "intellectual property" in the broad sense as described in the definition of "intellectual property". For purposes of the FFMs, WIPO also used the expressions "traditional knowledge, innovations and culture" and "traditional knowledge, innovations and practices," which, for WIPO, had the same meaning as

the shorter “traditional knowledge”. “Traditional knowledge” is a working term only. WIPO acknowledges the right of indigenous groups, local communities and other TK holders to decide what constitutes their own knowledge, innovations, cultures and practices, and the ways in which they should be defined.

Traditional Knowledge Holder

WIPO uses the term “traditional knowledge holder” to refer to all persons who create, originate, develop and practice traditional knowledge in a traditional setting and context. Indigenous communities, peoples and nations are traditional knowledge holders, but not all traditional knowledge holders are indigenous.

Conclusion: In summation, WIPO’s focus is on “traditional knowledge” as described above. Traditional knowledge is created, originated, developed and practiced by “traditional knowledge holders”, the intended beneficiaries of WIPO’s work in this field. From WIPO’s perspective, “expressions of folklore” are a subset of and included within the notion “traditional knowledge”. “Traditional knowledge” is, in turn, a subset of the broader concept of “heritage”. “Indigenous knowledge”, being the traditional knowledge of “indigenous peoples”, is also a subset of “traditional knowledge”. As some “expressions of folklore” are created by indigenous persons, there is an overlap between “expressions of folklore” and “indigenous knowledge”, both of which are forms of “traditional knowledge”.



Extract from Revised Draft Provisions for the Protections of Traditional Cultural Expressions/Expressions of Folklore (http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce-provisions.pdf)

SUBJECT MATTER OF PROTECTION

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,
(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community's cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

DRAFT

Appendix B Selected Background Resources

Librarianship and Cultural Expressions Website <http://wo.ala.org/tce/>

Librarianship and Traditional Cultural Expressions, Version 7, January 13, 2010
<http://wo.ala.org/tce/wp-content/uploads/2010/02/tce.pdf>

ALA Policy Manual

<http://www.ala.org/ala/aboutala/governance/policymanual/index.cfm>

Section Two: Positions and Public Policy Statements

40.1 Core Values of Librarianship

40.2 Code of Professional Ethics for Librarians

50.15.1 Principles for the Networked World

50.15.2 Principles for Digitized Content

53.1 Library Bill of Rights

60. Diversity

Code of Ethics for Archivists

http://www.archivists.org/governance/handbook/app_ethics.asp

Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries, and Archives. Molly Torsen and Jane Anderson, World Intellectual Property Organisation (WIPO), 2010.

http://www.wipo.int/export/sites/www/freepublications/en/tk/1023/wipo_pub_1023.pdf

IFLA Statement on Indigenous Traditional Knowledge updated March 2, 2010

<http://www.ifla.org/publications/ifla-statement-on-indigenous-traditional-knowledge>

Librarians and Traditional Cultural Expressions, Wayne Bivens-Tatum, May 13, 2010.

https://blogs.princeton.edu/librarian/2010/05/librarians_and_traditional_cultural_expressions.html

Protocols for Native American Archival Materials. First Archivists Circle, April 9, 2007.

<http://www2.nau.edu/libnap-p/protocols.html>

Statement from Library Copyright Alliance (LCA) WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, July 19-23, 2010.

http://www.librarycopyrightalliance.org/bm~doc/lca_wipo_comments_072210.pdf

Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage. Martin Skrydstrup, World Intellectual Property Organisation (WIPO), 2006.

http://www.wipo.int/export/sites/www/tk/en/culturalheritage/casestudies/skrydstrup_report.pdf

Appendix C Acronyms Used in this Report

ACRL	ALA Association of College and Research Libraries
AILA	American Indian Library Association
ALA	American Library Association
APALA	Asian Pacific American Librarians Association
BCALA	Black Caucus of the ALA
CALA	Chinese American Library Association
CALM	Committee on Archives, Libraries, and Museums
COL	ALA Committee on Legislation
IFC	ALA Intellectual Freedom Committee
IFLA	International Federation of Library Associations
IP	Intellectual Property
IRC	ALA International Relations Committee
IRO	ALA International Relations Office
LCA	Library Copyright Alliance
OITP	ALA's Office for Intellectual Technology Policy
REFORMA	National Association to Promote Library and Information Services to Latinos and the Spanish-Speaking
SAA	Society of American Archivists
TCE	Traditional Cultural Expressions
TG	Traditional Groups
TK	Traditional Knowledge
WIPO	World Intellectual Property Organisation