

MANAGING INTANGIBLE HERITAGE



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

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

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

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

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

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

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

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

Creating registers or databases of intangible heritage

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

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

Use of established criteria

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New criteria for listing intangible heritage

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

Pros and cons of listing

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

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

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

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

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

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

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

Values in listing criteria

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

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

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

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

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

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

Guidelines for listing including security mechanisms

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

The issue of redress

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

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

¹⁴ See (www.aiatsis.gov.au).

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

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

Involving and protecting the practising community

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

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

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

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

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

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

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

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

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

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

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

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

Structures for community representation

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

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

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

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

¹⁶ See (www.aapa.nt.gov.au).

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

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

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

Managing disputes over meaning

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

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

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

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

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

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

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

A legal framework for the protection of community rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Providing financial incentives for protecting intangible heritage

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

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

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

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

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

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

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

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

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

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

Protecting material traces and places associated with intangible heritage

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

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

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

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

¹⁷ See (www.countryside.gov.uk).

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

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

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

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

Making intangible forms tangible

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

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

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

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

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

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

Recreating and renewing intangible heritage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusions around managing intangible heritage

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