

## SAFEGUARDING TRADITIONAL KNOWLEDGE: THE ROLE OF INTELLECTUAL PROPERTY LAWS IN CULTURAL HERITAGE PRESERVATION

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### **ABSTRACT**

*This journal article explores the intersection of intellectual property (IP) laws and cultural heritage, along with highlighting the importance of these laws in protecting and preserving our diverse cultural legacy. It examines the role of international governing institutions, such as the World Intellectual Property Organization (WIPO), in promoting discussions and policies that link the IP system with the custodians of traditional culture. The article emphasizes the need to prevent biopiracy, where indigenous cultures' rights and knowledge are exploited and discusses real-world cases that undermine the significance of proper IP rights and legal remedies. Furthermore, it examines the preservation of cultural heritage through various IP mechanisms, including patents, copyrights, and trademarks, and discusses the challenges and limitations associated with protecting traditional knowledge (TK). The article proposes a way forward by advocating for a "sui generis" system specifically tailored for TK, which incorporates defensive and positive protection measures. It also highlights the importance of documentation and knowledge-sharing initiatives in effectively managing IP assets aligned with indigenous communities' values and development goals. Ultimately, the article calls for inclusive dialogue that transcends the cultural versus IP divide, aiming to find common ground and effective solutions at the convergence of cultural heritage and IP.*

**Keywords:** Intellectual Property Laws, Cultural Heritage, Traditional Knowledge, Biopiracy, Patents, Copyrights, Trademarks, Sui Generis System, Documentation, Knowledge-Sharing, Inclusive Dialogue.

### **INTRODUCTION**

I find John Steinbeck's question "Without our past, how will we know it's us?" to be extremely relevant in the current scenario. Understanding our past and tracing our evolution

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is crucial as it sheds light on how our current growth has been achieved. Moreover, it allows us to delve into our ancestral traditional knowledge, which provides us with a sense of cultural identity and fosters a stronger bond with our roots and future generations.

Cultural heritage encompasses traditional cultural expressions, which are the physical artifacts and intangible attributes inherited from past generations<sup>1</sup>. These expressions include stories, songs, customs, and other oral traditions that have been passed down through generations<sup>2</sup>. For instance, the Bishnoi community utilizes their age-old ancient teaching to preserve and safeguard the biodiversity of the forest's flora and fauna.

In this capitalist world, intellectual property rights have emerged as a powerful tool to safeguard traditional cultural expressions from unauthorized use and reproduction for commercial purposes<sup>3</sup>. These rights offer recognition and protection to traditional knowledge, enabling indigenous communities to assert ownership and gain legal recognition over their valuable assets. <sup>4</sup>Linking cultural heritage and intellectual property may seem intuitive as it nurtures creativity not only for the right-holders but for society.<sup>5</sup>

## IMPORTANCE

One of the most important roles played by IP laws in protecting cultural heritage is the prevention of biopiracy. Biopiracy occurs when the importance of indigenous cultures, genetic resources, and knowledge is disregarded, substituted, or taken advantage of by external entities.<sup>6</sup> In simpler terms, it refers to the granting of patents or recognition for specific genetic resources or indigenous knowledge without the consent of the rightful possessors. Thereby depriving them of the advantages that would arise from the capitalization of these resources.

An illustrative example of biopiracy in India involves neem and turmeric. These natural resources were granted patent rights in the US, but the patents were subsequently revoked after re-evaluation by the Council of Scientific and Industrial Research (CSIR) from India. The CSIR argued that there was no element of novelty in these innovations, as they had been

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<sup>1</sup> Logan William, *A companion to heritage studies* (John Wiley & Sons 2016) 57.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*

<sup>4</sup> World Intellectual Property Organization, *Intellectual Property and Protection of Cultural Heritage: The case of the national museums of Arts and Civilizations in France* (WIPO Report, 2009) 6.

<sup>5</sup> Mira Burri, *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 3.

<sup>6</sup> *ibid.*

in use in India for centuries<sup>7</sup>. This case highlights the significance of ensuring proper intellectual property rights and legal remedies at both the global and local levels, along with efficient mechanisms for addressing biopiracy. These actions can secure the rights of native communities and guarantee their fair participation in the commercial utilization of their biological resources.

In addition to preventing biopiracy, intellectual property rights (IPR) also play a crucial role in safeguarding cultural heritage and expressions. By providing documentation, identification, and revitalization, IPR helps to maintain the authenticity of traditional knowledge and gives acknowledgment to collective or individual rights associated with such knowledge<sup>8</sup>. This support facilitates the preservation of the creative expressions rooted in tradition and the societal frameworks that uphold and manifest them.

To illustrate this point, we can look at the case of the Ghanaian people who were deprived of their benefits due to the lack of protection provided by governing laws. In 1992, the production of the "Deep Forest" CD merged digital music samples inspired by Ghanaian melodies, generating substantial profits. However, traditional musicians from Ghana did not receive any returns or incentives.<sup>9</sup> This example emphasizes the need for intellectual property protection and attribution to guarantee that traditional artists and folks are rightfully incentivized for their contributions.

Nevertheless, when discussing the issue of protection and attribution, an important question arises: Who should benefit, and how should it be determined? Traditional knowledge is often the result of centuries-old cultural exchanges, making it challenging to distinguish what belongs to one cultural community versus another. Moreover, it becomes difficult to identify a single individual or owner when traditional knowledge is collectively practiced by multiple groups. Resolving this issue requires careful consideration and a balanced approach.

Furthermore, the promotion and facilitation of knowledge to a larger audience can be achieved through the participation of communities who share their knowledge with big

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<sup>7</sup> United Nations Conference on Trade and Development, *protecting and promoting traditional Knowledge: systems, national experiences, and International Dimensions* (UNCTAD, 2004) 85.

<sup>8</sup> Molly Torsen and Jane Anderson, *Intellectual Property, and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (World Intellectual Property Organization 2012) 16.

<sup>9</sup> Sheryll Mills, *Indigenous music and the law: An analysis of national and international legislation* (Yearbook for traditional music, 1996) 56.

corporations and industries. By leveraging the expertise and resources of these corporations, local communities can protect their knowledge and commercialize it on a larger scale.

One such scenario can be created when a community with deep knowledge of Ayurveda collaborates with big corporations and commercializes their knowledge due to its global appeal. By leveraging their expertise and resources, local communities can protect their knowledge through various tools provided by IP laws, such as patents and trademarks. These measures ensure the preservation of this knowledge and benefit people around the world by utilizing these remedies. Additionally, indigenous communities can earn a certain amount of income and defend their cultural heritage in a rapidly changing world.

### **INTERNATIONAL GOVERNING INSTITUTIONS**

The convergence of IP laws into international norms began with a significant step when these laws were incorporated into the trading framework through the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>10</sup> This agreement established a global minimum standard and connected IP law with World Trade Organization's (WTO) mechanism for resolving disputes providing an effective means of resolving disputes and enforcing outcomes on a global scale.<sup>11</sup> This arrangement not only fostered and promoted innovation but also drove economic growth, consolidating wealth for nations that exported intellectual property<sup>12</sup>.

Once IP became linked to trade, it started to extend its influence to other fields, including the environment, human rights, and public health<sup>13</sup>. In 2007, the WIPO General Assembly adopted the Development Agenda, which emphasized the necessity of new forms of IP protection that would accommodate the preservation of cultural heritage and encourage creativity and innovation through traditional knowledge<sup>14</sup>. This initiative aimed to facilitate discussions among member states both in terms of policy and practical aspects, between the IP system and the guardians of traditional culture.

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<sup>10</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights [1869] U.N.T.S. 299.

<sup>11</sup> Ruth L. Okediji, 'The TRIPS Dispute Settlement and the Sources of (International) Copyright Law' (2002) <[https://www.iprsonline.org/unctadictsd/docs/Okediji\\_Copyright\\_2005.pdf](https://www.iprsonline.org/unctadictsd/docs/Okediji_Copyright_2005.pdf)> accessed 16 June 2023.

<sup>12</sup> cf Burri (n 5) 11.

<sup>13</sup> Harry First and Diane L. Zimmerman, *Working within the Boundaries of Intellectual Property* (Oxford University Press 2010) 445-469.

<sup>14</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions* (WIPO/GRTKF/IC/5/3, 2003) para. 8.

In addition to WIPO, several international institutions, such as the International Council on Monuments and Sites (ICOMOS) and the International Federation of Library Associations and Institutions (IFLA), focus on conserving and safeguarding tangible cultural heritage.<sup>15</sup> They advocate for access to ancient traditional information and support the preservation of cultural heritage materials.

India, as a party to the Convention on Biological Diversity (CBD), shares a similar objective of ensuring that the people responsible for creating and preserving traditional knowledge benefit from its commercial use<sup>16</sup>. This CBD presents India with prospects to gain advantages from its resources. Consequently, India recommended the Biodiversity Bill in 2000, which includes provisions for protecting local people's knowledge regarding biodiversity.

Ensuring a fair distribution of benefits resulting from the utilization of biological resources and related knowledge. The bill stipulates that before accessing any resource, approval must be granted by the National Biodiversity Authority (NBA).<sup>17</sup> While India currently lacks specific legislation or regulations protecting traditional knowledge as intellectual property, there are laws concerning traditional knowledge in other IP statutes.

## **PRESERVATION OF CULTURAL HERITAGE THROUGH IP LAWS**

**Patent route:** A patent serves as a tool to protect innovation, which refers to a product or process providing a novel approach to accomplish something or offering a progressive technical alternative to problems<sup>18</sup>. In India, patent laws are governed by the Patent Act of 1970, which establishes a standard for the granting of a patent. These criteria include novelty, inventive step, and industrial applicability.<sup>19</sup> Novelty requires that the invention is new and does not pre-exist. The inventive step necessitates that the invention is not ordinary or evident to an individual with expertise in the pertinent field. Industrial applicability means that the invention can be used productively and provides practical benefits to the industry.

Traditional knowledge (TK) often faces difficulties in satisfying these criteria. TK is not considered novel or non-obvious, as novelty is evaluated based on prior art incorporating anything that has been previously documented or disclosed. In many cases, prior art has been

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<sup>15</sup> cf (n 6) 88.

<sup>16</sup> Ibid.

<sup>17</sup> The biological diversity act 2002, s 22 (1).

<sup>18</sup> cf Burri (n 5) 12.

<sup>19</sup> The patent act 1970, sec 3.

documented, rendering it ineligible for patenting<sup>20</sup>. This poses a significant challenge for patenting TK. However, patents can still be granted to local communities for inventions developed using TK, rather than for the TK itself.<sup>21</sup>

An example of this is the Chuulangun Aboriginal Corporation, in collaboration with the University of South Australia, research was conducted on medicinal plants from the bush. By conducting tests on targeted pharmacological activities, they discovered compounds with potential applications in the treatment of inflammation. A patent was granted, demonstrating a noteworthy instance of balanced economic benefit sharing between indigenous communities and researchers from Western backgrounds. Another challenge is the lack of readily available information about TK, making it uncertain whether TK will be duly recognized as prior art. To address this problem, India has taken the initiative to create a Traditional Knowledge Digital Library (TKDL). This digital library contains around thirty million pages of ancient and traditional knowledge translated into various languages.<sup>22</sup> This technology enables researchers to locate information about TK before applying for a patent.

**Copyright:** Copyright serves as a mechanism to safeguard a broad spectrum of creative works encompassing literature, art, and scientific expressions, including novels, poems, paintings, drawings, and scriptures<sup>23</sup>. The Copyright Act of 1957 governs this mechanism, requiring originality to be proven<sup>24</sup>. This means that the work must be originated by the author independently and demonstrate possession certain level of creativity. However, the act does not specifically mention the safeguarding of traditional, cultural, and artistic works. Although Section 31 protects unpublished works, the scope of IP protection for traditional knowledge has limitations<sup>25</sup>. Proving the originality of traditional literary and production works can be challenging. As they are frequently inherited from one generation to the next with minimal revisions, they tend to remain largely unaltered. This restriction hinders the protection of indigenous styles, offering protection only to such a degree that it accommodates originality.

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<sup>20</sup> Madhavi Sunder, 'The Invention of Traditional Knowledge' (2007)

<sup>21</sup> <https://heinonline.org/HOL/LandingPage?handle=hein.journals/lcp70&div=21&id=&page=>> accessed 16 July 2023.

<sup>22</sup> WIPO, *Protect and Promote Your Culture, A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* (Geneva: WIPO, 2017) 37.

<sup>23</sup> cf Burri (n 5) 15.

<sup>24</sup> cf Burri (n 5) 20.

<sup>25</sup> The copyright act 1957, sec 13.

<sup>26</sup> Ibid.

An example within the Indian context is the Warli tribe, an indigenous community in Maharashtra known for their unique and traditional art style characterized by intricate geometric patterns and figures depicting everyday rituals<sup>26</sup>. However, copyright law primarily focuses on protecting original and independently created works, which posed a challenge for the Warli tribe to protect their traditional art from unauthorized commercialization and misappropriation.

**Trademark:** A trademark consists of words, letters, symbols, or shapes, unlike patents and copyrights, which are legal rights claiming ownership over creative assets<sup>27</sup>. The purpose of a trademark is to associate a sign with specific products and services, as a result, consumer search expenses are reduced, enabling consumers to make faster and more informed decisions regarding the products and services they intend to purchase thanks to the goodwill associated with trademarks can establish a distinctive reputation and foster consumer loyalty.<sup>28</sup> In India, trademarks are governed by The Trademark Act of 1999, which outlines certain conditions that must be fulfilled to obtain trademark recognition under the law. Firstly, the trademark must possess uniqueness or the ability to differentiate the goods from one another. Secondly, it must conform to moral and public order standards, and it must not be generic or descriptive in nature.<sup>29</sup>

Trademarks can be related to the protection of TK as they can function as a defensive measure against the act of inappropriately using and commercializing indigenous words, symbols, and cultural expressions that have surfaced over the years. Registering traditional signs under a trademark offers the advantage of indefinite protection, unlike copyrights with a specific duration. Furthermore, there is no requirement for a trademark to be individually owned; it can be collectively owned by a community. An example of traditional signs being trademarked is seen in Lego Bionicles or Sony PlayStation cases that make use of Maori imagery originating from the natives of New Zealand.<sup>30</sup>

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<sup>26</sup> Shailendra Paranjpe, 'Warlis get intellectual property rights' (DNA, 19 July 2014) <<https://www.dnaindia.com/pune/report-warlis-get-intellectual-property-rights-2003444>> accessed 17 June 2023

<sup>27</sup> cf Burri (n 5) 16.

<sup>28</sup> Dan L. Burk 'Law and Economics of Intellectual Property: In Search of First Principles' (2012) <<https://www.annualreviews.org/doi/10.1146/annurev-lawsocsci-102811-173857>> accessed 16 June 2023.

<sup>29</sup> The trademark act 1999, sec 6.

<sup>30</sup> Susy Frankel, 'Third-Party Trademarks as a Violation of Indigenous Cultural Property' (2005) <<https://ssrn.com/abstract=1862685>> accessed 17 July 2023.

## WAY FORWARD

Conventional forms of intellectual property (IP) are inadequate in protecting traditional knowledge (TK) since they primarily focus on individual rights, whereas TK requires broader collective measures due to its association with communities. Therefore, implementing a "sui generis" system, which is defined as something unique and distinct, can be a suitable approach to safeguard these rights in India<sup>31</sup>. This system would involve modifying various elements of the existing IP regime to establish a different type of IP specifically tailored for TK.

According to TRIPS, the sui generis system should be effective<sup>32</sup>. However, it does not provide clear guidelines on what essential elements are required for this effectiveness. The Plant Genetic Resources Institute has identified several essential elements. Including a definition of protectable subject matter, the establishment of a protection framework, the delineation of the extent<sup>33</sup>

This system can incorporate two forms of intellectual property protection. First, defensive protection can be employed to safeguard external parties from acquiring rights over TK, thereby safeguarding the interests of the rightful custodian holders. Second, positive protection aims to grant legal recognition and credit to indigenous communities, enabling them to control the use and commercial exploitation of their TK<sup>34</sup>. This approach helps maintain a balance between indigenous communities and the government, facilitating a strategic policy for recognizing such knowledge and expressions while ensuring control by the appropriate parties.

Another method to prevent the exploitation of TK is through the proper documentation of associated TK. By documenting and making knowledge or materials available to patent examiners worldwide, prior knowledge of certain inventions can be established. WIPO supports indigenous communities through projects like the Creative Heritage Project, assisting them in documenting and preserving their cultural traditions. Simultaneously, these initiatives empower communities to manage their IP interests by creating their IP in the form

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<sup>31</sup> cf (n 6) 90.

<sup>32</sup> cf (n 9) 300.

<sup>33</sup> Jessyca Van Weelde, 'Capacity-Building – Intellectual Property and Traditional Knowledge' ( WIPO Magazine, September 2009) <[https://www.wipo.int/wipo\\_magazine/en/2009/05/article\\_0005.html](https://www.wipo.int/wipo_magazine/en/2009/05/article_0005.html) > accessed 15 June 2023.

<sup>34</sup> ibid.



of photographs and databases<sup>35</sup>. This approach equips indigenous communities to effectively manage their IP assets in a manner aligned with their values and development goals.

## CONCLUSION

The intersection between cultural heritage and IP is incredibly complex, involving multiple parties with diverse aims and interests. This essay only touches on a small portion of this complexity and the challenges that arise when combining IP rights with cultural heritage. Cultural heritage expressions often do not meet the legal requirements of IP law due to their intrinsic nature of being ancient and passed down through generations. However, certain tools such as patents, trademarks, and copyrights may offer some imperfect protection for traditional knowledge (TK).

Numerous nations have modified their national intellectual property (IP) systems to cater to the concerns raised by indigenous and local communities. This adaptive approach, characterized by reduced top-down control, is more likely to establish effective means of integrating intellectual property and cultural heritage systems. Through such mechanisms, it becomes possible to protect the knowledge and creative expressions deeply rooted in the traditions and cultural expectations upheld by these communities<sup>36</sup>.

In conclusion, there is an urgent necessity for inclusive dialogue involving all relevant stakeholders, surpassing the rigid divisions often found in debates on "cultural" versus "IP" matters. This dialogue should aim to discover commonalities and develop solutions that effectively address the intricate challenges that arise in the relationship between cultural heritage and IP.

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<sup>35</sup> *ibid.*

<sup>36</sup> *cf* Burri (n 5) 24.