

INTERNATIONAL LEGISLATIONS AND BEST PRACTICES FOR TRADITIONAL KNOWLEDGE PROTECTION

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Overview of Intellectual Property

Intellectual property embodies various creation of the mind or the human intellect. These include inventions, literary and artistic works, designs, symbols, et cetera, generally used in trade. These are referred to as intangible assets, and require legal protection in most cases, which helps in recognizing and granting creators with exclusive rights to control the use of their creation and its commercial exploitation as well. Thus, it can be said that intellectual property rights widely deal with the exclusivity of use and monetary gains arising at the behest of the creation. Intellectual property arises from human creativity and ingenuity, which generally represents original thought, effort, and skill. To give a basic understanding of the subject, IP is primarily divided into two segments: industrial property and non-industrial property¹²⁸⁶. The former, as the name suggests, concerns itself with application in any industry with commercial application, focusing on protecting inventions, brands, and designs used in industry and commerce. This includes mechanisms like patent protection for invention, trademarks for brand recognition, industrial design for product aesthetic and appeal, and geographical indication for products originating from a specific geographical location. Slightly contrary to this, non-industrial intellectual property, majorly referred to as copyright, lays emphasis on protecting artistic and literary work. This consists of a variety of creative expressions like books, music, films, paintings, dance, folks, performing arts, et cetera. The primary aim of both the types is to protect intellectual creations, however, they differ in the types of subject matter which they protect and the specific rights that the creator or owner of such work is conferred with. This includes the term of protection, the extent of exclusivity of use, assignment and transfer of rights, renewals of the respective IP, what constitutes as an infringement, remedies for their infringement, and so on. In this introductory chapter, the major types of IP are briefly explained.

GRASP - EDUCATE - EVOLVE

¹²⁸⁶ WIPO https://www.wipo.int/edocs/pubdocs/en/wipo_pub_895_2016.pdf

Traditional Knowledge

Traditional knowledge, as an intellectual property, shows a complex intertwining and overlapping of vast array of knowledge systems and practices along with cultural practices of local and indigenous communities with that of intellectual property protection. Traditional knowledge consists a range of things including knowledge systems, innovations, and practices developed by local and indigenous communities over generations, often deeply rooted in their cultural and spiritual identities¹²⁸⁷. To further elucidate upon what is included in traditional knowledge, it consists of knowledge related to agriculture, medicine, biodiversity, arts, crafts, and even ecological management. Unlike traditional forms of intellectual property, traditional knowledge is held collectively by the people of the community who practice their tradition over a long period of time¹²⁸⁸. Such knowledge is often passed on orally from one generation to the other and it is continuously evolving, posing challenges to traditional intellectual property concepts like individual ownership and fixed duration. Protecting traditional knowledge aims to preserve cultural heritage, promote sustainable development, and empower indigenous and local communities to control the use of their knowledge¹²⁸⁹. To recognize the inherent value of traditional knowledge, efforts are underway to protect it from misappropriation and exploitation, particularly by those who seek to commercialize it without fair benefit-sharing. Currently, various international legal and policy approaches are underway and being explored, which includes facets like sui generis protection, tailored to the specific needs of traditional knowledge holders, the use of defensive measures and mechanisms like documenting

(to prevent patenting by others) and the implementation of access and benefit-sharing agreements (also commonly referred to as ABS Agreements)¹²⁹⁰. However, challenges remain in balancing the need for protection with the desire to foster innovation and access to knowledge. Furthermore, ensuring that traditional knowledge holders are effectively involved in decision-making processes and that benefits are equitably distributed is crucial for the success of any protection mechanisms. The integration of traditional knowledge into mainstream intellectual property systems requires a nuanced understanding of its nature and a commitment to respecting the rights and interests of indigenous and local or rural communities, recognizing that traditional knowledge is not merely a resource but an integral part of their cultural identity overall welfare of the community¹²⁹¹.

The United Nations Declaration on the Rights of the Indigenous Peoples

The United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP), adopted in 2007¹²⁹², provides a significant international framework concerning the rights of indigenous peoples, including those related to cultural heritage and traditional knowledge.

Article 31 of the UNDRIP explicitly states that indigenous peoples have the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions¹²⁹³. This provision underscores the right of indigenous communities to not only preserve but also to manage and benefit from their cultural and intellectual heritage. Furthermore, article 11 recognizes the rights of indigenous people to practice and revitalize their cultural traditions and customs,

¹²⁸⁷WIPO <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-m2023-5-1-en-traditional-knowledge-and-intellectual-property.pdf>

¹²⁸⁸ PROPERTY RIGHTS AND TRADITIONAL KNOWLEDGE, JT Cross

¹²⁸⁹ Lucas Lixinski, 'Intellectual Property and Intangible Heritage', Chapter 6 in *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013)

¹²⁹⁰ WIPO https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1052.pdf

¹²⁹¹ PRESERVING INDIGENOUS WISDOM: TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS, Dhriti Mehra

¹²⁹² United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007).

¹²⁹³ United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007), Art 31.

encompassing the maintenance and protection, and development of past, present, and future manifestations of their cultures such as archaeological sites, artifacts, designs, ceremonies, technologies, and artistic expressions¹²⁹⁴.

Article 26 acknowledges their rights to the lands, territories, and resources they have traditionally owned, occupied, or used, emphasizing their right to own, use, develop, and control these, with a corresponding obligation on states to provide legal recognition and protection¹²⁹⁵. Given the intrinsic link between CIP and land for many indigenous communities, this provision is particularly relevant. Moreover, Article 32 emphasizes the principle of free, prior, informed consent (FPIC), requiring states to consult with indigenous people through their representative institutions to obtain their consent before approving any project affecting their lands, territories, and resources¹²⁹⁶. While UNDRIP is not a legally binding treaty, it represents a global consensus on the rights of indigenous people and serves as a vital ethical and moral guide for national legislations.

WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge

The World Intellectual Property Organization has been actively engaged in discussions concerning the protection of traditional knowledge, traditional culture cultural expressions, and genetic resources through its intergovernmental committee on intellectual property and genetic resources, traditional knowledge, and folklore¹²⁹⁷. Established in 2000, the IGC aims to negotiate international legal instruments for the protection of these forms of

cultural intellectual property¹²⁹⁸. A significant outcome of these longstanding negotiations is the WIPO treaty on intellectual property, genetic resources and associated traditional knowledge, adopted in May, 2024. This treaty introduces a mandatory patent disclosure requirement, obligating patent applicants whose inventions are based on genetic resources and or associated traditional knowledge to disclose the country of origin or source of the genetic resources and the indigenous people or local community providing the associated traditional knowledge¹²⁹⁹. The treaty seeks to enhance transparency and prevent the erroneous granting of patents on inventions that are not novel or inventive with regard to these resources and knowledge. While this treaty specifically addresses the intersection of IP, GR, ATK, discussions continue within the IGC to develop separate international legal instruments for the broader protection of TK and TCEs. WIPO also provides valuable resources, including databases of laws and treaties related to TK, TCS, and GRs.

Other global legislations

Other relevant international frameworks include the convention on biological diversity and the Nagoya protocol, as well as the UNESCO convention for the safeguarding of the intangible cultural heritage¹³⁰⁰. The CBD, adopted in 1992, has three primary objectives: first, the conservation of biological diversity, second, the sustainable use of its components, and third, the fair and equitable sharing of the benefits arising out of the utilization of genetic resources¹³⁰¹. Article 8(j) of the CBD specifically calls on signatory parties to respect, preserve,

¹²⁹⁴ United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007), Art 11.

¹²⁹⁵ United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007), Art 26.

¹²⁹⁶ United Nations General Assembly Resolution 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007), Art 32.

¹²⁹⁷ World Intellectual Property Organization, 'Traditional Knowledge' <https://www.wipo.int/en/web/traditional-knowledge> accessed 12th March, 2025.

¹²⁹⁸ World Intellectual Property Organization, 'WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge' <https://www.wipo.int/pressroom/en/articles/2024/article_0007.html> accessed 12th March, 2025.

¹²⁹⁹ World Intellectual Property Organization, 'WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (GRATK)' <https://www.wipo.int/treaties/en/ip/gratk/> accessed 10th March, 2025.

¹³⁰⁰ Terri Janke, 'UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural and Intellectual Property' (1997) 2 Art Antiquity & L 405

¹³⁰¹ Convention on Biological Diversity, 1992 UNTS 79

and maintain the knowledge, innovations, and practices of indigenous and local communities relevant to the conservation and sustainable use of biological diversity, and to protect their wider application with the approval and involvement of the knowledge holders¹³⁰². The Nagoya protocol on access to genetic resources and the fair and equitable sharing of benefits, adopted in 2010, provides a more detailed framework for implementing the ABS principles of the CBD¹³⁰³. It aims to establish greater legal certainty and transparency for both providers and users of genetic resources, including those associated with traditional knowledge, by setting out predictable conditions for access based on prior informed consent and mutually agreed terms, and by ensuring benefit sharing when genetic resources are utilized¹³⁰⁴. The UNESCO Convention for The Safeguarding of The Intangible Cultural Heritage, adopted in 2003, aims to protect and promote diverse cultural practices, expressions, and knowledge systems, including oral traditions, performing arts, and practices, knowledge concerning nature, and traditional craftsmanship¹³⁰⁵. It recognizes the importance of intangible cultural heritage as a cornerstone of cultural diversity and a guarantee of sustainable development and encourages states to implement measures for its safeguarding¹³⁰⁶. India ratified this convention in 2005 and since has been undertaking various efforts to safeguard its intangible cultural heritage.

Drawing from these international instruments and the experiences of other countries, India can adopt or adapt several potential models and best practices for enhancing its CIP protection framework. The principle of free, prior,

and informed consent as articulated in UNDRIP and the Nagoya protocol, should be a foundational element, ensuring that indigenous and local communities have the right to control access to and use of their knowledge and cultural expressions. The access and benefit sharing mechanisms detailed in the Nagoya protocol offer a valuable template for ensuring that communities receive fair and equitable benefits from the utilization of their genetic resources and associated traditional knowledge¹³⁰⁷. India's existing biodiversity act, which already incorporates ABS principles, should be further strengthened and aligned with the protocol's provisions. The mandatory disclosure requirement established by the WIPO treaty on GRs and associated TK represents a significant step in preventing the erroneous granting of patents and could be integrated into India's patent law. The UNESCO Convention, as earlier mentioned, provides a useful framework for identifying, documenting, and protecting intangible cultural heritage, which can inform India's strategies for safeguarding TCEs and other forms of traditional knowledge beyond those directly linked to genetic resources. The WIPO model provisions for national laws on the protection of expression of folklore also offer specific guidance on potential legal mechanisms for protecting TCEs against illicit exploitation and other prejudicial actions.

¹³⁰² Convention on Biological Diversity, 1992 UNTS 79, Art 8(j).

¹³⁰³ Convention on Biological Diversity, 'About the Nagoya Protocol' <<https://www.cbd.int/abs/about>> accessed 12th March, 2025.

¹³⁰⁴ Convention on Biological Diversity, 'Digital Sequence Information on Genetic Resources' <<https://www.cbd.int/dsi-gr>> accessed 12th March, 2025.

¹³⁰⁵ UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage, accessed March 25, 2025,

¹³⁰⁶ Lucas Lixinski, 'Intellectual Property and Intangible Heritage', Chapter 6 in Intangible Cultural Heritage in International Law (Oxford University Press, 2013).

¹³⁰⁷ Konstantia Koutouki and Katharina Rogalla von Bieberstein, The Nagoya Protocol: Sustainable Access and Benefits-Sharing for Indigenous and Local Communities, Vermont Journal of Environmental Law, Vol. 13, No. 3 (Spring 2012)