



INDIGENOUS TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS

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INTRODUCTION

Traditional knowledge encompasses the beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural experience and expression that belong to indigenous communities worldwide. Since the adoption of the Universal Declaration of Human Rights in 1948,⁽¹⁾ intellectual property has been considered a fundamental human right of all peoples. Only recently, however, has the need to protect, preserve and provide for the fair use of indigenous intellectual property – traditional knowledge – entered the domestic and international debate on intellectual property rights. Of particular concern to indigenous peoples has been the unlicensed use by non-indigenous groups, such as corporations, of traditional knowledge that has been developed over centuries.

HOW DOES INDIGENOUS TRADITIONAL KNOWLEDGE DIFFER FROM WESTERN SCIENCE?

Unlike the western custom of disseminating knowledge through publication, traditional knowledge systems exist principally in the form of songs, proverbs, stories, folklore, community laws, common or collective property and inventions, practices and rituals. The knowledge is transmitted through specific cultural mechanisms such as those just listed, and often through designated community knowledge holders, such as elders. The knowledge is considered collective to the community, not private to one individual or small group.

(1) Article 27 of the Declaration provides that:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Differences Between Western Science and Traditional Knowledge⁽²⁾

Factor	Western Science	Traditional Knowledge
Approach	Compartmental	Holistic
How communicated	Written	Oral
How taught	Lectures, theories	Observations, experience
How explained	Theory, “value free”	Spiritual, social values

Often, indigenous traditional knowledge systems contain a rich understanding of plant, crop and tree species, medicines, animal breeds, and local ecological and biological resources. They may also include useful technologies and adaptations to local environments. Traditional knowledge is not static, nor trapped in amber; it is often in current use. Sophisticated and adaptive, it evolves and responds to changes in the physical and social environment.

WHY PROTECT TRADITIONAL KNOWLEDGE?

For indigenous peoples such as Aboriginal Canadians, the rationale for protecting traditional knowledge centres on questions of fundamental justice and the ability to protect, preserve and control one’s cultural heritage.⁽³⁾ There is also the concomitant right to receive a fair return on what these communities have developed: many areas of traditional knowledge have potentially lucrative applications.

Non-indigenous people also have a strong incentive to ensure the fair use of traditional knowledge, because such knowledge has much to offer modern society. It is being used increasingly to assist policy-making in many areas: food and agriculture; culture; human rights; resource management, sustainable development and the conservation of biological diversity; health; trade and economic development. In some parts of Canada, for example, traditional ecological knowledge is being married to western scientific practices to improve environmental impact assessment processes and resource management, as well as genetic and medical research.⁽⁴⁾

(2) Indian and Northern Affairs Canada, *A Community Guide to Protecting Indigenous Knowledge*, Ottawa, 2001, p. 4.

(3) The Assembly of First Nations position on traditional knowledge is contained in its Resolution No. 27/2003 and can be consulted on-line at: <http://www.afn.ca/resolutions/2003.htm>.

(4) In Nunavut, traditional ecological knowledge is given equal weight to western science by the Nunavut Impact Review Board when making decisions about development, ecosystems and traditional culture. In addition, in 1997, the Government of the Northwest Territories adopted a policy incorporating traditional knowledge into government decisions and actions where appropriate. The policy applies to all departments and agencies of the Northwest Territories.

However, as the awareness and use of traditional knowledge continue to grow in mainstream policy and economic sectors, so do the incidences of its misuse and misappropriation. Image rights are violated when Aboriginal designs are reproduced for sale without authorization or recompense. Some research and pharmaceutical companies have applied and profited from traditional knowledge of natural resources, such as medicinal plants, without offering any compensation to the Aboriginal communities that are custodians of such knowledge.⁽⁵⁾

HOW TO PROTECT TRADITIONAL KNOWLEDGE

Aboriginal groups have highlighted five principal areas of concern with regard to the protection of traditional knowledge and practices:⁽⁶⁾

- Unauthorized copying of works by Aboriginal groups and communities
- Infringement of copyright of individual artists
- Appropriation of Aboriginal themes and images
- Culturally inappropriate use of Aboriginal images and styles by non-Aboriginal creators
- Expropriation of traditional knowledge without compensation

Protection of traditional knowledge has taken two approaches. Some countries have enacted specific legislation establishing minimum standards for the recognition and protection of traditional knowledge. In most jurisdictions, however, traditional communities have employed existing legal tools (e.g., contracts, licensing agreements) and intellectual property rights law to try to protect their traditional knowledge – albeit with mixed success.

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- (5) Until very recently, for instance, an American citizen, Loren Miller, held the patent for the Amazonian plant ayahuasca, intending to explore its medicinal value in cancer treatment and psychotherapy. The plant plays an important medicinal and religious role in the history and tradition of the peoples of the Amazon. Because local Amazon communities did not previously document the plant according to western intellectual property standards, it met the novelty criteria to be patented in the United States.
- (6) World Intellectual Property Organization, Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3, paper prepared by Michael Blakeney, October 1999, p. 4.

Establishing databases as a tool for the defensive⁽⁷⁾ protection of traditional knowledge has received increasing attention. In June 2002, the World Intellectual Property Organization examined the usefulness of TK databases as a means to defeat claims to patent traditional knowledge by parties other than the holders themselves.⁽⁸⁾ While there appears to be considerable support for this option, there is also considerable concern regarding “costs, access and use of the database, and the protection of the contents of it.”⁽⁹⁾ The advantages and difficulties of using such databases require further discussion and debate. The Tokyo-based United Nations University has been strongly critical of TK databases and has recommended that, unless these databases are confidential repositories of TK, they will do little to prevent the piracy of that knowledge.⁽¹⁰⁾

In Canada, effective domestic legislation that clearly protects indigenous traditional knowledge has not yet been adopted. It falls directly upon Aboriginal communities, therefore, to ensure necessary measures are taken to protect their traditional knowledge.⁽¹¹⁾ While Aboriginal communities have historically made limited use of Canadian intellectual property law⁽¹²⁾ to protect their tradition-based creations, there are a number of cases where it has been used successfully.⁽¹³⁾

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- (7) The term “defensive protection” refers to measures aimed at preventing the acquisition of intellectual property rights over traditional knowledge by parties other than the traditional knowledge holders. In contrast, positive protection refers to the use of intellectual property rights or the development of new types of rights providing for the affirmative protection of traditional knowledge.
 - (8) World Intellectual Property Organization, *Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data*, document prepared for the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Geneva, 13-21 June 2002), 10 May 2002. The Inventory can be consulted on-line at: http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkfic3_6.pdf.
 - (9) *Ibid.*, p. 3.
 - (10) *Ottawa Citizen*, “Researchers Blast ‘Biopiracy’ of Natives’ Medicinal Knowledge,” 19 February 2004.
 - (11) In 1999, the federal government produced an overview of Canadian intellectual property law of most relevance to Aboriginal peoples. This paper can be consulted on-line at: http://www.ainc-inac.gc.ca/pr/ra/intpro/intpro_e.html.
 - (12) The Canadian Intellectual Property Office (CIPO) administers the intellectual property system in Canada and disseminates intellectual property information. CIPO regulations and other intellectual property statutes can be consulted on-line at: <http://www.cipo.gc.ca>.
 - (13) In 1999, for example, the Snuneymuxw First Nation used the *Trademarks Act* to prevent the unauthorized reproduction of ancient rock-painting images (petroglyphs) of great religious significance to the community. The *Copyright Act* has also been used by Aboriginal artists to protect their artistic and literary creations, including the sculptures of Inuit artists, Haida jewellery, and wood carvings of Pacific Coast artists.

LIMITATIONS OF THE INTELLECTUAL PROPERTY RIGHTS REGIME IN PROTECTING TRADITIONAL KNOWLEDGE

The difficulty experienced by indigenous peoples in trying to protect their traditional knowledge under intellectual property (IP) rights law stems mainly from its failure to satisfy the requirements for protection under existing IP law. For example, intellectual property must be new, original, innovative or distinctive to qualify for protection. These requirements make it difficult for traditional knowledge – generally handed down from generation to generation – to obtain IP protection.

Moreover, from an Aboriginal perspective, the emphasis of the existing western intellectual property rights regime on individual proprietary rights does not address the collective nature of traditional knowledge. Because western IP law is based on individual property ownership, its aims are often incompatible with, if not detrimental to, those of traditional communities. For many traditional communities, intellectual property is a means of developing and maintaining group identity and survival, rather than promoting individual economic gain.

Another key concern shared by indigenous peoples worldwide is that the present intellectual property rights regime favours multinationals and other non-indigenous interests. Where IP protection may apply, the prohibitive costs of registering and defending a patent or other intellectual property right effectively limit its availability to the vast majority of indigenous communities, primarily in developing countries. In this way, the existing intellectual property rights regime is seen to help corporate interests and entrepreneurs lay claim to indigenous knowledge without appropriate acknowledgement or compensation for the communities who have developed that knowledge.

INTERNATIONAL INITIATIVES TO PROTECT TRADITIONAL KNOWLEDGE

The importance of protecting and preserving indigenous traditional knowledge has been recognized in several international instruments, including the Universal Declaration of Human Rights, the Convention on Biological Diversity,⁽¹⁴⁾ the draft United Nations Declaration

(14) Article 8(j) of the Convention on Biological Diversity provides that:

Each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the

on the Rights of Indigenous Peoples,⁽¹⁵⁾ the International Labour Organization Convention No. 168⁽¹⁶⁾ and the International Covenant on Economic, Social and Cultural Rights.⁽¹⁷⁾

The Rio Declaration (known as Agenda 21) and the Convention on Biological Diversity adopted at the 1992 Earth Summit in Rio de Janeiro, Brazil, emphasize the need for governments to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities” and encourage the right of traditional communities to share in the economic and social benefits “arising from the utilization of such knowledge, innovations and practices.”

A number of United Nations agencies are also involved in addressing the protection of traditional knowledge under the existing intellectual property rights system. The World Intellectual Property Organization (WIPO) is responsible for various activities promoting the protection of indigenous intellectual property worldwide. Specifically, WIPO has conducted a number of studies on the role of the intellectual property system in protecting traditional knowledge.⁽¹⁸⁾

In October 2000, member states of WIPO (including Canada) established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC acts as an international forum for debate and dialogue

holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

(15) Article 29 of the Draft Declaration on the Rights of Indigenous Peoples provides that:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

(16) Article 15(1) of the International Labour Organization Convention No. 168 provides that:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

(17) Article 15 of the International Covenant on Economic, Social and Cultural Rights states that:

The States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author.

(18) These reports can be accessed on-line at: <http://www.wipo.int/tk/en/publications/index.html>.

concerning the interplay between intellectual property and traditional knowledge, genetic resources and traditional cultural expressions (folklore).

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