

Protecting Indigenous Knowledge and Cultural Expressions through Intellectual Property

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The Value and Role of Indigenous Knowledge

Indigenous knowledge holds a great deal of value for Indigenous peoples. It is knowledge that Indigenous nations rely on for traditional land use studies that support negotiations and lawsuits concerning their lands and resources. It informs and inspires Indigenous artists and fashion designers who integrate it into their artistic creations, which may be sold around the world or exhibited in museums or art galleries. This knowledge may even find its way into new technologies, such as apps that support Indigenous language learning or reconnecting with Indigenous territories and traditions.



In short, not only is Indigenous knowledge a vital source of innovation and creativity, it also represents identity and cultural continuity for Indigenous peoples. As something highly valued, it is worth considering how Indigenous knowledge can be protected. In this article, we explore the topic of protecting Indigenous knowledge through intellectual property law.

Understanding Indigenous knowledge and Indigenous cultural expressions

Although there are no universally accepted definitions of “Indigenous knowledge” and “Indigenous cultural expressions”, the World Intellectual Property Organization (“WIPO”)^[1] offers working definitions for “traditional knowledge” (“TK”) and “traditional cultural expressions” (“TCEs”), which are terms used in the international space. Such working definitions are not meant to limit present or future understandings, but rather, they serve as a starting place. The working definitions are as follows:

Definitions from the World Intellectual Property Organization (WIPO)

- “TK is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.”^[2] It includes knowledge, know-how, skills, innovations and practices.^[3] TK may refer to knowledge about sustainable water management or knowledge about traditional medicines.
- TCEs refer to the creative expressions or forms in which knowledge may be represented or embodied.^[4] Examples of TCE include music, stories, art, crafts, words, names, performances, architecture, clothing and ceremonial regalia.

The Relationship Between TK and TCEs

TK and TCEs are related and interconnected concepts, since TCEs are the expression of TK. Regardless, WIPO distinguishes between the two terms since, from an intellectual property perspective, they raise different policy questions and implicate different legal protections.^[5] While WIPO’s working definitions have informed intellectual property policy in Canada, given Canada’s commitment to working in consultation and cooperation with Indigenous peoples under its *United Nations Declaration on the Rights of Indigenous Peoples Act*,^[6] Indigenous peoples’ approaches to their own knowledge and cultural expressions ought to and will likely inform Canadian intellectual property policy and law reform work as the process of reconciliation continues.^[7]

Intellectual property protection

Intellectual property generally refers to ownership-like rights to creations of the mind, such as inventions, artistic and literary works, and governmental, organizational and business names and logos.

Intellectual property protection is defined by the following key pieces of legislation: the *Copyright Act*, *Trademarks Act*, *Patent Act* and *Industrial Design Act*. Acquiring intellectual property protection requires the inventor or author to satisfy certain formal requirements, as defined by each piece of legislation; if acquired, such protection is often time-limited, or if it lasts indefinitely, it may be subject to renewal periods and/or other formal requirements to maintain registration and therefore legal protection. Nonetheless, “protection,” in an intellectual property sense, means protecting your work from someone else using, taking or selling it without your consent, and it generally assumes the creation or invention will be used within the commercial mainstream.

Intellectual property laws are best suited to protect contemporary expressions of Indigenous knowledge or cultural expressions. This means protecting the knowledge itself is not an

option, nor is it an option to protect intergenerationally transmitted knowledge unless it is expressed in a contemporary form, such as through a traditional land use study, work of art, recorded song or textile. While calls for change are ongoing,^[8] Indigenous governments, organizations and individuals have leveraged the use of existing intellectual property laws in various ways.

Examples of Intellectual Property Tools Used by Indigenous Communities

- **Trademarks** – Trademarking distinct Indigenous words and symbols of importance to an Indigenous community to prevent or control unwanted commercial use of such words or symbols by others. Trademarks can be renewed every ten years and may be renewed indefinitely.^[9]
- **Official Marks** – Registering an official mark, a type of trademark, used to protect badges, crests, emblems or marks used by Indigenous public authorities. Official marks prohibit others from using those marks without the consent of the owners and do not require renewal, lasting indefinitely. An example is the Kaska Tribal Council’s official mark concerning the word “KASKA.”^[10]
- **Certification Marks** – Registering a certification mark, another type of trademark, used to identify goods or services linked to a defined standard, such as the community in which the goods were produced. Certification marks may assist in combating inauthentically made Indigenous arts and crafts; an example of which is the Cowichan Band Council’s “GENUINE COWICHAN APPROVED” certification mark used to certify certain clothing made consistent with traditional methods.^[11]
- **Copyright** – Copyrighting can be used to protect TCEs and indirectly protect the TK communicated therein. For example, the TCE in a recorded song can be protected by copyright, thereby limiting access to and distribution of the TK communicated in the TCE.
- **Patents** – Registering a patent, which provides the exclusive right to make, use and sell an invention for 20 years. Patents may be used to indirectly protect traditional knowledge expressed in the invention. For instance, Beam Paints, which is an Indigenous-owned company operating in M’Chigeeng First Nation, produces plastic-free paints using natural materials and eco-conscious packaging “rooted in Indigenous knowledge and artistic traditions” and has used patents to protect its product.^[12]
- **Industrial Designs** – Industrial designs can be used to protect the aesthetics of a work derived from TK and TCEs, which can be helpful in protecting products such as jewelry and clothing.

Each type of intellectual property protection comes with its pros and cons, and depending on the creation or invention, one or more types of intellectual property protection may apply to a single work.

Conclusion

Depending on the goals of the Indigenous governments, communities, organizations and individuals, existing intellectual property laws may be used to protect Indigenous knowledge and cultural expressions directly or indirectly, and such tools can be used in conjunction with Indigenous laws, customs, protocols and advocacy nationally and internationally to fill in the

gaps where existing intellectual property laws fall short.

[1] For background, WIPO is a specialized agency of the United Nations that aims to protect and harmonize law and policy on intellectual property globally, and it is through WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore that the protection of traditional knowledge and traditional cultural expressions is addressed and discussed by member states and Indigenous and local communities.

[2] WIPO, "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions" (2020), online (pdf): WIPO
<www.wipo.int/edocs/pubdocs/en/wipo-pub-933-2020-en-intellectual-property-and-genetic-resources-traditional-knowledge-and-traditional-cultural-expressions.pdf> at 13-14.

[3] *Ibid.*

[4] *Ibid.* at 15.

[5] *Ibid.* at 13.

[6] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021 c 14.

[7] *The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan, 2023-2028*, includes shared priority 101:

Work in consultation and cooperation with First Nations, Inuit, and Métis to ensure appropriate measures are in place for Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, including working in partnership with responsible government departments to ensure that Canada's intellectual property legislative and regulatory frameworks (e.g., Copyright Act, Trademarks Act, Patent Act) are consistent with the UN declaration. (Canadian Heritage, Innovation, Science and Economic Development Canada)

United Nations Declaration on the Rights of Indigenous Peoples Act Implementation Secretariat, "United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan" (2023), online (pdf): Government of Canada
<www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf> at 46.

[8] See CBC Radio, "Nunavut family outraged after fashion label copies sacred Inuit design" (25 November 2015), online: CBC Radio
<www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.3336554/nunavut-family-outraged-after-fashion-label-copies-sacred-inuit-design-1.3336560>. See also Marie Woolf, "Feds urged to crack down on fake Indigenous art, copyright breaches" (7 July 2022), online: CBC News
<www.cbc.ca/news/politics/indigenous-art-fake-copyright-1.6513245>.

[9] See Trademark Act, R.S.C. c. T-13, s. 9(n)(iii).

[10] "KASKA," THE KASKA TRIBAL COUNCIL, Can No 0914045 (17 April 2002) advertised.

[11] Trademark Act, supra note 9, s. 2.

[12] See “HEMP OIL-BASED PAINT COMPOSITIONS AND METHODS OF MANUFACTURE THEREOF,” Can Patent Application No. 3170085 (application filed on 9 August 2022). See also Canadian Intellectual Property Office, “Beam Paints draws on Indigenous culture and traditions” (last modified 8 July 2025), online: Government of Canada <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/corporate-information/canadian-ip-voices-podcast-case-studies-and-blog/beam-paints-draws-indigenous-culture-and-traditions>.

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