

# Traditional Cultural Expression in Copyright: Bridging the Gap between Indigenous Knowledge

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**Abstract:** *The intersection between copyright law and Indigenous knowledge is complex. As indigenous knowledge is the traditional wisdom, practices and cultural expressions which are passed from one generation to another by oral transmissions as this knowledge is the identity of the indigenous community whereas Copyright law speaks about the legal right given to the owner of the intellectual property be it in any form such as artistic, musical, dramatic or cinematography This research paper delves with the intersection of copyright law and Indigenous knowledge, And it mainly addresses National and International legal framework relating to indigenous knowledge especially traditional cultural expression with some important case studies relating to indigenous knowledge and copyright law.*

**Keywords:** Copyright law, Indigenous knowledge, Traditional knowledge, Traditional cultural expression, Intellectual property rights.

## 1. Introduction

Indigenous knowledge is also called as traditional knowledge which is divided into 2 groups one is traditional knowledge and other is traditional cultural expression. Traditional knowledge involves knowledge, skills, know-how and innovations<sup>1</sup> which are protected under patent law. On the other hand traditional cultural expression includes indigenous artworks, music, songs, stories and performance that are typically generated and passed down through generations within a particular community<sup>2</sup> they are either in tangible or intangible form, but often it is a combination of two Traditional cultural expressions are seen as integral to cultural and social identities of the indigenous communities. And this indigenous knowledge is protected by the members of such communities. And this works should be protected under copyright law. Whereas Copyright is a legal right given to the owner<sup>3</sup> who creates innovative works it can be movie, songs or books. But, when it comes to indigenous knowledge, it gets complicated, as Indigenous knowledge is often shared within a community and transmitted orally from one generation to another generation lacking written format. whereas Copyright laws only protects written works.

### Research Problem

On one side, we have copyright laws that are made to protect things like books, music, and inventions. On the other side, we have Indigenous knowledge, which includes special traditions, stories, and knowledge which is passed from one generation to another generation in indigenous communities. The problem is that these two things don't always fit together. As Copyright laws doesn't recognize Indigenous knowledge. So, we need to find ways to protect indigenous knowledge especially traditional knowledge relating to cultural folklore in respect of copyright laws. This research aims to find ways to solve this problem and make sure Indigenous knowledge is protected and valued.

### Research Objectives

- 1) To examine the current legal framework relating to copyright law and identify the strengths and limitations in protecting the Indigenous knowledge.
- 2) To identify the areas of conflict between copyright law and Indigenous knowledge.
- 3) To Analyse the case studies that examine the protection of Indigenous knowledge within the existing copyright framework.

### Research Questions

- 1) How can we protect Indigenous knowledge in copyright law?
- 2) What are the challenges faced in applying conventional copyright law to safeguard indigenous knowledge.
- 3) What are policies, recommendations or legal reforms that could protect indigenous knowledge in copyright law.
- 4) Whether the international conventions and national legislation are enough in granting protection to indigenous knowledge?

## 2. Explanation

### History and Definition

Indigenous knowledge is also known as traditional knowledge this is divided into two types one is traditional knowledge and other is traditional cultural expressions, which are the shared wisdom and creative ideas of indigenous communities which are passed from one generation to another generation through oral transmissions.<sup>4</sup> This knowledge is the foundation of the Indigenous cultures and their relationship with the environment. Whereas on the other hand, copyright law is the which protects ideas and creativity. For example an indigenous communities has there own culture and art forms as these culture or art form are the integral part of their identity and heritage, these expressions are followed from and ages and are shared within their community in some cases these artworks are commercialized

<sup>1</sup> <https://www.wipo.int/tk/en/tk/>

<sup>2</sup> <https://www.wipo.int/tk/en/folklore/>

<sup>3</sup> <https://www.investopedia.com/terms/c/copyright.asp>

<sup>4</sup> <https://www.business.qld.gov.au/running-business/risk/ip/ip-kit/browse-ip-topics/traditional-knowledge/definitions>

and exploited by the outsiders without proper recognition or proper compensation given to the indigenous people. And one of the main problem is who is the owner of the work here indigenous communities.

From ages our ancestress followed their knowledge and then they transmitted this knowledge to the coming generations but during the colonial era due to conquest by the Britishers there was a lot of exploitation which was faced. As Europeans started occupying areas and after occupying those areas they started to control those areas and implemented their laws if those areas have rich resources then where exporting those resources to their countries. And they viewed traditional practices, stories and methods through their lens and started exploiting. One of the tragic consequences of colonization was loss of cultural heritage. However, history also reveals moments of resistance and resilience within Indigenous communities. Despite the immense pressures of colonialism, many Indigenous communities managed to safeguard their knowledge through oral transmission of their wisdom within their communities. In this Elders played a crucial role in passing down knowledge to the younger generation, ensuring that their cultural heritage is preserved.

### International Laws

The turning point in the recognition of Indigenous rights came in the modern era. That too after the world war II united nations came into picture. And it established many international declarations from WTO to WIPO. Out of those international recognitions,

1) UNDRIP is one United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>5</sup> Was adopted by united nations in 2007 it is the collective rights given to indigenous people and these rights protect and control cultural heritage and traditional knowledge. Few articles under these declarations which protect indigenous people are as follows.

Article 11 states that Indigenous people have the right to practice and revitalize their customs and traditions. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. And States shall provide redress mechanisms to protect indigenous people in respect of their culture, intellectual, religious and spiritual property.<sup>6</sup>

Article 24 States that Indigenous peoples have the right to protect their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. They also have the right to access it without any discrimination to social and health services. And they have equal right to the enjoyment. And

state shall take the necessary steps to protect it.<sup>7</sup>

Article 31 states that Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. And States shall take effective measures to recognize and protect the exercise of these rights.<sup>8</sup> While UNDRIP provides a framework for the protection of Indigenous knowledge and culture, the implementation and adaptation of these principles into copyright protection mechanisms may vary from one country to another. The need to align national copyright laws with the protection of Indigenous knowledge and cultural expressions has gained attention in recent years.<sup>9</sup>

2) The Convention on Biological Diversity (CBD) is an important agreement that deals with nature and living things. It also looks at the knowledge that indigenous people have about these things. This knowledge is often very important for using plants and animals in medicines and in other useful ways. One part of this agreement is the Nagoya Protocol. Which protects this knowledge when people or companies use this knowledge and most importantly they need to ask permission from the countries or communities that have this knowledge is called as "prior informed consent." After obtaining the consent from the indigenous communities they should share their benefits, like money or other good things, to this community by commercializing this knowledge. This agreement aims to protect the traditional knowledge of indigenous people and it makes sure that they are treated fairly. While this agreement doesn't exactly talk about copyright law but it speaks about how people use and share knowledge.<sup>10</sup>

3) The World Intellectual Property Organization (WIPO) is an international organization that helps to create rules for ideas and creations. They're concerned about the place where traditional knowledge, like the wisdom passed down through generations in Indigenous communities, meets copyright law. WIPO works to find ways to protect and respect this traditional knowledge while still following the rules of copyright law. One such initiative is Genetic Resources, Traditional Knowledge and Folklore was established by the WIPO General Assembly as an international forum for debate about the interplay between intellectual property (IP), and traditional knowledge, genetic resources and traditional cultural expressions. Members of the Intergovernmental

<sup>5</sup> Macbeth, Steven Alexander. "The Application of the "Best Interests" Principle to Maori Children's Collective Cultural Rights: A Conceptual Shift for the New Zealand Family Court?" 2015, <https://core.ac.uk/download/199186371.pdf>.

<sup>6</sup> Morse, Bradford. "Co-Management of Natural Resources by Indigenous People and States: A Method to Promote Environmental Justice and Sustainability." 2012, <https://core.ac.uk/download/56354588.pdf>.

<sup>7</sup> Gaia Nation: Reclaiming the Indigenous as the Soul of Humanity | GAIA – Global Academy of Indigenous Activism. <https://chandravikash.wordpress.com/2022/04/21/gaia-nation-reclaiming-the-indigenous-as-the-soul-of-humanity/>

<sup>8</sup> Indigenous Peoples to Share In Tea Industry Profits | Cultural Survival. <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-share-tea-industry-profits>

<sup>9</sup> <https://www.justice.gc.ca/eng/declaration/>

<sup>10</sup> <https://www.cbd.int/>

Committee (IGC) include member from states of WIPO and non- governmental organizations (NGOs) that are accredited to WIPO . In its Seventh Session at Geneva, in November 2004, the Committee formulated draft provisions for Protection of Traditional Cultural Expressions/Expressions of Folklore (TCEs). The provisions contained in this draft reflect the international opinion on the subject under consideration.<sup>11</sup> As Traditional knowledge is often shared in a community and doesn't fit neatly into the usual copyright rules, which is given for the owner who created it. So, WIPO is finding ways to make sure that traditional knowledge is kept safe and valued, even if it doesn't fall under copyright law. They're working to create new rules and ideas to make sure that everyone is treated fairly when it comes to traditional knowledge and copyright law.

4) The TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement is like a global rule book for copyright and other intellectual property rights. When it comes to traditional knowledge, which is the wisdom passed down through generations in Indigenous communities, TRIPs Agreement does not directly address traditional knowledge,<sup>12</sup> TRIPS allows countries to make their own rules. Countries can create special rules to protect traditional knowledge within their own copyright laws. These rules can make sure that traditional knowledge is respected and not used without permission. TRIPS gives countries the freedom to set these rules based on their specific needs and values.

### National Laws

In India, the traditional knowledge is considered as legacy.. As our beliefs, heritage and culture has various combinations of art forms, dances, symbols, songs, architecture and and scientific knowledge. India is home of many indigenous communities whose lifestyle has been shaped by their ancestors. These communities have unique culture and do not enjoy interference in it. The fundamental critique of using IPR to safeguard traditional knowledge is that it leads to the commercialization of knowledge; it treats knowledge as a product with monetary worth, which is a long cry from Indigenous Peoples' perspective, which regards their knowledge as spiritual and sacred.<sup>13</sup> In India, there is no particular law related Indigenous knowledge.

1) Indian Copyright law doesn't safeguard indigenous knowledge either traditional knowledge nor traditional cultural expression. And traditional knowledge are orally transmitted from one generation to another here it is difficult to find the owner whereas copyright law protects only written works of the creator or owner. And Indian copyright act only protects for a period for 60 years, Traditional knowledge is important and it should be protected for infinite years. As it is difficult to give protection under copyright law for indigenous knowledge But there is Section 31A of Indian

copyright act which safeguards unpublished works,<sup>14</sup>

2) India has taken significant steps to protect traditional knowledge through initiatives like the Traditional Knowledge Digital Library (TKDL). The TKDL documents traditional knowledge related to medicine, yoga, and other areas to prevent misappropriation by patent offices around the world.

3) Biological Diversity Act, 2002 aims to ensure the fair and equitable sharing of benefits arising from the use of biological resources and associated traditional knowledge. It requires to seek prior permission from the communities the access those resources.<sup>15</sup>

a) Protection of Plant Varieties and Farmers' Rights Act, 2001 this act focuses on the protection of plant varieties, but it also recognizes the role of traditional knowledge used by the farmers in the conservation of plant genetic resources.<sup>16</sup>

b) Apart from this India has certain acts which protect traditional cultural expressions those acts are Indian National trust for Art and cultural Heritage (INTACH), National folklore support centre, National mission for Manuscripts, National centre for arts.<sup>17</sup> These laws and initiatives demonstrate India's commitment in protecting the traditional knowledge, which are specific only to certain areas, there is need for a comprehensive legal framework for safeguarding Indigenous knowledge especially cultural folklore within the scope of copyright law.

### Comparative Study across the Globe

#### 1) New zealand

New Zealand's has implemented a unique and comprehensive legal framework to protect indigenous knowledge because of its rich Maori culture, as it is nation's identity. This Maori traditional knowledge is protected under copyright law. As it implemented by sui generis model to protect Maori traditional knowledge and cultural expressions. This model is found in copyright protection act 1994 of new zealand which recognizes the importance of maori culture and provides protection for cultural treasures, songs and craving. And New Zealand has its version of the traditional knowledge digital library which documents Maori traditional knowledge and cultural expressions<sup>18</sup>

#### 2) Canada

Canada's copyright law is governed by copyright act of Canada which grants protection to literary, artistic and musical works. This means if traditional cultural expressions are in written form then it can be protected. As Indigenous

<sup>14</sup> <https://copyright.gov.in/documents/copyrightrules1957.pdf>

<sup>15</sup> [https://www.indiacode.nic.in/handle/123456789/2046?sam\\_handle=123456789/1362](https://www.indiacode.nic.in/handle/123456789/2046?sam_handle=123456789/1362)

<sup>16</sup> <https://plantauthority.gov.in/>

<sup>17</sup> <https://jlmppofficial.wordpress.com/2020/08/23/traditional-cultural-expressions-intellectual-property-laws-protection-of-folklore-in-india/>

<sup>18</sup> <https://tile.loc.gov/storage-services/service/l1/l1glrd/2018298829/2018298829.pdf>

<sup>11</sup> Anurag Dwivedi† and Monika Saroha, Copyright Laws as a Means of Extending Protection to Expressions of Folklore National Law Institute University, PO Box No 369, Central TT Nagar, HO Bhopal 462003 Received 24 September 2004, revised 24 June 2005

<sup>12</sup> [https://www.iprsonline.org/pdf/2003/investment\\_sdc\\_may\\_2003\\_7.pdf](https://www.iprsonline.org/pdf/2003/investment_sdc_may_2003_7.pdf)

<sup>13</sup> Id at 7

knowledge is transmitted orally through generations in community, so it is challenging under conventional copyright law for the protection which primarily focus on the individual ownership, whereas if ownership is given in traditional knowledge than it should be given to a community.

### 3) Congo

Congo folklore is considered as their cultural heritage. And this folklore is protected by their Copyright law. And they have a society called as body of authors which collects royalties on behalf of the authors and represent the authors. And if they have to do reproduce, adopt or do any public performance then those groups should take prior permission from this society.

### 4) Australia

In Australia Traditional cultural expressions are protected through conventional copyright law

### 5) United state of America

US has not given any protection to indigenous knowledge but it have adopted narrow statutes in response of Native Americans to regain self governance and to control the use of traditional knowledge by Non community members which includes Antiquities act of 1906, National historic preservation act, 1966, Native american arts and crafts act, 2000 etc.<sup>19</sup>

### 6) Ghana

Ghana, has adopted its Copyright Act of 2005 which govern copyright laws in Ghana and changed the way traditional knowledge is protected. This includes all types of copyright protection from literary work to cinematographic work, but it should be written form as other countries convention method of protecting copyright law. Article 59 of this Act states to establishes a National Folklore Board, which should govern the administration, preservation, registration and promotion of expressions of folklore. And the Board may also authorize the use of folklore and should determine a fees to be paid for their work. The Act provides that the copyrights of the authors of folklore vest by the government as if the government is the creator of the works. And Monetary benefit received from this would be used for social welfare.

### 7) Namibia

Namibia grants indigenous communities En number of rights to protect the expression of folklore in Namibia. These exclusive rights is only given to Namibian folklore includes right to publicize, make a reproduction, or distribute the copies of an expression of folklore and this expression can be communicated in an expression form for public performance and it can be broadcast, distributed by cable or by any other means, and this expression can also be converted into a cinematographic film and any form of adaptation or translation can be done Article 61 also allows the use of the original expression if the use is "compatible with fair practice," such as for creating an illustration or borrowing the

expression to create an original work.

### 8) Nigeria

Nigerian Indigenous knowledge is protected under Copyright Law of Nigeria which protects the expressions of folklore, against reproduction, communication and broadcasting it. In addition it it forbids adaptations, translations, and transformations if they are made for any commercial use.

### 9) Rwanda

Rwanda provide protection to folklore in its copyright law, 1983 which covers traditions and literary productions, artistic works, religious works, scientific and technological knowledge.

### 10) Uganda

Uganda's indigenous knowledge is protected under copyright and neighbouring rights act, 2006 which grants copyright protection for the work done in the field of literature, traditional folklore and knowledge, science and art here the act emphasis on protecting Traditional folklore and knowledge.

### 11) Peru

Peru uses Sui generis method to protect Indigenous knowledge. And this knowledge is protected under Peru's Sui generis Traditional knowledge law, 2002 which aims to protect the collective knowledge of indigenous people. And it promotes fair and equitable distribution of the benefits which has been arrived from the use of such knowledge

### 12) Guatemala

Guatemala also uses sui generis method to protect indigenous knowledge. And it has enabled "Cultural Heritage Protection law"<sup>20</sup>

## 3. Case Studies

### 1) Milpururru V/S Indofurn Ply Ltd

An aboriginal Australian artists sued to prevent the importation by peru based company of carpets manufactured in Vietnam for the designs which was reproduced without the prior permission of the artist. As those designs were copied from Australian portfolio of artworks which was produced in Australian National gallery So the federal court held that the aboriginal artists had substantial damages and this act amounted to copyright infringement. So the court granted injunction against the infringement.

### 2) The Tuhoe Hauora charitable trust and cultural intellectual Property rights.

In New Zealand, the Tūhoe Hauora Charitable Trust represents the Tūhoe tribe, which has a rich cultural heritage and traditional knowledge. One of their initiatives involved the creation of a medicinal plant garden, where they cultivated and shared their traditional herbal remedies which was used by their ancestors for generations together. The Trust sought to protect their traditional knowledge while ensuring it will remains accessible to their community and respectful users. This case highlights the need to balance the preservation and sharing of Indigenous knowledge with

<sup>19</sup> Tribal Intangible Cultural Property: IP or Something More? - Berkeley Technology Law Journal. <https://btlj.org/2018/04/intangible-cultural-property-ip-or-something-more/>

<sup>20</sup> Module 8: Traditional Knowledge



copyright law. As the Trust wanted to protect their knowledge from unauthorized use and it also aimed to keep it accessible within their community.

### 3) The Maasai and Intellectual Property Rights

The Maasai people of East Africa have a rich cultural heritage and traditional knowledge related to their practices, designs, and artwork. In the past, their traditional designs and patterns were used without their consent by companies for commercial products. This raised questions about the protection of their traditional knowledge.

In response, the Maasai have taken legal action and engaged in advocacy efforts to protect their traditional knowledge. They have explored the possibility of using intellectual property rights, such as trademarks and copyrights, to protect their cultural expressions and by ensuring that they will benefit economically from their heritage.

### 4) Madhubani paintings and copyright issues

Madhubani painting is a traditional art form originating from Mithila region of Bihar. These paintings often depict mythological themes, religious motifs or scenes from daily life and they hold immense historical and cultural significance. Recently these paintings faced challenges concerning their unauthorized use and commercialization. Because of digitization the replica of these paintings are done without proper authorization of the original artists or communities. As legal action was taken.

## 4. Conclusion

The interconnection between copyright laws and Indigenous knowledge is bit tricky. As indigenous knowledge is a special knowledge that is gained by certain communities in the field of art, literature, music, dance or science technology which is passed down through generations. These communities want to make sure that their knowledge is protected and it is not used or shared without their prior permission. As this knowledge is very precious for their community. To make things better, there are some international agreements and declarations that try to protect Indigenous knowledge even in cultural expression and allowing the community to take benefit out of it. And many countries across the world have come up with their enactments to protect traditional work in any form from art to dance or knowledge relating to science and technology. Out of many countries even India tries to protect indigenous knowledge to an extent that is if it is only in written form. As there is a lot of ambiguity in this part that there is a question of owner as Indian copyright act only protects owner here in indigenous knowledge we can't assume who is the owner has the knowledge or information or and cultural expression or folklore is passed through generations and there is no one particular owner, if there is an owner also as this knowledge is shared among the community. India being a diverse country with different cultures and traditions each community has their own culture and traditions for eg: Dandiya and garba is a dance form practiced in Gujarat, Butaatta is a dance form which is performed in Mangaluru, and folksongs which are sung by different tribes across the world and many artforms such as worli art, Madhubani paintings all these are indigenous cultural expressions. And all

this should be protected but still there are problems and disagreements, because who is eligible to get the copyright. As it being a complicated issue so protection of this knowledge is needed or it would get vanished. As there are certain limitations to protect indigenous knowledge under copyright law those are authorship and ownership, originality requirement and time duration as copyright is only given for a limited period of time.

## 5. Suggestions

- 1) Ensure that Indigenous communities are actively involved in discussions and decisions regarding the use and protection of their knowledge. Their perspectives are important.
- 2) Promote awareness and understanding among both Indigenous and non-Indigenous individuals about the importance of Indigenous knowledge and the issues it faces in the context of copyright law.
- 3) Adopt new copyright laws with respect to indigenous knowledge especially Traditional cultural expression
- 4) Encourage collaboration between Indigenous communities, legal experts, scholars, and policymakers to find a right balance.

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