

Protect and Promote Your Culture

A Practical Guide to Intellectual Property for
Indigenous Peoples and Local Communities



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Foreword

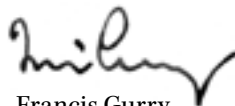
The mission of the World Intellectual Property Organization is to create a fair and balanced global intellectual property system that works for everyone, including indigenous peoples and local communities.

Throughout the world, indigenous peoples and local communities have developed a wealth of traditional knowledge and traditional cultural expressions which they rightly wish to protect and promote. Yet few have used the intellectual property system to do so. And, unfortunately, their knowledge systems and cultural expressions have sometimes been used without their authorization and they have not shared in the benefits of such use.

The intellectual property system does not provide solutions to all the challenges that indigenous peoples and local communities face concerning their traditional knowledge and traditional cultural expressions. However, it does include tools that can be used either to directly protect traditional knowledge and traditional cultural expressions or to prevent their misappropriation.

This short, accessible and practical guide aims to help indigenous peoples and local communities better understand the intellectual property system and make informed decisions about when and how to use intellectual property tools to protect and promote their traditional knowledge and traditional cultural expressions. It includes many examples where indigenous peoples and local communities have done exactly that. As these examples also show, the intellectual property system, while not perfect, includes mechanisms to modify or revoke rights that were granted to creations and innovations not eligible for protection.

It is my hope that this publication will contribute to the empowerment of indigenous peoples and local communities, will inspire them to continue innovating and creating, and will encourage them to make strategic use of and benefit from the intellectual property system.



Francis Gurry
Director General

Table of Contents

Introduction	7	Patents	31
Traditional knowledge, traditional cultural expressions and intellectual property	9	What do patents protect?.....	32
Key features of intellectual property protection	13	How do patents work? What kind of protection do they offer?	33
Balancing intellectual property rights and the public domain	15	Patents and traditional knowledge	34
How do intellectual property rights work?.....	15	An example from India:	
Why are there different types of intellectual property rights? In what ways do they differ?.....	16	<i>Myristica fragrans</i>	35
Why do you need to know about intellectual property?.....	18	An example from Australia:	
An example from South Africa: rooibos	19	the crocodile hunter.....	36
An example from Peru: SUMAQ SONQO	20	Another example from Australia: a collaborative research project leads to a patent	37
Where to find out more about intellectual property.....	21	Where to find out more about patents	38
Copyright	23	Trademarks	39
What does copyright protect?.....	24	What do trademarks protect?.....	40
How does copyright work? What kind of protection does it offer?....	25	How do trademarks work? What kind of protection does a mark offer?...	40
Copyright and traditional cultural expressions	26	COWICHAN: a certification mark from Canada.....	41
An example from Ghana: Kente	27	Collective and certification marks	42
An example from Australia: Dreaming stories	28	An example from Kenya: Taita baskets	43
Where to find out more about copyright	29	Examples from New Zealand and from the Andean Community.....	44
		Where to find out more about trademarks	45
		Geographical Indications	47
		What are geographical indications and why should they be protected?.....	48
		How are geographical indications protected?.....	48

An example from Ecuador: the Montecristi straw hat	49	Where to find out more about protection against unfair competition	58
Geographical indications, traditional knowledge and traditional cultural expressions	50	Trade Secrets	59
Where to find out more about geographical indications.....	50	What are trade secrets and why are they protected?.....	60
Industrial Designs	51	How does trade secrets protection work? What kind of protection does it offer?.....	60
What do industrial designs protect?.....	52	An example from Australia: the Pitjantjatjara Council's sacred secret	61
How does industrial design protection work? What kind of protection do industrial designs offer?.....	52	Trade secrets and traditional knowledge	62
Industrial designs and traditional cultural expressions	52	Where to find out more about trade secrets	62
A hypothetical example: designing didgeridoos	53	Table 1: What is protected by the different categories of intellectual property?	17
Where to find out more about industrial designs	54	Table 2: Summary of intellectual property tools	63
Protection against Unfair Competition	55	Glossary	64
Why protect against unfair competition?.....	56		
What kind of protection against unfair competition may be available?.....	56		
Using laws on unfair competition to protect traditional knowledge and traditional cultural expressions	56		
An example from Australia: misleading or deceptive labels	57		
Another example from Australia: preventing false representation	57		

Introduction

Intellectual property law can help you to protect and promote your culture

An Aboriginal community in Australia has gone into partnership with a university to develop painkilling drugs based on herbal treatments known to the community for many years. They have protected the new drugs through a patent.

Traditional farmers in Peru grow a particular type of potato which is famous for its quality and taste. They have started using a trademark to help promote their potatoes, helping them secure higher prices.

Copyright law in Ghana has been reformed to stop companies copying the distinctive fabric designs developed by certain ethnic groups.

These are just three examples of the ways in which indigenous peoples and local communities can benefit from the intellectual property system.

This is not to suggest that intellectual property law meets all the needs of indigenous peoples and local communities. But, if strategically used, the intellectual property system can be crucial. By using the intellectual property system, you may be able to prevent other people, companies or organizations from exploiting your traditional knowledge and culture without your permission (also known as misappropriation). And you may also be able to maximize the economic value of products and services that you develop based on your traditional culture.

So it is very important to understand intellectual property and the intellectual property system. This guide will help you do that. It:

- outlines the intellectual property system and some key concepts;
- introduces the main categories of intellectual property and explains how each category may be relevant to the particular needs of indigenous peoples and local communities; and
- gives lots of examples¹ of how different indigenous peoples and local communities around the world are using intellectual property successfully, whether to promote their own culture and creations or to prevent misappropriation.

The aim of the guide is to encourage and empower indigenous peoples and local communities to use intellectual property strategically, in line with your specific business, cultural and/or developmental needs. The main text is deliberately quite short and general, but there are notes and references to further reading so that you can learn more about the particular issues that interest you. Most of the reading references are to other publications from the World Intellectual Property Organization (WIPO) which are available free of charge online.

Please note that this guide is *not* a substitute for legal advice. Intellectual property law is technical and varies from country to country, so you should consider taking

professional advice.² But reading this guide will give you a good understanding of the basic issues and help you make informed decisions about next steps.

Traditional knowledge, traditional cultural expressions and intellectual property

Traditional knowledge (TK) is generally understood to mean the know-how, skills, innovations and practices developed by indigenous peoples and local communities, while traditional cultural expressions (TCEs) are generally understood as the tangible and intangible forms in which traditional knowledge and cultures are expressed.³

For example, the knowledge that indigenous peoples and local communities have developed regarding the use of plants for medicinal purposes is TK, while traditional dances, songs and designs are TCEs. Traditional handicrafts may embody both TK (the method of making) and TCEs (their external appearance).

Intellectual property protects creations of the human mind, including trade secrets, literary and artistic works, inventions, designs and symbols, and names and images used in commerce.

In most countries, intellectual property is protected by specific intellectual property laws, for example by national laws

on patents, copyright, designs and trademarks. Such laws generally allow owners of intellectual property rights to prevent other people from copying or using their intellectual property without permission in many circumstances.

The intellectual property system was not designed for TK and TCEs

There is something of a “mismatch” between TK and TCEs on the one hand and the intellectual property system on the other. Although TK and TCEs existed long before the intellectual property system was developed, they were not considered worthy of intellectual property protection until quite recently.

Indeed, the intellectual property system was designed to recognize, protect and reward *new* and/or improved creations and innovations. By definition, this would seem to exclude all types of TK and TCEs, and many people argue that while some types of intellectual property rights may be used to protect creations or innovations related to TK or TCEs, much of the modern intellectual property system is unfit for protecting many kinds and aspects of TK and TCEs.⁴

Nonetheless, the examples included in this guide show that indigenous peoples and local communities have used the intellectual property system to protect their TK and TCEs.

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) is an important reference in this regard:

“1. Indigenous peoples 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, literatures, 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.

“2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

Special laws to protect traditional knowledge and traditional cultural expressions

This guide focuses on the current intellectual property system. Nevertheless, it may be worth noting that work is also now taking place to create special intellectual property laws (referred to as “*sui generis*” laws) that cater specifically for the particular characteristics of

TK and TCEs. At the international level, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is currently negotiating an international legal instrument or instruments for the protection of TK and TCEs. And at the national level, some countries have introduced *sui generis* legislation that gives intellectual property-style protection to TK and TCEs, while several others have adapted their intellectual property laws to protect TK and TCEs. Others, however, do not see the need to modify their national intellectual property laws to protect TK and TCEs.

This guide will not examine *sui generis* laws or other special efforts to protect TK and TCEs. It focuses on the main categories of intellectual property in standard intellectual property systems and explains how indigenous peoples and local communities may be able to use them.

1. The facts have been simplified and shortened for the purposes of this guide.
2. For country-specific intellectual property information and advice, contact your national intellectual property office. Contact details for the intellectual property offices of WIPO Member States are available at: www.wipo.int/directory/en/urls.jsp
3. At an international level, there is no agreement on how TK or TCEs should be defined. These definitions are provided for the purposes of this guide. For more information about what is meant by TK and TCEs, see WIPO (2015) *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, pages 13-17; available at: www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf
4. For instance, the preservation, conservation and safeguarding of TK and TCEs are not covered by intellectual property protection.

Key features of intellectual property protection

In most countries, the intellectual property system involves laws on different categories of intellectual property such as patents, copyright, designs and trademarks

This legal system of protection enables the owners of intellectual property to obtain or register intellectual property rights provided they:

- meet the prescribed legal requirements; and
- follow any prescribed procedures, for example to register rights at the national/regional intellectual property office.

Broadly speaking, the different categories of intellectual property serve two different purposes. Patents, designs and copyright enable creators and innovators to get recognition for and commercial reward from their creative and inventive outputs. In essence, these intellectual property rights allow creators and innovators to have a say over when and how others copy or use what they have created and invented.

In contrast, protection granted to trademarks and geographical indications helps to differentiate particular goods and/or services from competing goods and/or services, and to make those goods and/or services more attractive to consumers through “intellectual property-smart” marketing and branding.

Laws against unfair competition can supplement the protection of trademarks and geographical indications by preventing one business from trading unfairly on another’s reputation. Unfair competition law may be particularly relevant when there is commercial misuse of TK or TCEs, for instance when there is a misleading

impression that a product is “authentic” or produced or endorsed by an indigenous people or local community.

Balancing intellectual property rights and the public domain

Unlike property rights in most *tangible* objects (like land or a car), property rights in *intangibles* such as intellectual property are not absolute. There are exceptions to them and they are limited in certain ways. For example:

- certain uses of copyrighted works, patented inventions and protected marks are permitted with no need to seek authorization from the owner of the intellectual property right; and
- certain types of subject matter cannot be protected by intellectual property rights.

A key concept in this regard is the *public domain*. Broadly speaking, this refers to any content which is not protected by intellectual property rights and so is free to be used by anyone. Content may be in the public domain because it was never protected by intellectual property rights or because it used to be protected but the rights have expired.

The public domain and the exceptions and limitations to intellectual property rights aim to balance the rights of intellectual property rights holders, consumers, competitors, follow-on creators and innovators, and the public at large. For example, copyright protection prevents

a creative work from being copied, but other creators are allowed to be inspired by it or borrow from it in certain ways to create new and original works. This fosters creativity, artistic freedom and cultural diversity.

By striking the right balance between the interests of creators/innovators and the wider public interest, the intellectual property system seeks to nurture a fair environment in which creativity and innovation can flourish.

How do intellectual property rights work?

Intellectual property rights are legal rights. In general, intellectual property right owners (also known as right holders) can use their rights to prevent other people or organizations from using their creations or innovations without their authorization. In other words, they can exclude others from using the protected intellectual property, and so lawyers refer to intellectual property rights as *exclusive rights*.

Intellectual property right owners may also be able to leverage their intellectual property rights through intellectual property-savvy business models and business strategies to earn money from their intellectual property.

By legally granting creators and innovators a limited amount of “control” over

their creations and innovations, the intellectual property system enhances the value of those creations and innovations. This control strengthens the ability of creators and innovators to manage their creative and innovative outputs and secure a return from those that are commercially successful.

Creators and innovators may be able to market and sell their intellectual property themselves, or they may enter into deals with other people or organizations. Most intellectual property rights are tradeable: they can be sold outright (known as *assignment*) or the holder can retain ownership but authorize certain uses of the intellectual property (known as *licensing*).

Crucially, having intellectual property rights does not oblige the right owner to commercialize or exploit the protected intellectual property – it simply empowers him or her to decide if and when to let others access and/or use his or her intellectual property rights.

Two other points are also very important. First, intellectual property rights are territorial; in other words, they are limited to a particular country or group of countries (region), and depend on the relevant national or regional law.

Second, intellectual property rights are essentially private rights. The intellectual property system provides a legal frame-

work for the creation, registration or grant, and enforcement of intellectual property rights, but it is up to the right owner to protect and exploit them. If intellectual property rights are, or are likely to be, misused or violated by others, the owner generally needs to request the competent authorities (police, customs, courts or administrative authorities) to take action under the applicable national intellectual property law.¹ Such action may result in the imposition of sanctions ranging from court injunctions to prevent unauthorized use of the intellectual property rights to the payment of damages and fines by the infringers of the rights. In some cases, infringers may even face imprisonment.

Why are there different types of intellectual property rights? In what ways do they differ?

Different types of intellectual property rights have been created to protect different kinds of creations and innovations in different ways and for different purposes. The different types of intellectual property rights differ in regard to the:

- subject matter of protection;
- requirements for the grant of protection;
- conditions for protection;
- nature of the rights granted, including the type and extent of limitations and exceptions to the granted rights; and
- duration of the protection granted.

Table 1 summarizes what the main categories of intellectual property protect.

Table 1: What is protected by the different categories of intellectual property?

Types of intellectual property rights	What do they protect?	Examples
Copyright and related rights	Copyright protects a wide range of literary, musical and artistic works. Related rights protect the legal interests of certain people or organizations who help to make creative works available to the public without creating them.	A book such as the Harry Potter books A sound recording such as a music album
Patents	Inventions.	A vaccine
Trademarks, certification marks, collective marks	Signs that distinguish one organization's products or services from those of another, and so help to build an organization's reputation or brand.	INTERFLORA®
Geographical indications (GIs)	Signs that relate certain products and services to a place which has a reputation for those products or services.	Champagne
Industrial designs	The aesthetic elements of a product – its look and feel.	The design of a chair
Trade secrets	Confidential information.	The formula to make Coca-Cola

Why do you need to know about intellectual property?

Intellectual property rights can protect a huge variety of different intellectual creations. While they may not necessarily protect traditional knowledge and traditional cultural expressions as such, they may well be relevant for products and services that are related to your TK and TCEs.

As already mentioned, intellectual property rights are private rights – it is down to the owner to secure and enforce them. This means that the onus is on you to protect and promote your intellectual property.

By understanding the basics of intellectual property, you are better placed to:

- protect your TK and TCEs;
- promote products and services based on your TK and TCEs – if you wish to do so;
- stop others from using the intellectual property system to claim ownership of creations or inventions that are based on or have been developed using TK or TCEs without complying with the relevant legal requirements; and
- reduce the risk of free-riding by others on the successful use of TK and TCEs in marketable products in national and international markets.



An example from South Africa: rooibos

Deep in the mountains of the Cedarburg, north of Cape Town in South Africa, red bushes dot the landscape. Known as “rooibos” (“red bush” in the Afrikaans language), these shrub-like plants hold remarkably beneficial nutritional and health properties. The scientific name of rooibos is *Aspalathus linearis*. The plant has been used for generations by the region’s indigenous peoples – the Khoi and the San – to treat a wide range of ailments.

A company filed a patent application at the European Patent Office (EPO) for an invention entitled “Rooibos and Inflammation”.² The main claim of this patent application covered the “use of a composition comprising *Aspalathus linearis* or an extract thereof for the preparation of a product to treat and/or prevent inflammatory disorders”. The application disclosed that rooibos is a bush found in South Africa, that rooibos tea has been popular in South Africa for generations, and that rooibos tea was becoming popular in other countries due to its high level of antioxidants. It also stated that the inventors had found that rooibos “also possesses potent anti-inflammatory properties”.

The EPO patent examiners refused to grant a patent as they considered that the claimed invention did not meet the requirements for patentability of novelty and inventive step (discussed in more detail below in the section on patents). As a result, the patent applicant withdrew the patent application and no patent was granted.

As this case shows, inbuilt mechanisms in the patent system prevent the patenting of inventions that do not fulfill all the patentability requirements. If an invention simply replicates traditional knowledge then it will not meet the requirement of novelty.

An example from Peru: Sumaq Sonqo



The Andean region of Peru is well known for its native potatoes,³ but the native potato farmers needed assistance to promote their product. The *Cooperativa Agraria de Producción Agrícola*

Sumaq Sunqu Ltda registered a collective mark “SUMAQ SONQO”⁴ to communicate the reputation and quality of the potatoes and distinguish them from other potato varieties.⁵ The registration of the collective mark was intended to lead to an increase in the potatoes’ reputation, which in turn might enable the farmers to sell them more easily – and hopefully at a higher price. Farmers’ increased incomes could then add value to the region and its culture, and enhance its identity and reputation. The 500 producers are the sole users of the collective mark and have to adhere to the specific quality standards established by the group. This should allow for a higher brand positioning.⁶

This case illustrates how collective marks can be used to promote TK-related products marketed by indigenous peoples and local communities.

Where to find out more about intellectual property

WIPO *What is Intellectual Property?*; available at:

www.wipo.int/edocs/pubdocs/en/int-property/450/wipo_pub_450.pdf

1. Some lawyers or associations of lawyers, such as PIIPA (Public Interest Intellectual Property Advisors), provide legal aid services *pro bono*.
2. Available at: https://worldwide.espacenet.com/publicationDetails/originalDocument?FT=D&date=20091216&DB=&locale=en_EP&CC=EP&NR=2133088A2&KC=A2&ND=4#
3. Native crops such as native potatoes are crops that have been developed and cultivated by indigenous peoples and local communities (in particular, peasant or farming communities) for centuries using traditional farming systems and traditional conservation practices.
4. Collective Trademark Certificate no. 00000142, registered in Peru.
5. The United Nations Industrial Development Organization (UNIDO), Agro Rural, the National Institute for the Defense of Competition and Intellectual Property (INDECOP) and the farmers formed an *origin consortium* – a group of individual producers, companies or cooperatives within the same value chain who seek to enable and promote a quality product with high added value. One of the activities of this origin consortium was the creation of the collective mark.
6. UNIDO Peru: *Collective Mark for Peruvian Native Potatoes*; available at: https://www.unido.org/fileadmin/user_media_upgrade/What_we_do/Topics/Export_promotion/FS_NATIVE_POTATOES_19MAR2013.pdf

Copyright

What does copyright protect?

Copyright protects a wide range of literary, artistic and scientific creations (often referred to as *creative works*). These include, among others:

- novels, poems, plays and newspaper articles;
- films, musical compositions and choreography;
- paintings, drawings, photographs and sculpture;
- computer programs and electronic databases; and
- maps and technical drawings.

The owner of copyright generally has the right to prevent other people or businesses from copying his or her work or making it available to the public without authorization.

Copyright recognizes the contribution of creators and helps to ensure that their work has economic value by giving them legal rights over it. This rewards creativity and encourages people to continue creating. In other words, copyright and its related rights provide incentives in the form of recognition and fair economic rewards. They also encourage creative works to be shared because creators can publish them knowing that they have a legal remedy against unauthorized copying or piracy.

How does copyright work? What kind of protection does it offer?

Protection for original creative works

Copyright protects the expression of ideas. To qualify for protection, these forms of expression must be original creations of their authors or creators. In addition, in some countries, creations or works must be fixed in a tangible form. This means, for example, that if you create a dance in a country where fixation of works is required, you will need to note it down or record it in some way in order for it to be protected by copyright.

When lawyers say that copyright protects *creative* works and that those works have to be *original*, those terms can be a little misleading because they are not used in their everyday sense. “Originality” here usually just means that an author needs to have created a work themselves rather than copying it. Works do not have to be completely new, very original or artistically creative to be protected.

However, copyright only protects the expression of ideas, not the ideas themselves. For example, lots of people have had the idea of telling a love story through a novel, play or film. That idea does not belong to anyone, but the way an author tells the story is protected by copyright law.

No need to register works

Unlike other types of intellectual property, under most national copyright laws there is no need to register copyright works to protect them; the author or creator will automatically have copyright in his or her work by virtue of creating it or fixing it in tangible form.

However, some countries do operate systems for the voluntary registration of copyright, and it may well be worth using such a system if it is available in your country or finding some other way of recording the date of creation and authorship. If there is a dispute, you may need to prove that you created a work and when you created it.

Rights and exceptions/limitations

Two kinds of rights are granted under copyright:

- *Economic rights* permit the rights owner to get financial reward from the use of his or her works by others. Economic rights generally last for the lifetime of the creator plus at least 50 years after his or her death. They generally belong to the creator when the work is first created or fixed, but can be transferred (assigned) so that someone else becomes the owner. Creators and other copyright owners can also generally license their works – retaining ownership but

granting permission for other people to use the rights in specific ways (for example, permission to publish and sell a book in certain countries). Rights may be transferred or licensed in exchange for a one-off fee or periodic royalties.

- *Moral rights* protect the integrity and reputation of the creator of the copyrighted work. Moral rights include the right of the creator to be acknowledged as the creator of the work (known as the right of paternity or attribution) and the right to prevent distorted reproductions of the work (the right of integrity). In many jurisdictions moral rights cannot be transferred, and in some jurisdictions they last forever.

National laws include certain limitations and exceptions to copyright protection. For instance, under certain conditions, others may be allowed to quote from a protected work without needing permission from the rights owner.¹

Copyright and traditional cultural expressions

National copyright laws can vary significantly so you need to check the laws of your country, but potentially copyright law may be relevant to traditional cultural expressions and works inspired by them.

Often, it is not possible to identify the author/s or creator/s of a TCE, as these are collective in nature and transmitted from generation to generation. As a TCE is handed down from one generation to the next, it constantly evolves, develops and is recreated within the local community or the indigenous people concerned. However, TCEs may well qualify for copyright protection, particularly as copyright can protect works by unknown authors and works made by groups of authors.

Furthermore, in some jurisdictions the performers of musical, dramatic or choreographic works are granted copyright or related rights protection, because their creative intervention gives life to those works.

Other people may claim copyright to protect works inspired by your TCEs. Often a very thin line divides works inspired by TCEs and works that are copies of TCEs. Generally, inspiration is allowed but copying a material part of another work is not.

If someone else claims copyright in a work based on your TCE, check the copyright law of your country.² This will provide information regarding the works that it protects and the procedures that you need to follow to protect your interests in your TCE.



An example from Ghana: Kente

Kente cloth is a form of strip weaving with patterns “woven into the cloth in alternating blocks so when the strips are sewn together to form a piece of cloth the overall effect is that of a checkerboard”.³ It is a mosaic fabric made from colorful threads, with designs depicting historical events or social beliefs of the community’s significant persons and experiences.⁴ It is produced by the Asante ethnic group and is closely associated with Asante royalty.⁵

Around the 1980s, imitation Kente cloths appeared on textiles in markets around the world, raising concerns about how to protect it. Copyright law in Ghana aimed to respond to those concerns.

Under section 76 of the Copyright Act 2005 of Ghana, folklore is defined as “the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adrinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore”. Expressions of folklore are protected under that Act against reproduction, communication to the public, adaptation, translation and other transformation. The rights of folklore are vested in the President on behalf of and in trust for the people of the Republic of Ghana.⁶

This example shows that intellectual property laws can be adapted to provide some protection for TK and TCEs. In this particular case, the Copyright Act of Ghana protects TCEs.

An example from Australia: Dreaming stories



Banduk Marika, Rirratjingu people, *Djanda and the Sacred Waterhole* 1984; linocut, printed in color, from two reductive blocks; printed image 53 x 30 cm; National Gallery of Australia, Canberra; Elizabeth Mudge Fund 1984. © Banduk Marika.



All rights of Ms. Banduk Marika in connection with this unauthorized reproduction are reserved. Image courtesy of Buku-Larrnggay Mulka Centre.

Among the different clans of Aboriginal communities of Australia, Dreaming stories have been used to pass on important knowledge, cultural values and belief systems to later generations. Through song, dance, painting and storytelling which express the Dreaming stories, the Aboriginal communities of Australia have maintained a link with the Dreaming – the mythological time when the natural world was created – from ancient times to today, creating a rich cultural heritage. Dreaming stories have been reproduced in paintings and artworks.⁷ The right to “use pre-existing designs and well recognized totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually, that right will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced.”⁸

In 1994, a copyright infringement claim was brought by three Aboriginal artists against a carpet factory. One of the well-known paintings which had been reproduced on carpets is entitled *Djanda and the Sacred Waterhole*. The underlying image of this work belongs to the Rirratjingu clan and is part of the mythology of the Dajankawu creation story. Ms. Banduk Marika of the Rirratingu clan claimed copyright in the work.

The three Aboriginal artists alleged that the carpet company had “manufactured, imported into Australia, offered for sale and sold woolen carpets which reproduce artwork, or substantial parts thereof, of each of the artists without the license of the owners of the copyright.” The Federal Court of Australia found in favor of the Aboriginal artists, acknowledging that “the import into Australia of all 246 carpets which the applicants allege to be infringing reproductions of the artworks constituted infringements.”⁹

This example shows that the intellectual property system can be used by indigenous peoples and local communities to stop others from infringing their intellectual property rights.

If you think someone has infringed your copyright, for example by copying and selling your TCEs without permission, check the copyright law of the country where the alleged infringement occurred. This will determine what exactly is protected, what options you have and what procedures you need to follow to safeguard your copyright.

Where to find out more about copyright

WIPO's webpage on copyright:
www.wipo.int/copyright

WIPO (2016) *Understanding Copyright and Related Rights*; available at:
www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf

WIPO (2006) *Creative Expression: A Guide to Copyright and Related Rights for Small and Medium-sized Enterprises*; available at:
www.wipo.int/publications/en/details.jsp?id=152&plang=EN

WIPO/INDECOPI (2001) *Copyright Comic Book*; available at:
www.wipo.int/edocs/pubdocs/en/copyright/484/wipo_pub_484.pdf

1. While limitations and exceptions, like intellectual property law itself, are specific to each jurisdiction, in general, the source of the quotation and the name of the author need to be mentioned, and the extent of the quotation needs to be compatible with fair use, fair dealing or fair practices.

2. WIPO Lex, available at www.wipo.int/wipolex, is a useful tool to find the IP laws in force in each country.

3. Gertrude Torkornoo (2012) "Creating capital from culture – re-thinking the provisions on expression of folklore in Ghana's Copyright Law" *Annual Survey of International and Comparative Law* 18(1), pages 1-2; available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/4>

4. Torkornoo, as above, pages 1-2.

5. Boateng Boateng "Walking the tradition-modernity tightrope: gender contradictions in textile production and intellectual property in Ghana" *Journal of Gender, Social Policy and the Law* 15(2), page 342; available at: <http://digitalcommons.wcl.american.edu/jgspl/vol15/iss2/>

6. Ghana: Copyright Act 2005, section 4.

7. Terri Janke/WIPO (2003) *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, pages 9-13; available at: www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf

8. *Milpurru and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659.

9. *Milpurru and Others v Indofurn Pty Ltd and Others*.

Patents

What do patents protect?

Patents protect inventions – new and inventive products and processes.

An invention can be:

- a technical solution to a problem (a product); or
- a new way of doing something (a process).

A patent gives the holder the exclusive right to make or use the protected invention commercially. Patent protection only applies in a certain territory (a country or region), and only for a limited period of time (generally 20 years).

The main purpose of the patent system is to promote technological innovation. It does this in two ways: by helping to ensure that inventors can get a fair commercial reward for their successful inventions, and also by ensuring that detailed information about inventions is recorded and published so that other people can learn from it.

How do patents work? What kind of protection do they offer?

The patentability criteria

In order to qualify for patent protection, an invention generally has to meet the following requirements (also known as *patentability criteria*):

- *novelty* – the invention must be new, not known in the body of existing knowledge in the relevant technical field;
- *inventive step* (also referred to as *non-obviousness*) – the invention must not be evident or obvious to a person skilled in the relevant field of technology based on what is already known in that field or another field of technology;
- *industrial applicability or utility* (depending on national legislation) – the invention must be capable of being produced or used in any kind of “industry” in the broad sense, including agriculture, or it must be useful and provide some practical benefit; and
- the subject matter of the invention must fall within the *patentable subject matter*, as provided under the applicable patent law.

Applying for a patent

To obtain a patent, an inventor or company has to file an application with a national or regional patent office and pay the relevant application fees.

The patent applicant is required to disclose the invention adequately. He or she has to include a complete and clear explanation of the invention in the patent application (called a *specification*). After a period of time, this information is published so that everyone can learn from it.

A patent application includes one or more sentences called *claims* which specify the scope of the protection sought by the applicant over the invention. Only new and inventive (non-obvious) subject matter should be included in the claims. If accepted by the patent office, the claims define the scope of the patent holder’s rights.

The patent office assesses the application. If the office considers that all its legal requirements, such as the patentability criteria, have been met, the patent is granted as filed. Alternatively, if an office considers that the claims are too broad or there is another issue with the application, the patent applicant may be allowed to modify the initial application and address the issue, for example by modifying the claims. In such a case, the patent office may then grant a patent to the “redefined” scope of the invention as per the revised, narrower claims.

Exploiting and renewing patent rights

Once the patent is granted, the owner can exercise his or her exclusive rights to make or use the invention him or herself, or he or she may assign or license rights to someone else. Generally, the owner will need to pay periodic renewal fees if they want to maintain the patent in force for the whole 20-year period of protection.

Patents and traditional knowledge

Novelty, inventive step and prior art

A particularly important issue for indigenous peoples and local communities is the relationship between traditional knowledge and the patentability requirements of novelty and inventive step.

To qualify for patent protection, an invention must be new and inventive. Novelty is assessed by comparing the invention with the relevant *prior art*. In general, the prior art consists of everything that was known or disclosed before the date that the patent application was filed at the patent office and which is relevant to the invention in the sense of describing the invention in whole or in part.

In theory, the prior art may include anything and everything that was ever made available to the public anywhere in the world in any language. In practice, however, no one has access to all the world's knowledge and there is a limit to what patent offices can check in assessing applications.

TK may be considered prior art if it has already been:

- published;
- publicly used (this will require proof of when and where it was used); or
- orally disclosed (again, this will require proof).

Including traditional knowledge in the prior art

There is wide variation among patent offices as to whether the novelty and inventive step of a claimed invention is assessed and, if so, how. Some country's laws require the patent office to examine each patent application in detail to determine whether novelty and other requirements have been met, but in other countries the patent office may not examine for novelty or inventive step.

An example from India: *Myristica fragrans*

Nutmeg or *Myristica fragrans* has been used since ancient times for oral diseases in Indian systems of medicine.

A consumer products company filed a patent application for an invention called “Oral compositions containing extracts of *Myristica fragrans* and related methods”.¹ The main claim covered “an oral composition comprising; a combination of extracts comprising an extract from *Myristica fragrans* and a natural extract other than the extract from *Myristica fragrans*; and an orally acceptable carrier”.²

As part of the procedure, the European Patent Office undertook a prior art search and found a number of documents that anticipated the patent application, including among others two references related to TK from the Indian Traditional Knowledge Digital Library of India (TKDL).

The TKDL³ is a compilation of traditional knowledge available from existing literature on Indian systems of medicine (Ayurveda, Unani, Siddha and Yoga), presented in digitized format and in five international languages (English, French, German, Japanese and Spanish). The TKDL is currently available to patent offices that have signed access and non-disclosure agreements requiring them to use it exclusively for patent search and examination purposes. The main objective of the TKDL is to prevent the misappropriation of Indian traditional knowledge.

The Indian TKDL filed a third-party observation citing four prior art documents.

The Examining Division of the European Patent Office considered that the invention did not meet the requirement of inventive step. It also referred to the third-party observation filed by the TKDL and pointed out that the four documents it had cited appeared to anticipate the invention. A patent was not granted.⁴

This example shows that TK can be a source of prior art and so it may be used to prove that a claimed invention lacks novelty or inventive step. If you understand how the patent system works, you may be able to challenge patent applications that are based on your TK.

An example from Australia: the crocodile hunter

The Jarlmandangh Burru Aboriginal community resides in Kimberley in North West Australia. The marjala plant (scientific name: *Barringtonia acutangula*) is well known to the Jarlmandangh Burru community for its healing properties, including pain relief. It is associated with the creation story of the Fitzroy River.⁵

Mr. John Watson, an elder from the Jarlmandangh Burru community, had his finger bitten off while hunting crocodiles. To stop the pain, he chewed the bark from the marjala plant and put it on his wound. The marjala plant stopped the pain until he was able to get to a hospital. This made his local community think about its commercial potential.⁶

Subsequently, the Jarlmandangh Burru community explored the commercial benefits of the marjala plant and reached a partnership agreement with Griffith University. In 2004, Griffith University and the Jarlmandangh Burru Aboriginal Corporation filed a patent application in Australia for an invention entitled “Novel analgesic compounds, extracts containing same and methods of preparation”. As indicated in the patent application, the invention relates to new compounds having analgesic properties and extracts containing them. Such compounds are obtained from plants of the *Barringtonia* species.⁷ A patent was granted to Griffith University and the Jarlmandangh Burru Aboriginal Corporation for this invention.



**Another example from Australia:
a collaborative research project leads to a patent**

The Chuulangun Aboriginal Corporation and the University of South Australia have undertaken research based on bush medicine plants. They have collected plants and tested them in a laboratory to study their pharmacological activities. This has led to the identification of certain compounds that can be used in the treatment of inflammation.

As a result, patent applications have been filed and a patent has been granted to the University of South Australia and the Chuulangun Aboriginal Corporation for an invention entitled “Anti-inflammatory compounds”.⁸

One of the inventors, David Claudie, is an elder from the Chuulangun community who knows the medicinal uses of plants that grow there through his father’s lineage.⁹

Thanks to the agreements they have signed and the patent they jointly own, both the University and the Chuulangun Aboriginal Corporation have a say on how the compounds they have identified are commercialized, and will share the commercial benefits.

These are two examples from among a handful of patents that have so far been granted to an indigenous people or local community for an invention developed using its TK, as at 2017. TK as such was not patented; what was patented were new and inventive innovations developed using TK.

However, even if a patent office does not consider relevant traditional knowledge through its own examination procedures, you may be able to ensure that they take account of the TK. Anybody may alert a patent office to relevant prior art. How and when you can do this will depend on the national or regional law of the patent office concerned: some offices allow it to be done before a patent is granted, while others allow it after grant.

In any case, if a patent office has reached an incorrect decision about a patent because it did not consider a relevant prior art document, it should be possible to rectify that decision by challenging it through the patent office itself and/or by filing an appeal in a court of law.

Where to find out more about patents

WIPO's webpage on patents:
www.wipo.int/patents

WIPO (2006) *Inventing the Future: An Introduction to Patents for Small and Medium-sized Enterprises*; available at: www.wipo.int/publications/en/details.jsp?id=132

WIPO/INDECOPI (2002) *Patents Comic Book*; available at: www.wipo.int/edocs/pubdocs/en/patents/485/wipo_pub_485.pdf

1. International application no. PCT/US2010/058466; available at: <https://patentscope.wipo.int/search/en/detail.jsf?docId=WO2011068813&recNum=1&maxRec=&office=&prevFilter=&sortOption=&queryString=&tab=PCT+Biblio>

2. EP 2 689 806 A1; available at: <https://register.epo.org/application?number=EP13189942>

3. For more information, visit <http://tkdl.res.in>

4. It is deemed that the applicant has withdrawn the patent application, according to the EPO website.

5. Virginia Marshall, Terri Janke and Anthony Watson (2013) "Community economic development in patenting traditional knowledge: a case study of the Mudjala TK Project in the Kimberley Region of Western Australia" *Indigenous Law Bulletin* 8(6); available at: www.austlii.edu.au/au/journals/IndigLawB/2013/21.pdf

6. Australian Government/IP Australia (2012) *Nanga Mai Arung – Dream Shield: A Guide to Protecting Intellectual Property for Aboriginal and Torres Strait Islander Peoples*, page 31; available at: www.iba.gov.au/wp-content/uploads/2010/08/20131612_IP-Australia_Dream_Shield.pdf

7. Patent application no. AU2004293125: <http://pericles.ipaustralia.gov.au/ols/auspat/applicationDetails.do?applicationNo=2004293125>. An international patent application was also filed: PCT/AU2004/001660.

8. Additional information regarding this patent may be found at: <http://pericles.ipaustralia.gov.au/ols/auspat/applicationDetails.do?applicationNo=2010317657>

9. See Australian Government/IP Australia "Chuulangun Aboriginal Corporation and University of South Australia": www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/chuulangun-aboriginal-corporation; and UTS – Indigenous Knowledge Forum, North West Local Land Services (2014) *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*, pages 21-22; available at: www.ipaustralia.gov.au/sites/g/files/net856/ff/uts_-_recognising_and_protecting_aboriginal_knowledge.pdf

Trademarks

What do trademarks protect?

A trademark – often referred to simply as a mark – is a distinctive sign that allows a provider of goods and/or services to build an exclusive reputation and so create loyalty among its consumers. Marks are very important for marketing and branding all kinds of goods or services by all types of businesses, big or small.

A mark may consist of one or more words, letters, numbers, drawings, symbols, the shape and packaging of goods or a combination of two or more of these. In many countries, even non-visible signs such as sounds or fragrances can be the subject matter of a mark. The possibilities are almost limitless.

How do trademarks work? What kind of protection does a mark offer?

A mark is linked to one or more specific goods and/or services. The owner of a mark has the exclusive right to use it in the relevant territory for the specified goods or services. They can prevent other people or organizations from using it or a confusingly similar mark in relation to identical or similar goods or services.

To be protected, a mark must fulfill the following conditions, among others:

- it has to be *distinctive* – capable of distinguishing the goods and/or services of one provider from those of other providers;
- it should *not* be *generic*, *descriptive* or *deceptive* in relation to the goods and/or services to which the mark is applied; and
- it should *not* be *identical* or *confusingly similar to other marks* that have already been registered for identical or similar goods and/or services.

In most countries, a mark needs to be registered to be protected effectively. An application needs to be filed, and fees paid. Usually, the registration of a mark at the national trademark office/registry lasts for 10 years at a time. However, it may be renewed indefinitely on timely payment of the prescribed fees.

COWICHAN: a certification mark from Canada

The Cowichan tribe is located in the Cowichan Valley region of Vancouver Island in British Columbia, which consists of seven traditional villages: Kw'amutsun, Qwum'yiqun', Hwulqwselu, S'amuna', L'uml'umuluts, Hinupsum and TI'ulpalus.¹ Traditionally, the Cowichan tribe lived outdoors and they knitted clothes and blankets to withstand the climate, including what has become known as the Cowichan sweater.

In 1995, the Cowichan Band Council of British Columbia filed a trademark application with the Canadian Intellectual Property Office for "COWICHAN".² The mark was registered as a certification mark in 1996.³ The COWICHAN mark distinguishes "clothing, namely sweaters, vests, ponchos, hats, toques, mittens, scarves, socks and slippers". According to the register: "The certification mark, to be used by persons authorized by the certifier, will certify that the wares have been hand-knit in one piece in accordance with traditional tribal methods by members of the Coast Salish Nation using raw, unprocessed, undyed, hand-spun wool made and prepared in accordance with traditional tribal methods."

This example shows that indigenous peoples and local communities can use certification marks to certify that the products they market are made using traditional methods (TK).

Generally, the protection granted to well-known marks goes beyond the regular rules. They can be protected even if they are not registered in a given country, and they usually benefit from stronger protection when they are registered.

Collective and certification marks

A mark need not be owned or used by just one person, business or organization. Marks can also be owned and/or used by groups. This may be a useful possibility for indigenous peoples and local communities.

Your community may wish to consider establishing a *collective mark*. A collective mark is owned by an association or cooperative representing a group of people or businesses. All the members of the association or cooperative can use the collective mark for goods and/or services that comply with criteria established by the association or cooperative. For instance, the sole criterion may be that the goods and/or services originate from a certain community, or from a certain geographical area, or they may also have to meet a specified quality standard.

Collective marks may be especially useful to market products such as handicrafts or native crops that are produced using traditional methods. There will often be many individual producers of such goods within a community. By joining together to establish a collective mark, you can reduce your marketing costs significantly. An example of a collective mark is SUMAQ SONQO from Peru (mentioned earlier).

Another type of mark used by a group is a *certification mark*. The owner of a certification mark allows anyone to use it provided they meet certain prescribed standards. Indigenous peoples and local communities might also consider using a certification mark for goods and/or services with certain distinctive qualities.

An example from Kenya: Taita baskets

In Taita Taveta County, Kenya, sisal baskets are produced according to a traditional art by local women. This skill has been passed down from generation to generation.

The community of basket weavers has formed the Taita Baskets Association, which is the proud owner of the collective trademark “TAITA BASKET”. This collective mark can be used by members of the Association to protect and promote their baskets. The Association has established regulations on the use of the mark and adopted certain quality standards. The Association has registered the mark with the aim of developing a strong, recognizable and profitable regional brand.⁴

Like SUMAQ SONQO, this example shows that collective marks may be useful for indigenous peoples and local communities.



Examples from New Zealand and from the Andean Community

In some countries, the national trademark law does not allow the registration of trademarks that include the names or expressions of the culture of indigenous peoples, unless the trademark applications are filed by the indigenous people or with their consent.

New Zealand and the Andean Community provide interesting examples.

In New Zealand, the Trade Marks Act 2002 prevents a trade mark from being registered if its use or registration would be likely to offend a significant section of the community, including Māori.⁵ According to section 178, the Commissioner of Trade Marks may appoint an advisory committee to advise whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text or imagery, is, or is likely to be, offensive to Māori.

Papatūānuku is a significant Māori *atua* or *tipuna* (god or spiritual ancestor) for the indigenous peoples of New Zealand. According to a guide produced by the New Zealand Intellectual Property Office, a trademark containing the word “Papatūānuku” would be offensive, and could be a basis for objection against a trademark application in New Zealand as provided for under the Trade Marks Act 2002.⁶

In the Andean Community,⁷ Decision 486 provides that signs which consist of the names of indigenous, Afro-American or local communities, or the names, words, letters, characters or signs used to distinguish their goods or services or the manner of their processing, or which constitute an expression of their culture or practice, may not be registered as marks, except where the application is filed by the community itself or with its express consent.⁸

A number of trademark applications have been rejected under Article 136(g) of Decision 486. For instance, a trademark application filed for the mark “WAYUU” was rejected in Colombia and a trademark application filed for the mark “SHUARA” was rejected in Ecuador because these are names of indigenous communities.

These examples show how trademark law can include specific provisions to better protect the interests of indigenous peoples and local communities.

Where to find out more about trademarks

WIPO's webpage on trademarks:
www.wipo.int/trademarks

WIPO (2016) *Understanding Industrial Property*; available at:
www.wipo.int/publications/en/details.jsp?id=4080

WIPO (2006) *Making a Mark: An Introduction to Trademarks for Small and Medium-sized Enterprises*; available at:
www.wipo.int/publications/en/details.jsp?id=106&plang=EN

WIPO/INDECOPI (2000) *Trademarks Comic Book*; available at:
www.wipo.int/publications/en/details.jsp?id=65&plang=EN

1. www.cowichantribes.com/about-cowichan-tribes
2. Application no. 0792173.
3. Registration no. TMA465836.
4. WIPO (2016) "Basket Weaving Project in Kenya Gains Momentum": www.wipo.int/cooperation/en/funds_in_trust/japan_fitip/news/2016/news_0002.html; WIPO (2017) "WIPO Project: Collective Mark for Kenyan Basket Weavers": www.wipo.int/cooperation/en/funds_in_trust/japan_fitip/news/2017/news_0001.html
5. New Zealand Trade Marks Act 2002, section 17(1)(c).
6. New Zealand Intellectual Property Office (2016) *Protecting Intellectual Property with a Māori Cultural Element: User Guide*, page 11; available at: <https://www.iponz.govt.nz/assets/pdf/maori-ip/protecting-ip-with-a-maori-cultural-element.pdf>
7. The Andean Community includes the Plurinational State of Bolivia, Colombia, Ecuador and Peru.
8. Decision 486, Article 136(g).

Geographical Indications

What are geographical indications and why should they be protected?

A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are essentially due to that origin. The geographical origin may be important because of natural factors (such as the local soil or climate) or human factors (particular skills, knowledge or traditions), or a combination of the two. A well-known example of a geographical indication is “Darjeeling” for tea from India.

The place of origin is important for many different products – agricultural products, wines and spirits, handicrafts, and more. Products from certain places can command a premium, so geographical indications are a potentially valuable type of intellectual property.


How are geographical indications protected?

Many countries protect geographical indications through their national laws. At the very least, such laws generally prevent people or organizations from using a GI when this might mislead the public as to the true geographical origin of a product.

National laws in relation to geographical indications vary greatly.

Some countries have special (*sui generis*) laws. In some of these countries, there are laws in relation to a particular type of GI called *appellations of origin*. Like other GIs, an appellation of origin is used for a product that is linked to a particular place, but in the case of an appellation of origin the link between product and place must be particularly strong and the legal protection of the appellation is usually more stringent than for other GIs.

In some countries, it may instead be possible to protect a GI through a collective mark and/or a certification mark.



An example from Ecuador: the Montecristi straw hat

The Montecristi straw hat is made in the town of Montecristi in Manabi province, Ecuador, by expert weavers, and dates back to the 16th century. Its production involves a time-consuming and labor-intensive process that takes many steps – among others, these include harvesting the green leaves of the *toquilla* plant, boiling the fibers, the creation by expert weavers of intricate spiral patterns flowing outward from the center of the crown of each hat, the pounding of the rudimentary hats into their distinctive shape, and the addition of finishing touches that mean the hats do not have seams.¹

In 2005, a group of *toquilla* fiber artisans filed an application to register an appellation of origin with the Ecuadorian Institute of Intellectual Property. They claimed that the cooperative and other community members from Montecristi and its surrounding region should be the only parties allowed to use the label, and that other hat makers from Ecuador and other countries should be barred from using it. In 2008, the Montecristi straw hat was recognized as an appellation of origin in Ecuador.²

This geographical indication involves the traditional knowledge of local communities in Ecuador. It indirectly protects a traditional cultural expression of local communities. It shows that geographical indications can be used to promote and protect TK- and TCE-related products, and so can benefit indigenous peoples and local communities.

Geographical indications, traditional knowledge and traditional cultural expressions

Some TCEs, such as handicrafts, are protected indirectly using geographical indications, in particular appellations of origin. TK and TCEs can be included in the specifications or standards for the protected GI, giving them indirect protection.

Where to find more out more about geographical indications

WIPO's webpage on geographical indications:

www.wipo.int/geo_indications

WIPO (2013) *Geographical Indications: An Introduction*; available at:

www.wipo.int/publications/en/details.jsp?id=272&plang=EN

1. Alexandra Basak Russell (2010) "Using geographical indications to protect artisanal works in developing countries: lessons from a banana republic's misnomered hat" *Transnational Law & Contemporary Problems*, vol. 19: 704, page 709.

2. Basak Russell, as above, page 716.

Industrial Designs

What do industrial designs protect?

In intellectual property law, industrial designs protect the aesthetic or ornamental aspects of a product – how it looks and feels rather than how it works or what it does (functionality). The aesthetic appeal of products is often very important to consumers, so designs are potentially valuable and should be protected.

How does industrial design protection work? What kind of protection do industrial designs offer?

Only new (or original) designs are protected. In other words, to be protected, an industrial design needs to differ significantly from existing designs. In addition, in some countries for a design to be considered an industrial design, the design law requires that it should have been reproduced by industrial means in at least a certain minimum number of copies.

In most countries, to be protected an industrial design needs to be registered at the national design office or registry. This will entail filing an application and paying fees.

The holder of an industrial design has exclusive rights, meaning that no one else is allowed to make or market articles that embody the design in the country where

it is registered without the right holder's authorization.

Once registered, an industrial design is protected for at least 10 years.

In some cases, industrial designs can also be protected by copyright as works of applied art.

Industrial designs and traditional cultural expressions

Industrial designs are sometimes inspired by traditional cultural expressions.

They can also be copies of TCEs. Where a design simply copies a TCE, it will not meet the requirement of novelty or originality and so it should be possible to prevent it from being registered or, if it has already been registered, have the registration cancelled.

A hypothetical example: designing didgeridoos¹

After conducting an examination of the Designs Register of Australia, Terri Janke found some designs that had been "derived" from or "inspired" by indigenous themes. For instance, she found a hand-painted didgeridoo.²

Ms. Janke met with Mr. Lewis Burns, an Indigenous man from Dubbo, New South Wales, who shapes, designs and paints didgeridoos. According to Mr. Burns, he was the first didgeridoo maker to design a footed didgeridoo some years ago.

As Ms. Janke explains, the design of a didgeridoo cannot be registered as an industrial design unless its shape and configuration are new, since the shape and configuration of didgeridoos have been known for a long time. However, the appearance of a particular style could be considered new or original.³

Mr. Burns could have registered his footed didgeridoo design before he made it public – this would have entitled him to prevent others from copying the footed style during the period of design protection. However, he was unaware of the protection provided by design laws and did not register his innovation. Now, it is too late to protect his design as it has already been commercially applied and so would no longer be regarded as new.⁴

This hypothetical example shows that industrial designs can be used to protect new designs related to TK or TCEs. It also highlights the need to file an application before making a design public.



Where to find more about industrial designs

WIPO's webpage on industrial designs:
www.wipo.int/designs

WIPO (2016) *Understanding Industrial Property*; available at:
www.wipo.int/publications/en/details.jsp?id=4080

WIPO (2006) *Looking Good: An Introduction to Industrial Designs for Small and Medium-sized Enterprises*; available at:
www.wipo.int/publications/en/details.jsp?id=113

1. We are not aware of any example of an industrial design that has been registered by an indigenous people or local community, nor any example where third parties have registered an industrial design based on TK or TCEs.

2. Terri Janke/WIPO (2003) *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, page 79; available at: www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf

3. Terri Janke/WIPO, as above, page 80.

4. Terri Janke/WIPO, as above, page 80.

Protection against Unfair Competition

Why protect against unfair competition?

Acts or practices contrary to honest business practices need to be discouraged. They can cause harm to honest entrepreneurs who play by the rules, consumers and the public at large, so they should be prohibited.

What kind of protection against unfair competition may be available?

Different countries protect against unfair competition in different ways. Some have specific legislation such as laws on unfair competition, trade practices or labeling, while others ensure protection against unfair competition through the part of their legal system that deals with civil wrongs – meaning essentially that one party can sue another to secure a legal remedy for the harm that other party has allegedly caused.¹

The approaches countries have taken to ensure protection against unfair competition vary greatly. But at a minimum, creating confusion, discrediting a rival business or its products or services, and using misleading indications are all generally prohibited.²

Using laws on unfair competition to protect traditional knowledge and traditional cultural expressions

In some countries, laws against unfair competition may be used to protect TK and TCEs. Many indigenous peoples and local communities will have established reputation, distinctiveness and goodwill in the production of their handicrafts, artworks and other traditional products. These valuable but intangible qualities may be safeguarded using various mechanisms under unfair competition law, depending on the jurisdiction.

Laws against the use of misleading indications may well be especially useful in this regard. For instance, it will be prohibited to use indications that imply that a product is authentically indigenous, or that it has been produced by a particular community, when it is not authentically indigenous or has not been produced by that community.

The tort of passing off may also be relevant. In some countries, passing off is considered to be an act of unfair competition. If someone passes goods off as if they were produced or endorsed by a particular community, it may be possible to succeed in an action of passing off. As the plaintiff bringing the action, you would need to prove that you had goodwill (reputation), that there was a misrepresentation likely

An example from Australia: misleading or deceptive labels

The section on copyright earlier in this guide included a case from Australia where three Aboriginal artists successfully sued a carpet company for infringing copyright in their artworks (see page 28).

Another issue in that case was whether the carpets infringed Australia's Trade Practices Act.

The carpets included a label stating "Royalties are paid to Aboriginal Artists". The court found that this was misleading. By using it, the carpet factory had misled consumers into believing that the copyright in the artworks belonged to the company or was licensed to it, or that the carpets were approved or made under the license and approval of the Aboriginal artists.

This example shows how protection against unfair competition can supplement the protection granted by other types of intellectual property rights.

The example on the right shows how protection against unfair competition can be useful to protect the interests of indigenous peoples and local communities as well as to prevent consumers from being misled or deceived.

Another example from Australia: preventing false representation

The Australian Competition and Consumer Commission (ACCC) initiated proceedings against an unincorporated business which comprised three art galleries. It alleged that the defendant misrepresented that three of the artists whose works it promoted and sold were of Australian Aboriginal descent when in fact they were not.

The Federal Court found that the defendant had engaged in misleading and deceptive conduct in contravention of the Trade Practices Act by:

- representing that products they offered for sale were "Aboriginal Art" or "Aboriginal Artefacts" when some of those products were produced by people not of Aboriginal descent;
- representing that certain artists whose work they offered for sale were of Aboriginal descent when in fact those artists were not of Aboriginal descent; and
- affixing cards bearing the words "Certificate of Authenticity of Original Aboriginal Art" to artworks painted by people who were not of Aboriginal descent.

The Federal Court granted injunctions:

- restraining the defendant from engaging in similar conduct for a period of five years;
- ordering it to pay the ACCC's costs; and
- ordering it to write to the purchasers of artwork produced by these three non-Aboriginal artists and advise them of the court proceedings.

to deceive the public, and that this misrepresentation had damaged or was likely to damage your goodwill.

Unfair competition law supplements the protection provided by other types of intellectual property rights. No exclusive rights are granted and no registration is required.

Violation of trade secrets is also generally considered an act of unfair competition. The next section will cover this issue.

Where to find out more about protection against unfair competition

Terri Janke/WIPO (2003) *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, pages 9-13; available at: www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf

1. In some countries, this civil wrong will be called a *tort* whereas others call it a *delict*.

2. See Article 10*bis* of the Paris Convention for the Protection of Industrial Property, available at: www.wipo.int/edocs/lexdocs/treaties/en/paris/trt_paris_001en.pdf

Trade Secrets

What are trade secrets and why are they protected?

Many countries protect confidential information. This is often referred to as the law of trade secrets or undisclosed information. It is particularly useful to protect confidential information that cannot be protected by another type of intellectual property right, but even in some cases where protection through a patent or copyright is available it may be a preferable alternative.

How does trade secrets protection work? What kind of protection does it offer?

Trade secrets are protected either through general protection against unfair competition or through specific provisions of national law or through case law (that is, law developed by the courts) on the protection of confidential information.

Generally, trade secret protection allows a holder of confidential information to prevent that information from being disclosed to, acquired by, or used by others without the holder's consent in a manner contrary to honest commercial practices. For protection to apply, the following conditions must be met:

- the information must be kept secret or disclosed in confidence only to those who need to know it for its normal exploitation, for example in a business;

- reasonable measures need to have been put in place to preserve such secrecy; and
- the information must have commercial value because it is kept secret or disclosed only in confidence to those who need to know it.

As long as the above conditions are met, trade secret protection may continue indefinitely. Furthermore, the confidential information does not need to be registered at any government office to be protected.

Trade secrets protection allows for secret information to be protected against unfair practices such as espionage, breach of contract and breach of confidence. But if someone independently discovers or develops the protected information, their use of that information will not be regarded as misappropriation of someone else's trade secret.

If there is a breach of confidence, the trade secret holder will need to prove that the conditions for protection of a trade secret were met and that there was a breach of confidence.

If they can prove those things, their legal remedy will be compensation of some kind. In most cases, the breach of confidence will entail the loss of protection of the trade secret as it will no longer be secret.

**An example from Australia:
the Pitjantjatjara Council's sacred secret**

The Pitjantjatjara Council of Australia was successful in preventing the sale of a book entitled *Nomads of the Desert* written by Charles Mountford. The publication released significant and secret ceremonial information of the Pitjantjatjara people.¹ The Pitjantjatjara Council claimed that information concerning religious and sacred matters had been given to Mountford in confidence. He recorded it in “photographs, drawings and descriptions”.²

The court found that the information in the book held “deep religious and cultural significance to the plaintiffs” and that its unauthorized release might “undermine the social and religious stability of their community”.³ An injunction was granted preventing the sale of the book in Western Australia.⁴

This example shows that laws on confidential information can be used by indigenous peoples and local communities to protect their confidential TK and TCEs.

Trade secrets and traditional knowledge

Trade secrets protection covers, among other things, technical know-how such as formulas, manufacturing processes and other technical knowledge which results from experience and intellectual talent.

Trade secrets protection basically relies on measures taken by its holder to preserve its secrecy or confidentiality. Such measures could be applied to protect confidential TK as a trade secret.

Where to find out more about trade secrets

WIPO's webpage on trade secrets: www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm

WIPO (2002) "Trade secrets are gold nuggets: protect them" *WIPO Magazine*; available at: www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2002/wipo_pub_121_2002_04.pdf

1. Jane Anderson (2010) *Indigenous/Traditional Knowledge & Intellectual Property* (Duke University School of Law Center for the Study of the Public Domain Issues Paper no. 4), pages 21-22; available at: www.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf

2. Judith Bannister "Indigenous cultural heritage in Australia: the control of living heritages", in Matthew Rimmer (ed.) (2015) *Indigenous Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, U.K.; Northampton, MA, U.S.A.: Edward Elgar, page 424.

3. Bannister, as above, page 424.

4. Bannister, as above, page 424; WIPO (2004) *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* (Background Paper No. 1), page 55; available at: www.wipo.int/publications/en/details.jsp?id=285

Table 2: Summary of intellectual property tools

	What is protected?	Requirements	Duration of protection
Copyright	Literature, music, paintings and sculptures, among other things	<ul style="list-style-type: none"> • Original work • Automatic protection 	Life of the author plus at least 50 years after his or her death
Patents	Inventions	<ul style="list-style-type: none"> • New (novel) • Inventive step • Industrially applicable or useful • Patentable subject matter • Full disclosure of the invention • Application • Application and renewal fees 	In most jurisdictions, 20 years from date of application
Trademarks	<p>Words, designs, letters, slogans, symbols and packaging, among other things</p> <p>Laws on unfair competition may also help to protect distinctive signs</p>	<ul style="list-style-type: none"> • Distinctive • Not generic, descriptive or deceptive • Not identical or confusingly similar to other protected trademarks • Application • Application and renewal fees 	At least 7 years at a time, renewable indefinitely provided renewal fees are paid and the mark is used
Geographical indications	Agricultural products, foodstuffs, beverages and handicrafts, among other things, with a geographical name linked to a country, region or locality	<ul style="list-style-type: none"> • Product possessing qualities or reputation from a particular region • Different formalities apply depending on national or regional laws 	Indefinite unless registration is cancelled
Industrial designs	Ornamental or aesthetic aspects of an article	<ul style="list-style-type: none"> • New or original • Reproduced by industrial means • Application • Application and renewal fees 	At least 10 years
Trade secrets	Information deemed secret	<ul style="list-style-type: none"> • Information must be secret • Measures must have been taken to keep it secret • Information must have commercial value because it is secret • No application required 	Indefinite provided the conditions are met

Glossary

Copyright (also called author's right)

A legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture and films to computer programs, databases, advertisements, maps and technical drawings.

Geographical indication (GI)

A sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place and the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

Industrial design

The ornamental or aesthetic aspects of an article. An industrial design may consist of three-dimensional features such as the shape of an article or two-dimensional features such as patterns, lines or color.

Patent

An exclusive right granted for an invention – which is generally defined as a product or a process that provides a new way of doing something or offers a new technical solution to a problem. To get a patent, the invention must meet the relevant patentability criteria, and technical information about the invention must be disclosed to the public in a patent application.

Public domain

Elements that are not, or are no longer, protected by intellectual property rights and can therefore be used by anyone without any authorization.

For instance, the following elements are in the public domain:

<ul style="list-style-type: none"> • Descriptive marks that cannot be registered as trademarks • Discoveries, which are not considered inventions and so cannot benefit from patent protection 	Elements that are ineligible for intellectual property protection and were never subject to intellectual property protection
<ul style="list-style-type: none"> • Industrial designs that are not new or original • Inventions that are not new or inventive 	Elements that might in principle have been granted intellectual property protection, but applications were not submitted or were rejected
<ul style="list-style-type: none"> • A work no longer subject to copyright protection • An invention no longer protected by a patent 	Elements that benefited from intellectual property protection, but which have since fallen into the public domain, their term of protection having expired

Trademark (or mark)

A sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.

Trade secrets

Any confidential business information which provides an enterprise with a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret.

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