

# **On Intellectual Property Protection of Intangible Cultural Heritage in Tibetan Areas**

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**Abstract:** Intangible Cultural Heritage is the Melting Pot of Cultural Diversity and the Guarantee of Sustainable Human Development. Protecting Intangible Cultural Heritage in Tibetan Areas is the Need to Preserve Cultural Diversity in Tibetan Areas. Intellectual Property Rights Are of Great Significance to Participants Supporting Cultural Creation. the Convention on Cultural Diversity is a Useful Supplement to the Agreement on Intellectual Property Rights. the Wuhan Declaration on Intangible Cultural Heritage Protection and Intellectual Property Describes: “the Intellectual Property System Plays an Important Role in the Protection of Intangible Cultural Heritage, But the Protection of Intangible Cultural Heritage Also Poses Great Challenges to the Current Intellectual Property System.” the Protection of Intellectual Property Law Should Occupy the Most Subjective and Fundamental Core Position among the Numerous Legal Means to Protect Intangible Cultural Heritage.

## **1. Introduction**

The General Assembly of Members of the United Nations Adopted the Declaration on the Rights of Indigenous Peoples, Declaring That Indigenous Peoples Have the Right to Maintain, Control, Protect and Develop Their Cultural Heritage, Traditional Knowledge and Traditional Culture. the Outline of the National Intellectual Property Strategy Issued by the State Council Clearly Points out That Our Country's Geographical Indications, Traditional Knowledge, Genetic Resources and Folk Literature and Art Face the Common Task of Perfecting the System and Strengthening the Protection. to Truly Realize the Comprehensive Protection of Intangible Cultural Heritage in Tibetan Areas, the Realistic Choice Should Be Both Administrative Protection and Civil Protection, Both of Which Are Indispensable. Admittedly, There is Still a Big Gap between the Protection of Intangible Cultural Heritage and the Protection of Modern Intellectual Property Rights in Terms of Principles, Conditions, Current Situation and Even Basic Concepts. However, a Considerable Part of Intangible Cultural Heritage That Conforms to the Purpose of Intellectual Property Protection as a Whole Can Still Be Given Special Forms of Intellectual Property Protection by Amending Legislation. Especially in the Current Situation Where the International Intellectual Property Protection System is Generally Dominated by Developed Countries and Intangible Cultural Heritage is Weakened in the International Intellectual Property Protection System, China, as a Developing Country, Should Try to Change This Unreasonable Situation in International Intellectual Property Negotiations and Cooperation and Strive for Greater Benefits for Developing Countries Including China.

## **2. The Relationship between Tibetan Cultural Diversity and Intellectual Property Protection**

### **2.1 The Characteristics of Tibetan Traditional Cultural Expression and the Protection of Intellectual Property Rights**

Intangible cultural heritage is the melting pot of cultural diversity and the guarantee of sustainable human development. Cultural diversity is the source of communication, innovation and creation. It is not only a factor to promote economic growth, but also a means to enjoy satisfactory intellectual, emotional and moral spiritual life. Protecting intangible cultural heritage is the need to

preserve cultural diversity.

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the World Heritage Convention and the Convention on the Protection of Intangible Cultural Heritage adopted by UNESCO in 2005 provide a powerful framework for the international community to protect cultural diversity. Put forward the view that cultural diversity and intellectual property protection complement each other, that is to say, intellectual property is of great significance to the participants supporting cultural creation, and the Convention on Cultural Diversity is a useful supplement to the Intellectual Property Agreement.

## **2.2 The Manifestation of Tibetan Traditional Culture and the Protection of Intellectual Property Rights**

Traditional cultural expressions, also known as folk literary and artistic expressions (TCES/EOF for short), are important types of intangible cultural heritage. Some scholars believe that the protection of traditional cultural expressions is inseparable from the intellectual property system, while there are conflicts.

The latest developments in the international protection of traditional cultural expressions, the latest achievements of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in the protection of traditional cultural expressions in November 2006——Revised Policy Objectives and Core Principles for TCES/EOF Protection. Some scholars believe that the 14 substantive articles on knowledge protection during this period are significant achievements made by the international community in its continuous struggle for the protection of traditional knowledge in the past 20 to 30 years. At the same time, there are also some deficiencies in the substantive provisions, such as omission of traditional names in the protection of the object, and the legislative and technical strategy of uncertain exclusive rights to traditional knowledge in the design of rights.

The Director of the Copyright Department of the National Copyright Administration believes that improper use of folk literature and art should be prevented. He believes that there are two modes of legislation on folk literature and art: one is protected by copyright law, and the other is protected by special legislation. which mode is more appropriate deserves further study. In terms of the corresponding legal relationship framework, including the definition of licensor, the scope of rights, the rights restrictions of the recorder, i.e. the reproducer, and the folk art holder, further research and discussion are required.

The Wuhan Declaration on Intangible Cultural Heritage Protection and Intellectual Property describes: “The intellectual property system plays an important role in the protection of intangible cultural heritage, but the protection of intangible cultural heritage also poses great challenges to the current intellectual property system.” Therefore, “all countries should protect the intangible cultural heritage by improving relevant legal systems such as intellectual property rights, and take effective measures in terms of capital investment, technical means, social publicity and personnel training to establish a sound system for the protection of intangible cultural heritage.” The protection of intellectual property law should occupy the most subjective and fundamental core position among the numerous legal means to protect intangible cultural heritage. Introducing the intellectual property protection system into the field of intangible cultural heritage and making necessary changes in combination with the particularity of intangible cultural heritage are important ways to protect intangible cultural heritage, which deserve sufficient attention in the ongoing legislation of intangible cultural heritage in our country.

The construction of intangible cultural heritage intellectual property protection system involves a lot of contents, but the following aspects should be paid special attention and studied: first, the formulation of specific system contents; Second, the protection of intangible cultural heritage rights needs to set up “administrative confirmation” in procedure. Third, the implementation of intellectual property protection for intangible cultural heritage can take the form of multi-level protection.

In a word, intangible cultural heritage and intellectual property are closely linked. It is an

important way to protect intangible cultural heritage to introduce the intellectual property protection system into the field of intangible cultural heritage and to make necessary changes in combination with the particularity of intangible cultural heritage. It is worth paying enough attention in the ongoing legislation of intangible cultural heritage in China.

### **3. Feasibility of Intellectual Property Protection for Intangible Cultural Heritage**

Intangible cultural heritage reflects the collective personality of certain social groups. In explaining what intellectual property rights are, especially the existence basis of personality right in copyright, Giercke further explained the idea of personality right in his German Private Law written in 1895. Hegel founded the theory of will and personality. People have rights to knowledge products, which also embodies the spirit, personality and free will of people. Intangible cultural heritage embodies the collective personality of its source group and is the identity symbol of a specific nation.

#### **3.1 There Are Many Similarities between Intangible Cultural Heritage and Intellectual Property Protection System**

Both have the characteristics of “invisibility”. Both belong to the category of human intellectual achievements and have certain value. All of them are proprietary. This makes it possible for the current intellectual property rights to protect intangible cultural heritage. Using intellectual property rights to protect intangible cultural heritage is a good mode choice.

#### **3.2 The Protection Purpose of Intangible Cultural Heritage is Consistent with the Value Orientation of Intellectual Property Rights**

The protection of intangible cultural heritage is to inherit and carry forward the excellent traditional culture of the Chinese nation, to promote the construction of socialist spiritual civilization, and to promote the development of society. Intellectual property protection law is to protect the legitimate interests of developers of intellectual achievements, so as to promote people to develop more intellectual achievements and promote social development. It can be seen that the protection purposes of the two are consistent, and the use of intellectual property system can also adapt to the protection of intangible cultural heritage. For example, the US Disney Company has made use of the cartoon movie “Hua Mulan” shot by Chinese folk stories to generate US\$ 300 million in box office revenue, which is very able to show that intangible cultural heritage has the economic benefits of the current object of intellectual property law.

Intellectual property system is an innovative system. For example, as a traditional performing art handed down from generation to generation by the Tibetan people, traditional Tibetan opera is not only a “national intangible cultural heritage”, but also successfully selected into UNESCO's “list of human intangible cultural heritage” and has become a common precious heritage for all mankind. Tibetan opera can be protected as traditional knowledge, should belong to folk literature and art expression, and should be protected by intellectual property rights.

### **4. Analysis of Intellectual Property Protection Mode of Intangible Cultural Heritage**

#### **4.1 Copyright Protection Mode**

The relevant provisions of the “Model Law on Protection of Folk Literature and Art Expressions from Abuse of Domestic Legislation” on the personal rights of works: In all printed publications disseminated to the public, the source of all forms of folk literature expression with clear sources must be indicated in an appropriate manner, that is, the residential group or geographical location from which the relevant expressions are used can be regarded as the provisions on the right of authorship. In terms of copyright, many countries that have laws to protect intangible cultural heritage works grant rights subjects “reproduction rights”, “translation rights” and corresponding “dissemination rights”.

The copyright protection mode pays attention to the static protection of intangible cultural

heritage. Through collecting, recording, classifying and cataloging, the intangible cultural heritage is archived and preserved by means of writing, audio recording, video recording, digital multimedia and other means, and protected by relevant copyright systems. The copyright protection mode can promote the intangible cultural heritage to be preserved in the form of pictures, pictures and videos, so as to record the original historical development, preserve excellent human intellectual achievements and avoid cutting off the connection between the past and the present due to the development of the times. According to the Copyright Law, works must be created by the author himself. However, intangible cultural heritage is the crystallization of collective wisdom and the result of the spread of the times. Therefore, it is difficult to meet the requirements of copyright protection. Obviously, the protection of intangible cultural heritage by copyright alone cannot achieve complete protection. Therefore, in the protection of intangible cultural heritage, we need comprehensive protection methods.

#### **4.2 The Copyright Protection System is Perfect**

According to the Copyright Law, copyright belongs to the author. Article 3 of the 1982 “Model Law on Protection of Folk Literature and Art Expressions from Abuse of Domestic Legislation” stipulates that the use of folk literature and art shall be authorized by the “competent department”. However, it does not specify the “competent department” and gives countries freedom of choice. Tunisia stipulated in the 1966 Law on Literary and Artistic Property Rights that folk art is part of the country's heritage, and anyone who uses it for profit must obtain authorization from the Ministry of Culture except those national organizations that represent the public interest. According to Chinese “Measures for the Administration of Cultural Stations”, cultural stations are the country's most grassroots cultural institutions, and cultural institutions owned by the whole people set up by township people's governments and city street offices. One of the tasks of the cultural station is to collect and sort out the national and folk cultural and artistic heritage, and to do a good job in the publicity and protection of cultural relics. At present, the local “Regulations on the Protection of Intangible Cultural Heritage” that has been promulgated clearly stipulates that the cultural administrative department of the people's government at or above the county level is the local intangible cultural heritage management institution, which is responsible for the protection of intangible cultural heritage.

#### **4.3 Protection Mode of Trademark Rights and Geographical Indications**

The trademark protection mode is applicable to the protection of all intangible cultural heritage in commercial development, especially to the protection of special symbols and marks of the birthplace and indigenous communities. When intangible cultural heritage enters the field of commercial development, we use the trademark right system to endow some cultural heritage with local characteristics with geographical indications and protect them through certification trademarks or collective trademarks. In practice, using trademark rights and geographical indications to protect intangible cultural heritage has great advantages, especially the trademark law stipulates the right of renewal. Its protection period can be extended through legal procedures, which is suitable for the long-term protection of intangible cultural heritage. At present, certification or identification has been used initially in our country. Since Luzhou Laojiao liquor brewing technology was included in the first batch of intangible cultural heritage list in our country, the advertisement of “Guojiao 1573” product produced by Luzhou Laojiao Co., Ltd. has already begun to identify the “intangible cultural heritage” logo.

#### **4.4 Patent Protection Mode**

As an intangible asset, patent has great commercial value and is an important means to enhance the competitiveness of enterprises. Chinese Patent Data Technology Center started the research and development of “Chinese Traditional Medicine Patent Database” in June 2001. Chinese “Opinions on Strengthening the Protection of Intangible Cultural Heritage” has also explicitly proposed the establishment of a database.

The current intellectual property law can transform intellectual achievements into economic

benefits, thus promoting the dissemination and promotion of intangible cultural heritage. It plays a certain role in protecting intangible cultural heritage and the interests of its birthplace. However, due to the incomplete integration of the existing intellectual property system and intangible cultural heritage, the exploration of the protection of intangible cultural heritage will continue.

#### **4.5 Learn from Experience**

Intellectual property protection of intangible cultural heritage has been widely used in foreign legislative practice, but in the choice of legislative mode, some countries use traditional intellectual property law to protect intangible cultural heritage, such as Australia, Tunisia and Tanzania. Other countries, such as the United States and India, protect intangible cultural heritage through special legislation on intellectual property rights of intangible cultural heritage. These legislations and practices have effectively promoted the protection and promotion of intangible cultural heritage. Some of these systems and measures, such as permanent protection, authorized use, payment of user fees, and formulation of special laws, are worth learning and learning from. China should fully consider and draw lessons from these foreign legislative experiences when carrying out intellectual property protection of intangible cultural heritage, so as to improve our legal protection in this respect.

#### **5. Conclusion**

Intellectual property protection of intangible cultural heritage has also begun to attract our attention. The State Council's "Outline of National Intellectual Property Strategy" issued by the State Council involves many issues of intellectual property protection of intangible cultural heritage. In the goals for the past five years, it is proposed that trade secrets, geographical indications, genetic resources, traditional knowledge and folk literature and art should be effectively protected and rationally utilized. In the third part, the first item of "strategic emphasis" is "improving the intellectual property system". It is proposed that legislation on genetic resources, traditional knowledge, folk art and geographical indications should be done well in due course. The sixth item of the "special task" in the fourth part is "intellectual property rights in specific fields", which mainly expounds the protection system of intangible cultural heritage intellectual property rights. However, it still needs a lot of painstaking work to implement the National Intellectual Property Strategy Outline into corresponding legislation. Article 44 of Chinese Intangible Cultural Heritage Law stipulates: "Where the use of intangible cultural heritage involves intellectual property rights, the provisions of relevant laws and administrative regulations shall apply. Where other laws and administrative regulations provide otherwise for the protection of traditional medicine, traditional arts and crafts, etc., such provisions shall prevail. "It can be said that Chinese legal protection of intangible cultural heritage is in a steady state.

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