

*Original Paper*

# The Legal Protection Path of Intangible Cultural Heritage of Ethnic Minorities Beyond the Framework of Intellectual Property Rights

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Received: December 31, 2023      Accepted: January 20, 2024      Online Published: February 5, 2024

doi:10.22158/fet.v7n1p33

URL: <http://dx.doi.org/10.22158/fet.v7n1p33>

*This paper is a phased research result of the research project of Kangba Cultural Research Center: Research on the integration of intangible cultural heritage into local community governance in Garze Prefecture under the background of 'community consciousness' (project number: KBYJ2021B017).*

## **Abstract**

*For the legal protection of intangible cultural heritage of ethnic minorities, China has basically formed a legal protection mode combining international legal protection with domestic legal protection, and combining public law protection with private law protection. However, the protection of intangible cultural heritage by the intellectual property system is concentrated in two aspects: creative products (works) based on traditional knowledge and traditional skills that have not yet been disclosed and can be applied in industry. The protection of intangible cultural heritage of ethnic minorities is facing the dilemma of limited compatibility of intellectual property rights. Therefore, we should clarify the protection ideas of intangible cultural heritage of ethnic minorities, go beyond the framework of intellectual property rights, and form a diversified protection path of intangible cultural heritage of ethnic minorities.*

## **Keywords**

*intangible cultural heritage of ethnic minorities, intellectual property rights, legal protection*

## **1. Problem Posing: The Status Quo of Legal Protection of Intangible Cultural Heritage of Ethnic Minorities**

Since the beginning of this century, the protection and inheritance of intangible cultural heritage of ethnic minorities have gradually attracted the attention of various countries. So far, China has initially set up a legal protection framework for the intangible cultural heritage of ethnic minorities that combines international legal protection with domestic legal protection, and public law protection with private law protection. However, at present, there is no law specifically protecting the intangible cultural heritage of ethnic minorities in China.

### *1.1 Public Law Protection with “Intangible Cultural Heritage Law” as the Core*

The “Intangible Cultural Heritage Law of the People’s Republic of China” implemented on June 1, 2011 opened a new stage in the protection of intangible cultural heritage in China, making the protection of intangible cultural heritage in China more comprehensive, more standardized and more effective. This law takes inheriting and promoting the Chinese traditional culture as the legislative purpose, establishes the basic principles of authenticity, integrity, inheritance and enhancing the cultural identity of the Chinese nation, maintaining national unity, promoting social harmony and sustainable development, and formulates the investigation system, representative project list system and inheritance and dissemination system. The “Intangible Cultural Heritage Law” is an administrative law, which clarifies the role and responsibility of the government in the protection of intangible cultural heritage, implements top-down administrative protection, and provides protection for the protection of intangible cultural heritage with national force. The protection of intangible cultural heritage in China, including the protection of intangible cultural heritage of ethnic minorities, is facing severe challenges. The state-led administrative protection measures are simple smooth and effective.

### *1.2 Private Law Protection with Intellectual Property Rights as the Core*

The protection of intangible cultural heritage of ethnic minorities through the intellectual property system is an indispensable private law protection method. For example, traditional oral literature can be included in the protection scope of “copyright law”, and traditional music, dance, opera and other performing arts can also be protected through the performer’s rights in the “copyright law”; traditional handicrafts can get patent protection; traditional medicine of ethnic minorities can also be protected by applying for patents and registering trade mark. Through the protection of intellectual property rights of intangible cultural heritage rights holders, they enjoy spiritual rights and property rights, so that intangible cultural heritage is not improperly used, and intellectual property rights holders can benefit from intangible cultural heritage, and then enhance their endogenous motivation for the protection, inheritance and development of intangible cultural heritage. This bottom-up civil protection can arouse the enthusiasm of the rights holders from the root. It is true that not all intangible cultural heritage of ethnic minorities can be included in the scope of intellectual property protection, but this private law protection still has an irreplaceable advantage over public law protection.

## **2. Reflection on the System: The Inclusion-exclusion Relationship Between Intangible Cultural Heritage of Ethnic Minorities and Intellectual Property Rights**

Intellectual property rights and intangible cultural heritage rights have non-materiality and property in the object. There is a certain degree of similarity between the two objects, which makes the view of using the intellectual property legal system to protect intangible cultural heritage recognized by many scholars. However, the differences between the two in the objects cannot be ignored. Intangible cultural heritage is usually the crystallization of collective wisdom, with a long history, emphasis on inheritance, and relative stability. However, in the context of Western industrial society, the object of intellectual property rights is usually created by specific individuals or organizations, with a clear protection period and emphasis on innovation. In addition, the generation of intangible cultural heritage is the result of joint development based on group interests, not to grant creators economic benefits. In terms of generation, acquisition and utilization, intangible cultural heritage and intellectual property rights are different. Therefore, the existing intellectual property system shows limited compatibility with the protection of intangible cultural heritage of ethnic minorities.

The reasons for this problem are as follows: First, the root cause. Intangible cultural heritage has both cultural attribute and economic attribute, which indicates that intangible cultural heritage rights have both “public rights” and “private rights” attributes. This phenomenon is what German scholars call the “dual structure of public property” (Liang, 2016). Intellectual property is a typical private right. The difference in the attributes of rights determines the difference in the protection methods of the two, and the applicable legal system cannot be directly applied. Second, the direct cause. First of all, most of the intangible cultural heritage has a long history, and the subject of rights is not clear. Most of them are disclosed in the process of inheritance, which basically does not meet the prerequisite for protection stipulated by the modern intellectual property system, and it is difficult to be included in the scope of intellectual property protection. Secondly, intangible cultural heritage has holistic characteristics. If the current intellectual property system is directly applied, it will be classified as copyright, patent, trademark and other rights, undermining its integrity. Finally, idea-expression dichotomy is an important principle in the intellectual property system. Its basic connotation is that the law only protects the expression of thought, but not the thought itself embodied in the expression, which means that the thought itself will be in the public domain. It is difficult for ethnic minority groups to achieve the purpose of protecting intangible cultural heritage by relying solely on the intellectual property system (Yang, 2014).

The limited compatibility of modern intellectual property system with intangible cultural heritage is mainly reflected in the following two aspects: creative products (works) based on traditional knowledge and undisclosed traditional skills that can be applied in industry. Many intangible cultural heritages of ethnic minorities have been publicized in the inheritance, lack of novelty, and are difficult to be compatible with the modern intellectual property system. Products created on the basis of traditional intangible cultural heritage need legal protection, but traditional intangible cultural heritage

itself also needs legal protection. For the former, the existing intellectual property system has played a positive role; for the latter, the existing intellectual property system is not compatible.

In particular, it should be pointed out that not all the intangible cultural heritage of ethnic minorities need intellectual property protection. Some intangible cultural heritages of ethnic minorities, such as Kangding Zhuanshanhui, are intangible cultural heritages with cultural significance, but they are not related to intellectual property systems such as copyrights, trademark rights or patents. They do not have intellectual property significance and should be included in the scope of administrative protection.

### **3. Unity and Diversity: The Optimal Path of Legal Protection of Intangible Cultural Heritage of Ethnic Minorities**

The protection of the intangible cultural heritage of ethnic minorities includes the protection of the intangible cultural heritage of ethnic minorities themselves and the protection of creative products (works) based on the intangible cultural heritage of ethnic minorities. For the former, the intellectual property system is difficult to include it in the scope of protection due to the limitation of protection elements; for the latter, the relevant content of intangible cultural heritage protection in the intellectual property system can be applied. Since the intellectual property system cannot fully meet the needs of the protection of intangible cultural heritage of ethnic minorities, in order to achieve the goal of the protection of intangible cultural heritage of ethnic minorities, we should follow a diversified approach, not only rely on the path of intellectual property rights, but also rely on other paths outside the framework of intellectual property rights, such as the “Intangible Cultural Heritage Law”, and improve the relevant system. It is of great significance to construct a protection system of pre-use license, in-use management and post-infringement relief for the intangible cultural heritage of ethnic minorities.

#### *3.1 Pre-use License*

The pre-use licensing system of intangible cultural heritage of ethnic minorities should include three systems: information disclosure, prior informed consent and license certificate. Because it is the most urgent to license before use in the patent protection of intangible cultural heritage of ethnic minorities, this paper takes this as point of penetration. According to the provisions of Article 26 (5) of the Patent Law, only inventions that rely on heritage resources need to specify the source when applying for a patent, and the scope of protection is relatively narrow. At the same time, if it is not stated whether the source will grant a patent, the article is not clear. It is recommended to establish an information disclosure system when applying for patents for intangible cultural heritage of ethnic minorities or its development achievements, with the above-mentioned law as a reference, requiring applicants to indicate the source of the heritage and use the information disclosure system as a mandatory norm. It is clearly stipulated that the source should be disclosed when submitting a patent application. If the source cannot be explained, it shall be supplemented within a certain period of time (such as 6 months). If it is still impossible to explain, the patent will not be granted (Mubo Xiang, 2016). At the same time, the prior informed consent system should be introduced when applying for patents on intangible cultural

heritage of ethnic minorities or its development achievements. The applicant should provide the license certificate of the origin group of intangible cultural heritage of ethnic minorities or inheritor, otherwise the patent application will be rejected. In the later stage, if the applicant wants to commercially develop and utilize the patented products, he or she needs to obtain a license when applying for a patent for the intangible cultural heritage of ethnic minorities or their development results. Where no source disclosure or false disclosure is made when applying for a patent for the intangible cultural heritage of ethnic minorities or its development achievements, the patent shall not be granted; if the patent has been granted, the relevant right holders can apply for the patent to be invalid, and if there is evidence to prove it, they can support it.

### *3.2 In-use Management*

#### *3.2.1 The Exercise of Property Rights of Intangible Cultural Heritage of Ethnic Minorities*

First of all, ethnic minority groups themselves can use a certain intangible cultural heritage they own, and can obtain benefits through commercial use. Secondly, the right holder of the intangible cultural heritage of ethnic minorities can license others to use a certain intangible cultural heritage commercially and get paid. Thirdly, the rights holders of intangible cultural heritage of ethnic minorities have the right to share the economic benefits obtained by others based on the achievements of innovation and development of their intangible cultural heritage, which is the use of benefit sharing theory in the protection of intangible cultural heritage of ethnic minorities (Han, 2010). Finally, for the intangible cultural heritage of ethnic minorities that have entered the public domain, when using this part of the intangible cultural heritage, there is no need to obtain the permission of the relevant obligee, but a certain royalty should be paid to it. Through the orderly exercise of property rights, the development of intangible cultural heritage of ethnic minorities can be more standardized. At the same time, the property income is not only conducive to the inheritance and development of intangible cultural heritage of ethnic minorities, but also provides support for the economic, social and cultural development of the ethnic areas.

#### *3.2.2 Self-management of Intangible Cultural Heritage of Ethnic Minorities through Civil Regulations and Habits*

Before the introduction of relevant laws on the protection of intangible cultural heritage, the intangible cultural heritage of ethnic minorities was protected through civil regulations and habits. They developed with the development of intangible cultural heritage of ethnic minorities, played an active role in history, and gained respect and recognition among the people. In the contemporary era, some of these civil regulations and habits are in line with the value goal of national law in protecting the intangible cultural heritage of ethnic minorities. Therefore, the civil regulations and habits for the protection of intangible cultural heritage of ethnic minorities should pay attention to the adoption of the times, and the part that does not go against the law and public order and good customs should still play an active role in the self-management of intangible cultural heritage of ethnic minorities within the ethnic group.

### 3.2.3 The Management of Intangible Cultural Heritage of Ethnic Minorities by Civil Social Associations and Grassroots Autonomous Organizations

The “Intangible Cultural Heritage Law” establishes a public participation mechanism for the protection of intangible cultural heritage, and realizes the combination of government protection and social protection, so as to protect the intangible cultural heritage of ethnic minorities more comprehensively and effectively. Civil social associations and grassroots autonomous organizations are closest to the original environment of ethnic minorities’ intangible cultural heritage, and they are also the most understand of the protection and inheritance of a certain ethnic minority’s intangible cultural heritage. They are not only conducive to the formation of the protection atmosphere of ethnic minorities’ intangible cultural heritage, but also play a positive role in the propaganda, propagation and orderly development of ethnic minorities’ intangible cultural heritage, and lay a preliminary foundation for the government to investigate the intangible cultural heritage of ethnic minorities and determine the list of representative projects.

### 3.3 *Post-infringement Relief*

#### 3.3.1 Types of Infringement

Whether the infringed intangible cultural heritage of ethnic minorities has entered the public domain can be divided into two categories. In view of the intangible cultural heritage of ethnic minorities that do not enter the public domain, it can be divided into two categories according to whether it is licensed by the right holder: First, any individual or organization commercializes the intangible cultural heritage of ethnic minorities that do not enter the public domain without permission, which constitutes a tort. In the second category, although any individual or organization is licensed to use the intangible cultural heritage of ethnic minorities that have not entered the public domain, it does not indicate the source of intangible cultural heritage, which constitutes a tort. For the intangible cultural heritage of ethnic minorities entering the public domain, because it has been made public, you don’t need permission to use them. According to whether it is commercialized or not, it can be divided into the following two categories: first, any individual or organization makes non-commercial use of the intangible cultural heritage of ethnic minorities entering the public domain, but does not specify the source, which constitutes a tort; second, any individual or organization’s commercial use of the intangible cultural heritage of ethnic minorities entering the public domain, but without payment or source, constitutes a tort. For example, the people’s government of Sipai Hezhe Township in Raohe County, Heilongjiang Province v. Guo Song and other cases of copyright infringement of folk literature and art works belong to this situation.

#### 3.3.2 Perfection of Litigation System

Conciliation, intermediation and litigation are the most commonly used solutions to the infringement disputes of intangible cultural heritage of ethnic minorities. Conciliation and intermediation have the advantages of simple operation and relatively low economic costs, and have played an active role in practice. In particular, court mediation should be paid more attention to, its procedures are more

standardized, and the results are more authoritative. It is an effective way to resolve disputes over intangible cultural heritage. “The first case of bobing dispute in Xiamen history” is an example. However, conciliation and intermediation may also fail to reach an agreement, so it is particularly important to solve the infringement disputes of intangible cultural heritage of ethnic minorities through litigation.

#### 3.3.2.1 Clarify the Subject of Litigation

“Traditional knowledge is the intellectual achievement of traditional clan spiritual production and intellectual labor. In the definition of property rights, property should be defined as producer ownership (Yan, 2006).” The intangible cultural heritage of ethnic minorities is the cultural wealth created and inherited by the common ancestors of a certain ethnic minority in a specific environment. It is the common property of the ethnic group, and the owner of this common property should be the ethnic group. However, in tort litigation, there are many difficulties in directly participating in litigation by ethnic groups as the subject of rights. At this time, it is obviously more feasible for representative institutions of ethnic groups to participate in litigation to protect their rights. The representative institutions of ethnic groups are usually the management institutions of intangible cultural heritage of ethnic minorities, which can include the following categories: (1) The regulatory agencies established by ethnic minority groups themselves. (2) The national township or autonomous county (banner) where the intangible cultural heritage of a certain ethnic minority is located is used as a representative institution to participate in rights protection litigation. The case of the people’s government of Sipai Hezhe Township in Raohe County, Heilongjiang Province v. Guo Song and other cases of infringement of the copyright of folk literature and art works is the judicial practice of this way. (3) Government departments with the management function of intangible cultural heritage of ethnic minorities. In the absence of the first two subjects or the first two subjects do not exercise the right of action actively, the government agencies responsible for the management of the intangible cultural heritage of ethnic minorities in the place where the intangible cultural heritage of ethnic minorities is located should participate in the rights protection litigation as representative agencies.

#### 3.3.2.2 Give Full Play to the Role of Public Interest Litigation

Intangible cultural heritage not only reflects personal interests, but also has public interests, which determines that the protection of intangible cultural heritage has the basis of national or social public interests and meets the core conditions for filing public interest litigation. The plaintiffs who filed public interest litigation for the protection of intangible cultural heritage include three types: government agencies with management functions in the location of intangible cultural heritage, specific organizations with public welfare representativeness by law, and people’s procuratorates. The same infringement may not only infringe the personal interests of the rights holders of intangible cultural heritage, but also infringe the public interests of the state or society. At this time, the relevant rights holders can file private interest litigation, and the authorities can also file public interest litigation. The

two can coexist and do not conflict. At the same time, the facts and evidence identified in public interest litigation can be used or recognized directly in private interest litigation (Deng, 2020).

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