

Research on the Protection of Intellectual Property Rights of Intangible Cultural Heritage

Mingzhao Ma

Nanjing University of Science and Technology, Nanjing, China

Abstract: *Intangible cultural heritage (ICH) is a valuable crystallization of human wisdom, but the protection of ICH in China is facing many challenges in practice. The modern intellectual property rights system can only cover part of the ICH, and the defects of the intellectual property rights system itself may lead to the excessive commercialization of ICH, which is contrary to the protection purpose of inheriting and promoting ICH, forming a misunderstanding in the practice of ICH protection. From the perspective of the characteristics of ICH and the purpose of protection, we will clarify the subjects of rights and put forward legislative proposals for classification and diversified protection.*

Keywords: *intangible cultural heritage; intellectual property protection*

1. Introduction

At present, provincial, municipal and county ICH protection systems have been formed, and the relevant government agencies and the responsible work teams for ICH protection are gradually growing. The Law of the People's Republic of China on ICH came into effect on June 1, 2011, but the inheritance and development of ICH have encountered insufficient protection, insufficient publicity, weak awareness of inheritors' rights, and over-reliance on the government.

According to the survey, at present, the protection of ICH mainly relies on administrative agencies, which give inheritors certain financial support and require them to fulfill their obligation to promote and train inheritors. However, there are no corresponding measures for some infringement behaviors, and the awareness of inheritors to defend their rights is weak, resulting in frequent infringement and loss of economic benefits of ICH. The difficulty of non-heritage inheritance is not only the identification of the qualification of non-heritage during the preliminary assessment, but more importantly, the determination of the subject of specific protection, and the corresponding intellectual property protection must be carried out on the basis of a clear inheritor.

In recent years, intellectual property protection has become a hot topic in the field of non-heritage protection. In practice, some types of non-heritage can be protected by the Copyright Law, Patent Law and Trademark Law, but there are still some types of non-heritage that have long entered the public domain and cannot be covered by the scope of intellectual property protection, and cannot be effectively protected at the level of intellectual property protection. This paper will take the current situation and problems of the protection of NRMs as the starting point, and propose specific measures for the protection of NRMs from both legislative and practical levels.

It also clarifies the subjects of ICH protection and proposes the ways of classification protection and diversified solutions.

2. Feasibility of the protection of ICH

2.1. Consistency of object categories

As we can see from the definition, the so-called ICH is a unique traditional culture that is immaterial and has inheritance. From the perspective of the legal system, not all traditional cultures can be protected by the intellectual property system. The prerequisite for analyzing the legitimacy of intellectual property protection of ICH is to confirm the criteria for identifying the object of intellectual property protection.

Firstly, the criteria for determining the object of ICH are immateriality. ICH is essentially an intellectual achievement and a form of cultural expression. Although it depends on a certain material

carrier for its existence, it does not prevent its intangible nature. For example, the guqin, as the only single musical instrument inscribed in China's world-class ICH, is played on a physical instrument, but the core reason for the cultural identity of this item, which has been passed down to this day, is not only the simple material medium, but also the cultural imagery embedded in it, which embodies the Chinese cultural characteristics of the ancient people who sought to cultivate their bodies and nourish themselves, to entertain themselves, and to be subtle and introspective. Therefore, the immateriality of ICH coincides with the essential characteristics of the objects protected by intellectual property rights. Although the objects protected by intellectual property law also require a corresponding material carrier, such as the reproducibility requirement of copyright law for works, what intellectual property law protects is not the material carrier. However, what intellectual property law protects is not a tangible material medium, but an intangible intellectual achievement. Therefore, intangibility also becomes the basis for the design of the intellectual property system. In summary, ICH and intellectual property protection objects have a high degree of homogeneity.

Second, the territoriality of the object recognition criteria. When we look at the list of ICH, it is not difficult to find that most of the ICH items are named either by country, region or nationality, which makes it easy to see the territoriality of ICH. One of the reasons for such characteristics is the barrier of natural environment and the inconvenience of transportation in traditional agricultural societies, which created a relatively closed living environment and created distinctive regional cultures, hence the saying "Ten miles are different from the sky and a hundred miles are different from the customs. The other is determined by the locality of people. ICH emphasizes the living heritage of people and is closely related to the living environment in which the inheritors live. ICH is based on the unique way of production and life of people in a certain region, and is passed on by word of mouth, and is the product of the subjective initiative of local residents. Different ethnic groups and regions have different living habits and folk customs, and the ICH they create has its own characteristics. Therefore, territoriality is one of the important characteristics of ICH^[1]. The territoriality of intellectual property rights refers to the fact that the spatial scope of intellectual property rights granted by the law of a country is in principle limited to the territory of that country^[2], beyond which the intellectual property rights will cease to exist. Territoriality is an essential attribute of IPRs and is rooted in the intangible nature of the IP object. In summary, both ICH and intellectual property rights are territorial in nature.

2.2. Consistency of Protection Objectives

From the perspective of the intellectual property protection attribute of ICH, its protection mechanism is consistent with the current intellectual property protection system, and the ultimate purpose is to promote cultural innovation and development. The difference between the two is mainly manifested in the difference of protection objects and protection paths. The protection objects of the current intellectual property system include not only the intellectual achievements of the present, but also traditional culture including ICH, thus it can be seen that "tradition" and "innovation" have some degree of commonality and can be attributed to the crystallization of human intellectual activities. Both of them have intellectual property rights.

ICH is an intellectual achievement created and developed by the inhabitants of a certain nationality or region in the course of their long-term production and living practices. This process incorporates traditional elements such as lifestyles, customs and practices, and the rise and fall of society in the region. It is these cultures of different times, regions, and forms of expression that have created the complex and diverse situation of human society. The protection of ICH is an important means of safeguarding cultural diversity and promoting the diversified development of human society. All in all, the ultimate purpose of the intellectual property system is to safeguard the intellectual achievements of rights holders in the field of scientific research and literature, thus motivating people to be more enthusiastic in scientific and literary creation. At the same time, the legal system is also evolving with the times, and the intellectual property system is an open system. When a new object appears and the old intellectual property system cannot provide comprehensive protection, we should adjust the legal system in time to accommodate the existence of the new object, instead of excluding it from the scope of protection^[3]. At present, when ICH cannot be fully integrated into the existing intellectual property system, we should actively explore a suitable intellectual property protection model for its protection.

2.3. Consistency in value orientation

In the context of global integration and the rapid development of the borderless era, the protection of ICH has gradually become a global issue, especially since the development of multicultural integration

has put the ICH of less developed countries or regions at risk of extinction, and it is particularly important to establish a set of effective legal protection mechanisms to solve the above-mentioned problems.

The protection of ICH can not only inherit and promote China's excellent traditional culture, promote the construction of spiritual civilization, and promote the growth of Chinese cultural system; at the same time, since ICH has a huge economic value that cannot be ignored, its rational use and moderate commercial development can not only ensure the interests of the inheritors, but also promote the prosperity of local economy and society. Intellectual property rights also protect the rights holders of literary works, scientific and technological achievements, commercial signs and other objects, and promote the innovative development of intellectual achievements, thus promoting the progress of the whole society. It is easy to see that there are similarities between the two at the level of pursuit of value orientation. Therefore, in the process of protecting ICH, the relevant intellectual property rights system can be introduced to grant certain intellectual property rights to the rights holders of ICH, so as to protect their rights and interests in commercial development and increase their enthusiasm for the protection and creation of ICH, thus achieving the ultimate goal of promoting the progress of society as a whole.

3. Realistic dilemma of intellectual property protection for ICH

According to the definition of traditional knowledge by WIPO, traditional knowledge has the characteristics of group, tradition and timelessness; while according to modern intellectual property theory, its right object has the characteristics of individuality, innovation and timelessness. It is thus clear that TK is a category opposed to IP objects and has the opposite factual characteristics of contemporary intellectual achievements. Specifically.

3.1. The group nature of ICH contradicts the individual nature of intellectual property

Compared to the object of intellectual property rights, ICH is beyond the individual. The production and continuation of ICH cannot be accomplished by the wisdom and behavior of individual members of society, but is gradually accumulated by the group in which it is located, or even by multiple groups associated with it, in the course of long-term historical development, and is shared by the members of the region. At the same time, ICH is usually a combination of the beliefs and knowledge of the inhabitants of the region in which it is located, representing the moral values and religious beliefs of that particular group, and having a religious or cultural symbolic meaning, so it can also be regarded as a sign that distinguishes the community in which it is located from other communities. "No traditional knowledge can be separated from the social group to which it belongs. This social group can be a nation or a country, or a village or a tribe. The social group is the bearer of traditional knowledge, and any traditional knowledge cannot exist without the social group to which it belongs. "In this sense, ICH is symbiotic and coexistent with the production and living practices of social groups, and as an achievement reached through the attempts of generations, it contains a wealth of experience beyond what individuals can possess and is the common property of the whole collective. No individual can claim creator's rights over ICH, nor can anyone distinguish his or her contribution to ICH from that of the rest of the community. Thus, ICH is the product of collective wisdom, which cannot and should not be associated with specific individuals. The intellectual property system, however, protects the intellectual achievements by granting exclusive rights to the creator, and based on the protection of the private rights of the individual, achieves the ultimate goal of stimulating intellectual innovation and promoting the continuous progress of human civilization. Therefore, the group nature of ICH contradicts the individual nature of intellectual property rights, which is also a major obstacle to the use of intellectual property rights to protect ICH in practice.

3.2. The traditional nature of ICH contradicts the innovative nature of intellectual property

Traditionality refers to the characteristics of traditional knowledge in terms of the formation and application of knowledge compared with modern knowledge. As part of traditional culture, ICH is based on the cultural beliefs and social practices of a particular nation or community, and is derived from cultural traditions inherited from generations, and forms part of such cultural traditions. One of the conditions for the granting of intellectual property rights is that the object be innovative. By innovative, it is meant that the work is independently conceived and not or basically identical to the published works of others, i.e. not copied, plagiarized or altered from the works of others. Whether an ICH is innovative or not is an important consideration for whether it can be protected by intellectual property rights, and it is difficult to determine the innovativeness of most ICH, as most of them are slowly developed by certain communities based on the creative achievements of their predecessors, and are inherited and innovative.

The value of ICH lies in the fact that it is a unique historical heritage, and this value will continue to grow over time, and as a living historical heritage, authenticity is its essential requirement. The value of an intellectual property object lies in its innovativeness compared with existing intellectual achievements, and its innovativeness is negatively correlated with time. Specifically, the value of an intellectual property object lies in its originality compared with existing works, its inventiveness compared with existing technologies, and its identifiability compared with existing commercial marks. Innovativeness is a substantial element of an intellectual property object. In summary, the difference between the traditional nature of ICH and the innovative nature of intellectual property brings trouble to the intellectual property protection of ICH.

3.3. The permanence of ICH contradicts with the duration of intellectual property rights

Unlike the objects of intellectual property rights, the time of birth of the rights is determined, so the duration of protection can also be determined. Therefore, it should not be labeled as "protection period", which is not conducive to the inheritance and development of NRMs.

According to traditional intellectual property theory, there is a time limit for the protection of various rights, i.e. the duration of intellectual property rights. Whether it is a patent, a trademark or a copyright, the exercise of the right has a certain period of validity, after which the corresponding intellectual property rights enter the public domain and cannot continue to be protected; however, in the case of ICH, it evolves gradually after a long period of development, not to mention the use and improvement of it. If ICH is artificially given a certain protection period, it is likely to enter the public domain at the very beginning of its formation. In addition, ICH has the dual responsibility of maintaining the uniqueness of national culture and preserving the world's cultural diversity, and this responsibility can never be accomplished overnight; it is a permanent task. If a protection period is set for ICH, the rights will be deprived after the expiration of the period, and the law will no longer provide protection for it, which is contrary to the original purpose of protecting ICH.

4. Institutional Suggestions for the Protection of ICH Intellectual Property Rights in China

4.1. Determine different types of rights subjects

The subject of legal relationship refers to the individual or group who enjoys the rights and undertakes the obligations in the legal relationship, and is in a dominant position, directly determining the creation, change and destruction of the legal relationship. However, China's ICH Law does not make clear provisions on the subjects of rights.

The evolution and development of ICH is a long and slow process of flux, during which it may be owned by individuals, held by groups, or vested in the government. Different ICH belongs to different inheritance subjects, and the simple attribution of ICH to a certain type of subject is not in line with its complexity and fluidity, nor can it meet the needs of ICH protection and development. In my opinion, the right subjects of ICH are either the creators or the inheritors of the project, because only these two types of subjects know the process of production and development of ICH best, and it is justified to identify them as the right subjects.

4.2. Determining the scope of intellectual property protection of ICH

In the construction of the legal protection system of intellectual property of ICH, the object is quite an important part. The object of legal relationship is the objective object to which the rights and obligations of the subject are directed^[4].

Article 2 of China's ICH Law divides "ICH" into six categories, including "traditional oral literature and language as its carrier; traditional rituals, festivals and other folk customs; traditional arts, medicine and calendars; traditional sports and recreational arts; traditional arts, music, drama, dance, calligraphy and acrobatics; and others. Traditional sports and recreation; traditional arts, opera, music, drama, dance, calligraphy and acrobatics; and others". Accordingly, when setting the objects of intellectual property protection for China's ICH, attention should be paid to the following: first, on top of the above six categories, "objects, tools and cultural spaces related to the above traditional cultural knowledge" should be added as the seventh category. This is because the understanding of "intangible" cannot be limited to the spiritual aspect only, and when ICH is attached to a physical object, the physical object also becomes an inseparable part of it, so it is reasonable to include this part in the scope of protection. This is in line

with the concept of the Convention for the Safeguarding of the ICH. Secondly, we exclude the categories such as gender customs, religious beliefs and other traditional beliefs of people in specific areas, which are not related to the field of intellectual property law, and the objects that are not explicitly protected by intellectual property law, such as calculation methods and treatment methods of diseases.^[5]

In summary, when constructing the intellectual property protection system for ICH in China, the following objects should be included in the scope of protection: first, folk literature and arts, including oral legends, folk tales, traditional music, dance, drama, etc.; second, traditional science and technology, including traditional arts, traditional medicine, etc.; third, traditional identification marks, etc. Different protection modes are applied to different objects, for example, oral legends can be applied to the protection mode of copyright, traditional medicine to the protection mode of trade secrets, and identification marks in commercial development to the trademark right mode.

4.3. Determining the content of diversified rights

The scope of ICH objects is similar to that of existing intellectual property objects, and its rights should also reflect the corresponding characteristics of copyright and industrial property rights. Therefore, the content of the rights of ICH intellectual property should also include both personal rights and property rights.

First, personal rights.

The right to disclose the place of origin. This right is the basis of other rights and corresponds to the right of attribution in intellectual property, i.e. the right holder of ICH has the right to require users to indicate the source and origin when using the item, so as to give sufficient respect and recognition to the right holder and effectively avoid infringement and unjust enrichment.

The right to respect cultural dignity. Similar to the concept of the right to protect the integrity of a work, the right to respect cultural dignity means that no one may alter or distort the ICH without the permission of the right holder, and that the cultural properties contained therein are fully respected. This right is essentially to prevent the ICH from being infringed by external factors and to ensure its smooth transmission. The ICH has a strong cultural identity, and in the process of its formation and development, it has brought together the local national sentiment. If it is destructively redeveloped to meet the needs of the market, it will not only contradict the original purpose of protecting the ICH, but also lead to problems such as conflicts of beliefs and nationalities.

Right of public dissemination. The right of publication refers to the right of the owner of ICH to decide whether or not to disclose or disseminate the item to the public within the scope permitted by law. At present, many ICHs, such as traditional medicine recipes, are still semi-public or secret. Therefore, in order to better protect the interests of such rights holders, they are given the right to freely consider whether or not to make the ICH items they own public, or when, where and in what way to publicly disseminate them, according to the actual situation.

Second, property rights.

The right to prior informed consent. As a defensive protection measure, the right of prior informed consent means that the user needs to obtain the consent of the right holder before using the ICH in order to ensure that the right holder's right to know is satisfied. Of course, this right refers to the right of users outside the place of origin to inform the right holder before use and to obtain permission before use, as well as the obligation to keep confidential information known in the course of use. In the case of users in the place of origin or ICH with a strong public character, the above-mentioned notification of permission is exempted, but care must be taken not to distort or misuse it in the process of use.

The right to receive remuneration. This right is derived from two sources: the right of the right holder to receive financial remuneration for the exploitation of the ICH by virtue of its commercial value, and the right to demand a certain amount of remuneration or to share the proceeds obtained from the use of the ICH by licensing it to the user. Giving certain protection of property rights to relevant ICH can help realize its efficient exploitation, enhance the comprehensive utilization rate of ICH, and maintain the good development of ICH.

4.4. Provide for flexible protection time

Unlike the objects of intellectual property rights, ICH is a collection of knowledge fragments created by people in a specific region and passed down from generation to generation, and it is a living fossil of

human history. Therefore, it is unrealistic to set a protection period for ICH. Moreover, ICH is a dynamic development, and setting an artificial protection period is tantamount to interrupting the process of such dynamic transmission. However, from the perspective of the ultimate purpose of establishing an intellectual property system, setting a protection period can not only affirm the private right of the right holder to the ICH and ensure his monopoly right to the ICH item for a certain period of time, but also enable the ICH item to be shared by the public after the expiration of the protection period, and continuously stimulate innovation and re-creation of the ICH, so as to adapt to the development of the times and continuously prolong the life of the ICH. The vitality of ICH. From this aspect, it is necessary to set a protection period for ICH.

In summary, I believe that the existing provisions of the intellectual property rights system can be referred to, and no protection period can be set for the personal rights of ICH, while a corresponding protection period can be set for the property rights according to the specific situation, in order to achieve the purpose of stimulating innovation and maintaining the balance of interests. As for the specific duration, it is necessary to consider all political, economic and social factors and select the most suitable protection zone.

4.5. Clarify the restrictions on the rights of intangible cultural heritage

The balance of interests is a value pursued by all legal systems, and the intellectual property protection system of intangible cultural heritage is no exception. In the process of constructing this legal system, it is necessary to protect the private rights of intangible cultural heritage rights holders, and also take into account other stakeholders and the public interest. In other words, in the process of intellectual property protection of intangible cultural heritage, the balance of interests should be the criterion. It is necessary not only to grant certain exclusive rights to the right holders, but also to reasonably restrict this right, so as to achieve the purpose of better safeguarding intangible cultural heritage. Three systems: fair use, statutory licensing, and compulsory licensing, can be set up with reference to the current intellectual property system.

4.5.1. Fair use

Referring to the provisions of the Copyright Law, the author believes that the fair use in the protection of intellectual property rights of intangible cultural heritage can be provided for as follows: the use of intangible cultural heritage in the following ways may be carried out without the consent of the right holder and without remuneration to it, but the place of origin shall be indicated, and the normal use of the intangible cultural heritage by the original right holder shall not be harmed, nor shall the legitimate rights and interests of the right holder be harmed: Use within a reasonable range by members of the ethnic group; Use for personal learning or scientific research purposes; appropriate use in works for the purpose of introducing or commenting on an intangible cultural heritage; Unavoidable quotation or reproduction in various media for the purpose of reporting news; Use by state organs within a reasonable scope for the performance of official duties; Libraries, memorial halls, museums and other similar places for the purpose of displaying or preserving intangible cultural heritage; performing intangible cultural heritage items for free for non-profit purposes, and the performance is not paid to the audience; reproduction, copying, videotaping, etc. of intangible cultural heritage displayed in public places; Other acts of using intangible cultural heritage and its derivatives for the purpose of safeguarding the public interest.

4.5.2. Statutory permission

Statutory licensing is another system in the Copyright Law that restricts copyright property rights. Statutory permission in the protection of intellectual property rights of intangible cultural heritage refers to a system in which users may commercially exploit or exploit the disclosed intangible cultural heritage without the permission of the right holder, provided that remuneration is paid to the user and the place of origin is indicated in order to balance exclusive rights and public interests. This system applies to the use of textbooks, newspapers and periodicals, sound recordings, radio and television broadcasts, and other specific situations. Moreover, the following conditions must be met during use:

the object must be an intangible cultural heritage that has been disclosed and should be an intangible cultural heritage that the right holder has not declared that it is not permitted to use; the statutory license may have a commercial purpose and there is no limit on the number and number of uses, but it needs to pay remuneration to the right holder; the place of origin of the intangible cultural heritage must be disclosed at the time of use; In the process of using intangible cultural heritage, users shall not infringe the moral and property rights of the right holder.

4.5.3. Compulsory licenses

Compulsory licensing, i.e. involuntary licensing, is regulated in both copyright law and patent law. Compulsory licensing in the protection of intellectual property rights of intangible cultural heritage means that in the event of a public health crisis or other circumstances involving public safety and national interests, the competent departments of the State may, upon the application of the user and without the consent of the right holder, directly allow other units or individuals to use the intangible cultural heritage. The author believes that compulsory licensing should be limited to the occurrence of public health crises or major circumstances involving national security, before the state can implement compulsory licenses against intangible cultural heritage rights holders.

5. Conclusion

The inheritance of ICH is a major focus of China's cultural construction, and as intellectual achievements, ICH should also be protected by intellectual property law. The legal system of intellectual property in China is open, dynamic and constantly expanding. Although there is no law in China that is fully applicable to the protection of all kinds of ICH, intellectual property protection is undoubtedly the most suitable method for the protection of ICH at present. In addition to the current administrative protection carried out by the government and the state at all levels, the protection of ICH should draw on the existing intellectual property laws to provide classified and diversified protection for ICH, and clarify the subjects of rights and the scope of protection to form a more complete protection system. Through the protection of intellectual property rights of ICH, we can protect the legitimate rights and interests of inheritors, promote innovation and exchange of intangible heritage, and make intangible heritage balance economic benefits and cultural heritage in development, so that intangible heritage protection can be put into practice.

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