

# International Legislation on Traditional Cultural Expressions from the Perspective of Intellectual Property: Analysis of the Draft Provisions and Insights for China

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## Abstract

The protection of traditional cultural expressions is a significant topic in the preservation of cultural diversity and heritage. The Protection of Traditional Cultural Expressions: Draft Provisions offers a diverse legislative framework for safeguarding traditional cultural expressions. This article analyzes the core provisions of the Draft Provisions, including the scope of rights holders, the content of rights, and the exercise of rights, in light of China's specific circumstances. Based on international regulations, the article advocates for a tiered protection approach, the legal recognition of bearers, and the prioritization of the role of source communities. These recommendations aim to provide a comprehensive framework for protecting traditional cultural expressions in China, aligning domestic legislation with international standards.

## Keywords

Traditional Cultural Expressions, Bearers, Tiered Protection, Rights Holders

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## 1. Introduction

“Traditional Cultural Expressions (TCEs)”, also known as “expressions of folklore”, encompass a wide range of artistic or cultural forms, including music, dance, art, design, names, signs and symbols, performances, rituals, architectural styles, handicrafts, and narratives (WIPO, n.d.). These forms are an integral part of the identity and heritage of traditional or indigenous communities, passed down through generations, and are essential to the cultural and social identity of indigenous and local communities (WIPO, 2023d).

The earliest legal protection for traditional cultural expressions can be traced back to Article 15(4) of the 1971 Berne Convention, which emphasizes providing international protection for unpublished works with unknown authorship, allowing the competent authority designated by national legislation to act on behalf of the author to safeguard and exercise rights. Although the article does not explicitly mention traditional cultural expressions, its focus on addressing the uncertainty of rights holders has been interpreted as a response to the calls for legal protection of traditional cultural expressions.

Building on this foundation, the World Intellectual Property Organization (WIPO), in collaboration with UNESCO, developed the “Tunis Model Law on Copyright” in 1976 and the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” in 1982. These early efforts laid the groundwork for the protection of traditional cultural expressions but failed to fully address the growing demands for comprehensive safeguards. To address this issue more systematically, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in September 2000. By 2024, the IGC had convened 47 sessions aimed at creating a specialized intellectual property mechanism to grant exclusive rights to traditional cultural expressions within the framework of intellectual property theory. Among its achievements, the “Protection of Traditional Cultural Expressions: Draft Provisions” (hereinafter referred to as the “Draft Provisions”) stands out as a landmark document, reflecting the collective expertise and consensus of the IGC on this issue.

As a prominent organization in the field of international intellectual property, WIPO attracted extensive participation from member states during the drafting process of the “Draft Provisions”. As a result, the document reflects, to a significant extent, the latest global consensus on protecting traditional cultural expressions within the intellectual property framework. For China, a nation rich in traditional cultural expressions, adopting and adapting legislative elements from the “Draft Provisions” would not only advance the private law protection of traditional cultural expressions domestically but also enhance alignment and integration with international standards. Against this backdrop, this article will first conduct an in-depth analysis of the “Draft Provisions”, examining the legislative options embodied within its various provisions. Subsequently, it will provide tailored legislative recommendations for China, addressing how the country can effectively protect traditional cultural expressions by drawing from the “Draft Provisions” while considering its unique cultural context and practical needs.

## **2. Analysis of the Relevant Provisions of the “Protection of Traditional Cultural Expressions: Draft Provisions”**

An analysis of the “Draft Provisions” reveals that its design incorporates multiple options for addressing key issues, such as the “Facilitators” Alt’ and various “Alt”.

These options represent differing legislative proposals, providing member states with the flexibility to evaluate and select appropriate measures during discussions and implementation. This multi-choice structure not only reflects the diversity of perspectives during the drafting process but also offers member states the ability to tailor protections to their specific cultural contexts and practical needs. This article will primarily analyze the provisions of the “Draft Provisions” concerning rights holders, the content of rights, and modes of exercising rights, as these issues are central to the legislation on traditional cultural expressions and are hotly debated among Chinese scholars. Therefore, to better understand the specific content of the “Draft Provisions” on these key issues and the legislative principles underpinning them, this article will conduct a detailed analysis of the relevant provisions and their various options, exploring the differing positions they reflect and the potential implications.

### **(1) Rights Holders**

Article 4 of the “Draft Provisions” addresses the issue of identifying the beneficiaries of protection for traditional cultural expressions. This article provides member states with two primary legislative options: Alt 1 and the Facilitators’ Alt. These options offer member states distinct pathways to establish the scope of protection in their domestic legislation (WIPO, 2023a).

First, Alt 1 explicitly defines the beneficiaries of protection as “the indigenous peoples and local communities who hold, express, create, maintain, use, and develop traditional cultural expressions”. This approach underscores the close relationship between traditional cultural expressions and the communities responsible for their creation, transmission, and development, highlighting their cultural significance and uniqueness. The core principle of Alt 1 is to ensure that the focus of protection remains on groups with original rights, thereby avoiding an overly broad extension of protection to entities unrelated to traditional cultural expressions. This option is characterized by its clarity and exclusivity, ensuring precise attribution of rights.

Secondly, the Facilitators’ Alt offers a more flexible protection model. In Article 4.1, it aligns with Alt 1 by designating indigenous peoples and local communities as the primary rights holders. However, Article 4.2 introduces an additional flexible clause, allowing member states or contracting parties to designate other beneficiaries in accordance with their national laws. For example, these additional beneficiaries could include specific creators or custodians of traditional cultural expressions. This option aims to provide member states with greater implementation flexibility, enabling them to adapt the framework to diverse social, cultural, and legal contexts.

Overall, these two options reflect the collective nature of protecting traditional cultural expressions, which are often created, maintained, and developed by communities or groups rather than through individual efforts. This collective rights framework aligns with the characteristics of traditional cultural expressions, which are typically passed down, preserved, and evolved collectively by communities or

groups. Alt 1 emphasizes the clarity and exclusivity of rights holders, focusing protection on source communities to ensure clear attribution of rights. In contrast, the Facilitators' Alt builds on the fundamental principles of Alt 1 but introduces a degree of openness, allowing member states to expand the scope of beneficiaries based on national needs while safeguarding the interests of source communities. This distinction highlights the effort to balance diverse interests during the drafting of international treaties and provides member states with the flexibility and autonomy needed for policy and legislative design.

## (2) Content of Rights

Article 5 of the "Draft Provisions" comprehensively outlines the content of rights associated with traditional cultural expressions, offering multiple alternative options to provide flexibility for member states (WIPO, 2023b). Alt 1 adopts a simplified protection framework, emphasizing the economic and moral interests of traditional cultural expressions under principles of reasonableness and balance. It explicitly excludes from protection those expressions that are widely used, have entered the public domain, or are already covered by other intellectual property rights. This streamlined framework reduces implementation complexity and administrative burdens, making it particularly suitable for countries seeking to protect cultural expressions through a more straightforward approach. However, the provisions under Alt 1 are relatively broad regarding complex scenarios such as the protection of sacred and secret traditional cultural expressions, potentially falling short in addressing the demands of comprehensive safeguarding.

In contrast, the Facilitators' Alt and Alt 2 and Alt 3 provide more detailed provisions regarding the shared principles and specific mechanisms for protecting traditional cultural expressions. First, all three provisions emphasize the principle of "tiered protection", which tailors the level of protection based on the nature of the traditional cultural expression, such as its sacredness, secrecy, or public accessibility. For instance, in the case of sacred or secret traditional cultural expressions, these provisions explicitly require obtaining the prior informed consent of the source community before use, ensuring the community's control over its cultural heritage. For non-sacred or non-secret expressions, the focus shifts to fair benefit-sharing and the safeguarding of moral rights, such as the right of attribution and the right to the integrity of the cultural expression. This differentiated approach ensures that the protection mechanisms are both context-sensitive and aligned with the unique characteristics of each type of traditional cultural expression.

Secondly, these three provisions uniformly establish a "benefit-sharing" mechanism, ensuring that source communities receive fair and reasonable economic benefits when their traditional cultural expressions are used. This mechanism aims to balance the interests of cultural users and source communities while promoting the legitimate dissemination and utilization of cultural expressions. In addition, all three provisions clearly outline the basic obligations of users when utilizing traditional cultural expressions. These obligations include respecting the

moral rights of the source community, such as proper attribution and maintaining the integrity of the cultural expression. By doing so, these provisions safeguard the intangible value of traditional cultural expressions, ensuring that their cultural significance and authenticity are not compromised.

However, these alternatives exhibit significant differences in the specific content of protection and implementation details. The Facilitators' Alt and Alt 2 emphasize control over the use of sacred and secret cultural expressions, such as prohibiting unauthorized use or commercialization. However, their restrictions on actions like "disclosure" and "recording" remain relatively vague. In contrast, Alt 3 offers a more comprehensive legal framework in this regard. It not only regulates the use of sacred and secret cultural expressions but also explicitly sets limitations on "disclosure" and "recording", effectively introducing a concept akin to "publication rights". This provision establishes a stronger safeguard for traditional cultural expressions, preventing sensitive cultural expressions from losing their cultural significance or being misused due to inappropriate disclosure, dissemination, or preservation.

In summary, Alt 1 is suitable for countries seeking a simplified protection framework, while the Facilitators' Alt and Alt 2 and 3 are better suited to address the complexities of comprehensive traditional cultural expression protection. Notably, Alt 3, with its strict restrictions on disclosure and recording, provides stronger legal support for safeguarding sensitive cultural expressions, demonstrating profound respect for cultural diversity and the rights of cultural communities. The flexibility of these options enables member states to select a protection model tailored to their legal systems and cultural realities, while also offering diverse pathways for international cultural protection efforts.

### **(3) Modes of Exercising Rights**

The "Draft Provisions" generally envision that the relevant rights associated with traditional cultural expressions will be exercised by the source communities themselves (WIPO, 2006). However, in practice, many countries rich in traditional cultural expressions are developing nations, with source communities often located in remote and isolated rural areas. Under such circumstances, relying solely on these communities to exercise their rights may not be realistic. Recognizing this challenge, the "Draft Provisions" offer an alternative pathway, allowing a designated "agency" to act on behalf of the source communities to exercise their rights (WIPO, 2010). This mechanism aims to address practical difficulties while ensuring the effective protection and utilization of traditional cultural expressions.

The "Draft Provisions", in Article 6, address the issue of modes of exercising rights, focusing primarily on the establishment of rights management agencies and their relationship with beneficiaries. Two alternative options (Alt 1 and Alt 2) are provided. These provisions aim to ensure the effective implementation of protection for traditional cultural expressions by establishing a rights management mechanism while safeguarding the interests of beneficiaries in practical operations

(WIPO, 2023c).

First, both Alt 1 and Alt 2 propose that member states or contracting parties may establish or designate a “competent authority” to manage the rights or interests associated with traditional cultural expressions. These authorities are tasked with working closely with beneficiaries within the framework of national laws to implement the protective measures outlined in the “Draft Provisions”. The establishment of competent authorities provides legal and administrative support for the exercise of rights, helping to address challenges beneficiaries may face due to a lack of resources or capacity, thereby ensuring the effective protection of their cultural expressions.

Secondly, the two alternatives differ in their approaches to implementation. Alt 1 emphasizes “close consultation” between the competent authority and beneficiaries but does not specify whether beneficiaries retain ultimate decision-making power. This relatively flexible approach provides member states with a degree of discretion but may, in certain cases, undermine beneficiaries’ participation and leadership. In contrast, Alt 2 builds on this by explicitly requiring the establishment of competent authorities to obtain the beneficiaries’ “explicit consent” or “joint participation”. This provision strengthens the decision-making role of beneficiaries within the management mechanism, reflecting a deeper respect for the autonomy of the actual holders of traditional cultural expressions.

In summary, Alt 1 is well-suited for member states that prioritize streamlined administrative procedures and efficiency. On the other hand, Alt 2 places greater emphasis on the participation and autonomy of beneficiaries, making it more appropriate for scenarios where the protection of collective rights is a central concern. Both alternatives provide flexibility in the exercise of rights related to traditional cultural expressions, while the establishment of specialized management agencies offers crucial institutional support for the protection and implementation of these rights.

### **3. China’s Choices Regarding the Core Provisions of the “Draft Provisions”**

The analysis of the “Draft Provisions” clearly illustrates that the diverse options offered for various issues reflect the flexibility and multifaceted demands of member states in legislative decision-making. These options not only provide multiple pathways for protecting traditional cultural expressions but also highlight the complexities inherent in balancing cultural preservation with practical implementation during the drafting of international treaties. Building on this understanding, the following section will explore, in light of China’s cultural context and legal practices, how China can make legislative choices that best align with its national circumstances. This approach aims to achieve effective protection for traditional cultural expressions while fostering alignment with international standards.

#### **(1) Defining the Scope of Rights Holders**

In addressing the scope of rights holders, this article supports the “Facilitators”

Alt' provision in the "Draft Provisions". This option not only explicitly designates source communities as rights holders but also allows for the inclusion of other beneficiaries, such as bearers of traditional culture. This design reflects a recognition of the diverse nature of rights holders, balancing the interests of source communities and the actual bearers of traditional cultural expressions.

Bearers are individuals who, during the process of cultural transmission, refine, modify, and adapt traditional culture and skills to align with the expectations of their community or group, thereby ensuring their continuation. These individuals embody the collective emotions and wisdom of their communities (Huang, 2020). Therefore, Bearers should be regarded as an indispensable component when defining the rights holders of traditional cultural expressions. While recognizing source communities as the primary rights holders, it is equally important to establish the legal status and associated rights of Bearers. This approach not only safeguards the overall interests of the collective community but also provides Bearers with adequate space to operate within the legal framework.

This arrangement effectively balances the interests of source communities and Bearers while accommodating the diverse needs of different regions and ethnic groups in the protection of traditional cultural expressions. It avoids the potential issues that may arise from a "one-size-fits-all" approach. Such a multi-layered design of rights holders enhances the inclusiveness and effectiveness of protecting traditional cultural expressions, offering valuable insights for future legislative efforts in China.

## **(2) What Rights Should Source Communities Enjoy?**

On the issue of the content of rights, this article supports the provisions outlined in Alt 3 of the "Draft Provisions".

The rationale lies in the fact that Alt 3 introduces the principle of "tiered protection" and further refines restrictions on the "disclosure" and "recording" of sacred and secret cultural expressions. This design reflects a commitment to the special protection of sensitive cultural expressions, catering to the diverse needs of different cultural contexts. For China, a civilization rich in traditional cultural expressions, many of these remain undisclosed and are kept confidential. For instance, the Nüshu script passed down among women in Jiangyong County, Hunan Province, is a private tradition shared only among a small group of women (Liu, 2016). The uniqueness and sensitivity of such cultural expressions demand heightened attention in their protection to prevent unauthorized misuse, dissemination, or recording.

Therefore, drawing on the relevant provisions of Alt 3 can help China establish a more comprehensive framework for protecting traditional cultural expressions, particularly by providing clear legal grounds for handling sacred or secret cultural expressions. This approach not only effectively prevents the destruction of sensitive cultural expressions but also offers a valuable reference for introducing the principle of "tiered protection" into China's efforts to safeguard traditional cultural expressions. It lays a solid foundation for balancing cultural preservation with legal regulation.

### (3) How Should Rights Be Exercised?

In terms of the exercise of rights, this article supports the provisions of Alt 2 in the “Draft Provisions”. The primary distinction between Alt 1 and Alt 2 lies in the latter’s stronger emphasis on the source community’s leadership in the management process, while also highlighting the democratic nature and transparency of the management mechanism.

The rationale for supporting Alt 2 is as follows: The protection of traditional cultural expressions within the intellectual property framework inherently falls within the realm of private law. Therefore, it is theoretically essential to affirm the leadership of source communities, fully respect their will, and foster the rights holders’ enthusiasm and sense of participation through effective mechanisms for exercising rights. If administrative agencies dominate the exercise of rights, this could lead to issues of insufficient legitimacy and fail to adequately reflect respect for the intentions of the source community.

On the basis of affirming the leadership role of source communities in the management process, administrative agencies can be assigned auxiliary duties. First, administrative agencies can be responsible for the registration and public disclosure of traditional cultural expressions. When source communities file their traditional cultural expressions with specialized institutions, these institutions should only serve a disclosure function, guiding users to identify and contact the relevant source communities. Second, administrative agencies should undertake roles in guidance, support, and assistance, but must refrain from interference.

The provisions of Alt 2, by granting source communities greater autonomy in exercising their rights, better align with the foundational principles of private law protection while balancing the need for both regulatory clarity and flexibility. This design not only preserves the cultural ownership of traditional cultural expressions but also mitigates the potential rigidity of management that may arise from administrative dominance. Based on the above analysis, this article concludes that adopting Alt 2 from the “Draft Provisions” is more in line with China’s practical needs for protecting traditional cultural expressions and the theoretical foundations of private law. It provides strong legal support for affirming the leadership role of source communities in the exercise of their rights.

## 4. Conclusion

The protection of traditional cultural expressions is a vital component of cultural diversity and humanity’s shared heritage. The “Draft Provisions”, through its diverse legislative options, offers member states valuable references for constructing localized protection frameworks. This article has analyzed and selected key provisions from the “Draft Provisions” in light of China’s unique context for traditional cultural expressions, proposing protection pathways tailored to national circumstances. These efforts not only contribute to improving China’s legal system but also provide significant insights for aligning cultural preservation with international standards. Looking ahead, China should continue to optimize its mechanisms for

protecting traditional cultural expressions through legislative and practical measures, ensuring the effective transmission and promotion of the unique values embedded in Chinese culture.

### Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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