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Research Policy Update

Intellectual Property Rights and Tribal Nations

The purpose of this research update is to describe Intellectual Property (IP) rights and the need for tribal nations to implement legal protections for IP, particularly that which involves biomedical research. The National Institutes of Health (NIH) recently conducted a tribal consultation on the issue of IP and biomedical research, but the outcome of that consultation is unclear. This update provides definitions of IP, the steps tribal nations can take to better protect their IP, and the types and benefits of legal protections currently available to tribal nations.

Intellectual Property – Definitions and Types

What is Intellectual Property? IP is any intangible – non-physical – creation. IP can take many forms and includes: new inventions, designs, technologies and discoveries, creative works and publications, as well as marketing materials. Sometimes IP can originate from research, and in the case of biomedical research, can generate significant commercial profits for the inventor or creator.

Why is protecting IP necessary? Tribal nations need to implement specific protections for any IP that results from research conducted with a tribal nation, its citizens, and/or impacting its lands or resources. These protections must ensure that tribal nations benefit and have legal recourse against possible theft, infringement, or misuse of IP. The legal protections for IP can prevent unfair competition and the likelihood of confusion and enable profit-making for IP creators, while also sharing the benefit of new creations with the public. IP laws seek to protect the inventor's rights while not hampering innovation by others.

How to protect IP? The first step in protecting IP is to determine what types of protections are available. The four primary types of protections and the types of IP they protect are listed below:

- **Patents:** An exclusive right to property that is granted for new inventions, technologies, scientific methods, devices, or materials that are a new way of doing something or a new

solution to a problem.¹ Inventions and discoveries, such as genetically modified crops, are examples of inventions that might have commercial value. Inventors apply for “patents” to retain exclusive rights so that others cannot make, sell, use, or distribute the new invention. In the United States, inventors apply to the U.S. Patent and Trademark Office. Patents can last up to twenty years.² There are three patent types:

- **Utility:** “New and novel” inventions or discoveries, such as new technologies;
 - **Plant:** New strains and varieties of organic materials, such as GMO foods; and
 - **Design:** Decorative but non-functional features or attributes, such as fonts.
- **Copyrights:** A copyright protects creative IP, such as books, poetry, art or film.³ Copyrights protect creative works for up to 120 years.⁴
 - **Trademarks:** A trademark protects signs or symbols that identify an organization or business, such as logos.⁵ Trademarks can potentially be held indefinitely with renewals.
 - **Trade Secrets:** Trade secrets protect internal, private information that is valuable to a business’s success.⁶ Trade secrets do not have to be new and can potentially be held indefinitely with renewals.⁷

Possible Benefits to Tribal Nations: IP has the potential to generate commercial revenue for tribal nations, particularly intellectual property that results from research. IP from biomedical research, especially IP used for pharmaceutical development of new medicines, can generate significant monetary gains. Examples of tribal nations using legal IP protections include: Cherokee Nation Entertainment LLC, a business owned by the Cherokee Nation, which owns three patents, including a device combining a lighted cup holder and cell phone charger;⁸ the Confederated Tribes of the Chehalis Reservation, which protected a published book called *Chehalis Stories* through copyright;⁹ and Chickasaw Nation’s production company, Chickasaw Nation Productions, which trademarked their logo.¹⁰

¹ World Intellectual Property Organization (n.d.). *Patents*. Accessed on September 29, 2019 at: <https://www.wipo.int/patents/en/>

² U.S. Patent and Trademark Office. (2015). *General information concerning patents*. Accessed on August 21, 2019 at <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents>

³ U.S. Copyright Office (n.d.), *Code of Federal Regulations: Title 37 – Patents, Trademarks, and Copyrights*. Accessed on August 21, 2019 at <http://www.copyright.gov/title37/>

⁴ U.S. Copyright Office limits copyrights to “95 years from first publication or 120 years from creation, whichever is shorter,” after which the publication enters the public domain.

⁵ U.S. Patent and Trademark Office. (2019). *Trademark basics*. Accessed on August 21, 2019 at <https://www.uspto.gov/trademarks-getting-started/trademark-basics>

⁶ U.S. Patent and Trademark Office. (2019). *Trade Secret Policy*. Accessed on August 21, 2019 at <https://www.uspto.gov/patents-getting-started/international-protection/trade-secrets-policy>

⁷ Trade Secrets retain legal protection until they are disclosed.

⁸ Cherokee Nation Entertainment LLC. (2016). *EPAS ID: PAT3905301*. Accessed on August 21, 2019 at <http://legacy-assignments.uspto.gov/assignments/assignment-pat-388q8-8o6.pdf>

⁹ Goertz, J.A., *The Confederated Tribes of the Chehalis Reservation*. (2018). *Chehalis Stories*. Lincoln, NB: University of Nebraska Press.

¹⁰ The Chickasaw Nation. (2018). *Registration Number: 5535918*.

IP in Biomedical Research: New inventions or discoveries from research hold potential for commercial profit or benefit for tribal nations. Researchers must understand that the tribal nation likely will want sole or shared ownership of the data, any inventions, and rights to any resulting inventions and patents from the research, including from biomedical research.



Federally Funded Research: Any inventions and patent applications stemming from federally funded research are required to be reported to the federal government for tracking. NIH-funded researchers must report new inventions and the progress of a patent application using NIH's iEdison online system. In addition, since the Bayh-Dole Statute in 1980, universities, small businesses or non-profit organizations receiving federal funding for research have been allowed to file for ownership of a patent (instead of being required to assign ownership to the federal government). This has increased patent filing among researchers. However, research partners, including tribal nations, have not always been included in the patents that researchers file.

Recommendations

The past experiences of tribal nations with researcher malpractice and abuse of tribal research partnerships necessitates additional work on the part of NIH to ensure that federally funded research does not result in researchers or other organizations, such as universities, taking advantage of tribal governments and filing patents for inventions from research on tribal lands or involving tribal citizens without tribal nations' consent.

NIH recently conducted a tribal consultation on the issue of IP in biomedical research. To date, no concrete actions have followed NIH's tribal consultation on this topic and many unanswered questions remain. For instance, why did NIH seek tribal consultation, and were there any policy decisions impacted by this consultation? Without clear answers to these questions, the tribal consultation was not meaningful and accountable as required by the Department of Health and Human Services' Tribal Consultation Policy (updated in 2010).¹¹

Since NIH funds biomedical research that may be conducted on tribal lands and/or with tribal citizens, it must ensure that the rights of tribal nations are protected in federally funded research. NIH should develop oversight or enforcement mechanisms to prevent tribal nations' IP rights from being violated or misused by an NIH-funded researcher, and in particular hold federally funded researchers accountable if tribal nations are improperly excluded from patent filings. NIH can address these issues with the researchers they fund in their application, review, and annual reporting processes. Tribal nations also must ensure their rights are protected under applicable law, including tribal law, and work to better implement their own legal protections for IP resulting from research.

¹¹ U.S. Department of Health and Human Services. (2010). *U.S. Department of Health and Human Services Tribal Consultation Policy*. Accessed on September 29, 2019 at: <https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf>

The NCAI Policy Research Center offers the following recommendations to tribal nations interested in taking action to protect their IP:

- Tribal nations should consider whether to develop their own research laws or codes and a process for review of any research proposed to occur with their nation, citizens, on their lands, or affecting their resources, such as instituting a research review board or an institutional review board (IRB). The review process can include requirements that researchers notify the tribal nation if an invention or patent is likely. For more information, read the following PRC research updates:
 - **Tribal research laws:** <https://bit.ly/2OMjyZK>
 - **Tribal review and tribal IRBs:** <https://bit.ly/33wKCjY>
- Tribal nations should determine whether it makes sense to enter into legal agreements with researchers at the outset of the research process to ensure that tribal rights are protected, including tribal rights to any IP that results from the research, and that all parties understand their expectations and obligations. These agreements can include requirements that researchers assign their invention and patent ownership rights to the tribal nation.
- Tribal nations should determine whether to protect their various IP at the federal level and, if so, submit applications for patents and trademarks through the U.S. Patent and Trademark Office (USPTO). Copyright applications may be submitted through the U.S. Copyright Office Registration Portal.
- Tribal nations should determine whether it makes sense to enter into non-disclosure agreements that may extend, for example, to tribal employees and between partners in order to protect trade secrets.

Conclusion: The protection of tribal IP rights is an essential part of a successful tribal-academic research partnership, and can ensure benefits to tribal communities and economies. The NCAI Policy Research Center encourages tribal nations to take every necessary step to understand and protect their IP rights, and for NIH to immediately take concrete actions to create an accountable process to ensure that federally funded researchers respect the rights of tribal nations and IP resulting from research.

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