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# First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law

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Traditional knowledge (TK) and traditional cultural expressions created socially and passed down from generation to generation have largely remained outside of the purview of Western intellectual property regimes, resulting in their widespread appropriation. Despite long-standing concerns that many of these practices were unfair, constituting forms of unjust enrichment and, in some cases, misrepresentation, the political will to develop means of governing these activities has taken decades to arrive. The idea of extending "protection" to traditional cultural content has engendered considerable controversy and is still opposed by many who consider such endeavours pernicious limits on freedom of speech, scholarship, artistic expression, and historical inquiry. Most, if not all, of these liberal objections have been overstated, and few of them seem informed by any understanding of the normative framework of international human rights law.<sup>1</sup> This chapter addresses the international institutions and processes that have brought these issues to global attention in the last two decades, the emergence of agreed upon principles and objectives, and the prospects these pose for protecting First Nations heritage. Examples of the latter are drawn from the case studies discussed in the introduction and companion to this volume.

### **Declaration on the Rights of Indigenous Peoples and the Daes Report**

As elaborated later in this volume, the *Declaration on the Rights of Indigenous Peoples*<sup>2</sup> (the *Declaration*) is by far the most comprehensive international statement of indigenous rights and aspirations. It is particularly significant for First Nations peoples because it establishes a variety of collective rights, including the right to maintain and develop autonomous legal systems, to practise cultural traditions, and to revitalize languages and oral traditions. The Daes Report<sup>3</sup> further elaborates principles to guide the creation of indigenous rights with respect to cultural property or heritage. Despite strong currents of state antagonism towards the *Declaration* and the failure of some

states to support the final version adopted by the United Nations (including Canada, the United States, New Zealand, and Australia), its negotiation has been historically productive. In addition to providing indigenous peoples with opportunities to publicize injustices they have suffered and survived, the process of bringing together so many diverse peoples from around the world has produced a better understanding of their commonality in terms of historic forms of state oppression while providing a forum for mobilizing resistance and crafting political aspiration. Indigenous peoples have also thereby reversed many colonial and racist stereotypes, becoming recognized not as peoples whose societies are relics of the past but, rather, as members of vibrant communities whose contributions to contemporary global well-being should be better understood and acknowledged. The principles governing state obligations to indigenous peoples are becoming so entrenched in international policy and practice across United Nations institutions and in state practice that they might be legally considered part of international customary law.

Although the *Draft Declaration* and its elaboration through the Daes Report contain the most expansive set of principles and provisions for the recognition and protection of aboriginal peoples rights with respect to their cultural heritage, recent endeavours undertaken by the World Intellectual Property Organization (WIPO) indicate that these principles are becoming more widely accepted and that their legal implementation may to some degree be undertaken with the encouragement of UN bodies, even by those states that do not implement the *Declaration*. However, these initiatives are not intended solely for the benefit of indigenous peoples; they attempt to balance indigenous (and minority) cultural rights with other principles of liberal democracy that may or may not always accord with the values of indigenous peoples themselves. To comprehend the impetus for these initiatives and their scope, it is necessary to understand two key international legal agreements, the *Convention on Biological Diversity*<sup>4</sup> (*CBD*) and the *Agreement on Trade-Related Aspects of Intellectual Property*<sup>5</sup> (*TRIPS*), that have set the stage for greater global attention to issues involving intangible cultural heritage.

### **Two International Legal Agreements: CBD and TRIPS**

The CBD is an international legal treaty with more than 180 state signatories, including Canada. It has three objectives: the conservation of biological diversity, its sustainable use, and the fair and equitable sharing of the benefits arising from the utilization of genetic resources. Under art. 8(j), states that are party to the *CBD* are obliged to find means to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such

knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.”<sup>6</sup>

Although few of the concerns expressed by First Nations peoples about protecting their cultural heritage in the case studies pertain *primarily* to traditional knowledge, innovations, and practices relevant for the conservation and sustainable use of biological diversity, this area has received extensive attention in international negotiations, in which the integral relation between the preservation of biological and cultural diversity has been explicitly recognized.<sup>7</sup> The Convention of the Parties (COP [this is the group made up of all states who have ratified the treaty]) has called upon member governments, “with the approval and involvement of indigenous and local communities representatives, to develop and implement strategies to protect traditional knowledge, innovations and practices based on a combination of appropriate approaches, respecting customary laws and practices, including the use of intellectual property mechanisms, *sui generis* systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice.”<sup>8</sup>

The Ad Hoc Open-Ended Inter-Sessional Working Group on art. 8(j) (the Working Group) is obliged to address the potential components of a *sui generis* regime for the protection of TK.<sup>9</sup> Reference to a *sui generis* regime means that the new law will not necessarily take the form of an intellectual property rights (IPR) regime but will be a law of its own kind.<sup>10</sup> Indigenous peoples participating in these meetings have argued that indigenous customary law provides an important, if not primary, source of norms and means for protection.<sup>11</sup> As a consequence, the Working Group has also been asked to compile and assess existing indigenous systems for protection,<sup>12</sup> and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits, adopted by the COP in 2002,<sup>13</sup> also recognize the importance of customary laws. Canada’s participation in these activities arguably indicates that the government has accepted international legal obligations to consider and to respect aboriginal customary law and indigenous codes of research practice.<sup>14</sup>

State governments can only respect those customary laws of which they are apprised;<sup>15</sup> aboriginal peoples must themselves decide whether and to what extent they want to share aspects of customary laws governing TK for the purposes of calling upon governments to respect these laws and to insist that private parties do likewise. In some instances – such as Wilson Duff’s *Histories, Territories and Laws of the Kitwancool* and Michael Bright’s book on fishing sites, places, and names – it appears that indigenous peoples have already authorized publication of at least some of their customary legal principles.<sup>16</sup> However, the Skinnipiikani have an “orally based practice and performance” system of law and do not codify them in written texts but,

rather, stabilize, authorize, and enforce their legal understandings "within the context of the proper enactment of ceremonial protocols."<sup>17</sup> Their law is expressed in and through key practices and protocols, with language, action, venue, and song being key elements that govern issues of right to aspects of intangible heritage. Their people do not even speak of many aspects of their cultural heritage or describe it to others unless such rights have been ceremonially transferred to them, and even then those responsibilities will limit permissible forms of disclosure.

For Canadian law to incorporate respect for Skinnipiikani customary law principles it will be necessary to show deference to the oral testimony of recognized elders or, alternatively, to subject all misappropriations of Skinnipiikani heritage to Skinnipiikani authority. Community sanctions such as withdrawal of respect will have effect in some instances, but it is not clear what, if any, impact these might have upon outsiders. A respectful dialogue between legal cultures will be necessary to achieve justice in cases involving outsider appropriation of TK in violation of proper protocols. Historically, it appears that, when rights were traditionally transferred, an exchange of *Siikapistaan*, or valuable consideration (often symbolized through animal hides), took place that produced "an ongoing, even perpetual, reciprocal obligation between those involved in the transfer."<sup>18</sup> In instances of wrongful appropriation by outsiders (even if approximate values for *Siikapistaan* could be established) it is not clear how Canadian law could offer restitution for these lost relationships or what form of restitution would be considered appropriate and respectful.

Although it may seem artificial to some First Nations peoples, explicitly linking traditional cultural heritage concerns to the maintenance of local ecosystems may enable communities to call upon newly emerging legal principles for pressuring the Canadian government, obtaining NGO assistance, and attracting publicity (if it is desired).<sup>19</sup> Few of the case studies make specific reference to environmental knowledge *per se*, although all make reference to the ways in which cultural practices are related to land. To the extent that traditional medicinal knowledge involves knowledge of local plants and their healing properties, for instance, it has been internationally recognized as a form of TK.<sup>20</sup> Skinnipiikani medicinal knowledge is clearly subject to ceremonial transfer, and the use of such TK outside of respected protocols is the kind of activity prohibited under the *CBD*. Ktunaxa/Kinbasket knowledge of local food berries and the means to sustainably manage yields is another form of TK that might be recognized.<sup>21</sup> There is no guarantee, however, that any Canadian legislation on this front will be passed. First Nations peoples can at this point only make reference to these principles in common law litigation or in lobbying activities that call the government to account for its failures to abide by its international obligations.

Nonetheless it must also be acknowledged that the *CBD* primarily seeks to encourage the *wider application* of such knowledge through new forms of sharing and benefit sharing.<sup>22</sup> Indeed, the Working Group understands its objective as developing guidelines that will "ensure that indigenous and local communities obtain a fair and equitable share of the benefits arising from the use and application of their traditional knowledge."<sup>23</sup> First Nations peoples might then consider the circumstances under which they would be prepared to share their traditional medicinal knowledge (perhaps with other indigenous peoples) and what forms of benefit sharing they would find culturally appropriate. Are relationships of contractual agreement with market-based actors followed by royalty payments or technology transfers appropriate in any circumstances? Would cross-cultural research exchanges such as apprenticeships with indigenous peoples in other parts of the world be welcomed? These are only two possibilities: investment in indigenous language education and support for community heritage preservation centres. Both are forms of benefit sharing that might be contemplated.

Non-governmental organizations (NGOs) "such as conservation, development, human rights, health, and other nonprofit organizations, foundations, pro bono law firms, and private consultants play growing roles as intermediaries in fostering, facilitating, and evaluating bioprospecting partnerships"<sup>24</sup> in which the ethnobotanical knowledge of forest-dwelling and indigenous peoples receives recognition and reward. Some of these arrangements have been controversial and deemed exploitative.<sup>25</sup> Others (in which the prior informed consent of the local community was more appropriately sought) have reaped important benefits for indigenous peoples by way of community development funds, enhanced health care, training and employment opportunities, research exchanges, and positive recognition for traditional practices that have fostered cultural revitalization and greater youth interest in indigenous language and intergenerational learning.<sup>26</sup> As traditional healers in many parts of the world become more organized and traditional medicine attracts the attention of NGOs committed to health and sustainable development, new opportunities for sharing, developing, and benefiting from practices of traditional medicine promise to multiply.

Not all knowledge that links people to territory will constitute TK as this is understood by the *CBD*. For example, among the Gitxsan House of Luuxhon based in Gitanyow (Kitwancool), British Columbia, crests on totem poles are linked to the peoples' history and to their territories,<sup>27</sup> and crest-bearing regalia (blankets, rattles, and poles) are held in trust. Such a trust "is more than a right to display certain images and to perform certain songs and dramas: it is intimately linked with the people's histories, which constitutionally define each group and its relations with other groups, and connects each group with its territories."<sup>28</sup> Interpreting pictures of masks

and props used in *naxnox*, or spirit dance, performances, Luuxhon elder Robert Good (Sindihl) identifies an *adaawk* (formal oral history) associated with a bird-head mask in which a spirit speaks to the people through the bird's mouth and tells them to fish at a particular site: "This permission-granting on the part of spirit powers is the underlying legal authority for any House to hold fishing sites and land territories."<sup>29</sup>

Might these manifestations of indigenous ties to territory be considered forms of traditional environmental knowledge? Not, it would appear, without further evidence that they contain knowledge about the particular qualities of soil, flows of water, plant life, fish migration and movement, animal behaviour, or climatic conditions. Kainai fishing rights, traditional foods, and medicines, on the other hand, are more likely to be recognized as TK. Kwakwaka'wakw knowledge of specific medicinal plants that are guarded because they grow only in particular areas<sup>30</sup> is a good example of the kind of TK that the *CBD* recognizes. The Ktunaxa/Kinbasket Treaty Council appears to have developed a traditional use and ethnobotany program that is providing local benefits based upon the principles proposed by the *CBD* while recording traditional land and resource use in the territory. If the Canadian government can be persuaded to create clear legal rights for indigenous communities with respect to TK, this would provide First Nations peoples with greater capacities to develop their TK for their own economic benefit and to protect traditional use sites against development initiatives that endanger them.

Although TK was not an issue in the Uruguay Round of trade negotiations that resulted in the establishment of the World Trade Organization (WTO) and the incorporation of intellectual property into the global trade regime via the *TRIPS Agreement*, developing countries began to push the issue as early as 1995 in the WTO Committee on Trade and Environment.<sup>31</sup> In particular, it was argued that *TRIPS* must be construed to accord recognition and compensation to TK holders to be congruent with the obligations that states held under the *CBD* pertaining to "the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity."<sup>32</sup> Trade negotiations have increased developing country interest in TK as these states recognize genetic resources and the TK that pertains to them as possible sources of economic development. By 1999, developing countries were advocating for a system of IPRs "applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders."<sup>33</sup> Many states (joined by NGOs), believed that "[b]y mandating or enabling the patenting of seeds, plants and genetic and biological materials, Article 27.3(b) [of the *TRIPS Agreement*] is likely to lead to appropriation of the knowledge and resources of indigenous and local communities."<sup>34</sup> Latin American governments, for example, urged the WTO to

establish a future round of trade talks “in order to make recommendations on the most appropriate means of recognizing and protecting traditional knowledge as the subject matter of intellectual property rights.”<sup>35</sup>

The protection of TK as an IPR was a proposal made by state governments, not by indigenous peoples and local communities themselves. It must be understood as a bargaining chip in a larger field of negotiations, in danger of being sacrificed if other trade concessions are made. As Graham Dutfield astutely observes:

[F]or developing countries, TK serves a strategic purpose at the WTO that is unlikely to serve the interests of traditional peoples and communities. While some trade negotiators and ministries may see TK as a significant moral or economic issue, it is difficult to imagine any developing countries pursuing this issue with any great determination. Measures to protect TK are far more likely to be achieved at the international level by the CBD COPs. And for governments genuinely interested in TK, whether out of a sense of social justice or because they believe TK can benefit national economies, solutions need to be found at the national level. These solutions have more to do with basic human rights than with intellectual property rights.<sup>36</sup>

In short, the protection of TK is not and cannot be reduced to an issue of IPRs because it is more fundamentally tied to the marginalization, exploitation, and oppression of indigenous and local communities embodying traditional lifestyles and the failure to recognize their basic rights as human peoples.<sup>37</sup>

Recognizing the work being done under the *CBD*, WIPO, and through the WTO TRIPS Council and Committee on Trade and Development, The United Nations Conference on Trade and Development (UNCTAD) Commission on Trade in Goods and Services and Commodities has also recommended to the international community that efforts continue to be made to promote fair and equitable sharing of the benefits derived from TK in favour of local and traditional communities and to explore minimum standards for an internationally recognized *sui generis* system for TK protection.<sup>38</sup> The World Health Organization has been asked to cooperate with both WIPO and UNCTAD to support countries in developing their capacities to protect knowledge of traditional medicine and medicinal plants.<sup>39</sup> In 2000, an inter-regional workshop recommended that “ways and means need to be devised and customary laws strengthened for the protection of traditional medicine [sic] knowledge of the community from biopiracy” and that “countries should develop guidelines or laws and enforce them to ensure benefit-sharing with the community for commercial use of traditional knowledge.”<sup>40</sup> The United Nations Commission on Human Rights indicated through a resolution in 2001 that there are actual and potential conflicts between the

*TRIPS Agreement* and the realization of economic, social, and cultural rights.<sup>41</sup> The resolution stressed the need for adequate protection of TK and regard for the cultural values of indigenous peoples, emphasizing concern for the protection of indigenous peoples' cultural heritage.<sup>42</sup> There thus appears to be growing international acceptance of the principle of protection for TK, benefit sharing for the use of TK, and more limited acknowledgment that local systems for protecting TK deserve respect, particularly if these are considered part of indigenous peoples' cultural heritage.

There is an ongoing contest between the WTO and WIPO with respect to which body will ultimately assume responsibility for establishing the principles that will govern a truly global IPR system.<sup>43</sup> WIPO appears to be cognizant of the fact that *TRIPS*, as a treaty negotiated largely at the behest of industrial states, spurred on by dominant industrial interests, does not represent a consensus of global stakeholders and that the IPR system must reach out to new beneficiaries or a more representative set of interests if the system is to secure greater legitimacy in the eyes of more of the world's peoples. Many nation-states also believe that the WTO TRIPS Council, given its commercial emphasis, is an inappropriate forum for the negotiation of rights pertaining to the TK of local and indigenous communities and the principles to govern the use and protection of traditional cultural expressions.

#### **The Work of the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore**

There is little doubt that IPRs primarily serve the interests of industrialized countries and the industrial interests within those nation-states. Although they are premised upon the need to provide incentives for creative activity, it is largely acknowledged that they do more to protect investment than to spur creativity.<sup>44</sup> They are also widely faulted for creating forms of private censorship. In many fields of technology it can also be argued that the existence of IPRs tends to promote concentrations of ownership.<sup>45</sup> These rights are largely oriented to establishing the capacity to create market exchange relationships involving knowledge, innovations, and cultural forms, although there are some dimensions of both copyright and trademark that may be used to prevent appropriations deemed injurious to creators and misrepresentations as to origin that cause confusion or offence to a people. Although stimulating innovation and investment are the goals of most IPRs, certain forms of protection – such as trademarks like collective and certification marks, geographical indications, and appellations of origin – may protect products that have been produced in a traditional manner.<sup>46</sup> These forms of IPRs have proven useful to some indigenous peoples in Canada and elsewhere.<sup>47</sup> Finally, trade secrets protect knowledge of value that has been

wrongfully disclosed. Arguably, this common law form of action could be used in circumstances in which indigenous cultural heritage has been used in breach of confidence or in which knowledge was shared with someone who could be held to have a fiduciary obligation to the peoples with whom it originated. This may be an attractive option where outsiders have commercially exploited knowledge shared with them in confidence or in violation of shared understandings of its appropriate use.

In a series of declarations and statements, indigenous peoples around the world have gone on record in stating their opposition to Western-style IPRs as a method of protecting their traditional knowledge and intangible cultural heritage.<sup>48</sup> They have made it clear that their relationship to their intellectual property is part and parcel of their relationship to their ancestral territories, which should assume priority. Such territorial rights are also integral to international norms of self-determination that apply to all peoples. The Union of BC Indian Chiefs put it succinctly: "Indigenous Peoples' own languages, knowledge systems and laws are indispensable to their identity, and are a foundation for self-determination" and "inextricably and inalienably connected with their ancestry and ancestral territories."<sup>49</sup>

Neither UN bodies nor state governments have been willing to consider that acknowledgment of indigenous rights with respect to traditional knowledge or traditional cultural heritage necessarily involves acceptance of the principle of self-determination for indigenous peoples. As a political matter, then, First Nations peoples must determine whether to forego all consideration of a new set of protections for intangible cultural heritage in favour of more comprehensive forms of self-governance or to engage in such deliberations with the caveat that these are partial, provisional, and temporary methods for dealing with issues of appropriation until authoritative principles for the interpretation of the *Declaration's* cultural heritage rights are established.

WIPO, as the UN body responsible for the administration of IPRs, has – despite continuing resistance to the IPRs model – become an important forum for the negotiation of principles to protect TK and intangible cultural heritage through the work of its Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC).<sup>50</sup> Representatives of indigenous peoples have had a voice in this process only as accredited observers, although the Permanent Forum is now involved with these deliberations.<sup>51</sup> Indigenous groups have had an insufficient role within this process, although, increasingly, more indigenous NGOs have been constituted to increase indigenous participation. Enhanced and effective participation by a wider range of indigenous peoples in these deliberations is necessary if it is to have authority.<sup>52</sup> More funding for a wider range of indigenous participation is also crucial to the legitimacy of these negotiations.

The IGC has assumed responsibility for “intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.”<sup>53</sup> The IGC meets twice yearly to negotiate the principles relevant to such protection. It is important to note that the IGC’s mandate is *not* limited only to aspects of knowledge and intangible cultural heritage relevant to *biological* diversity and, thus, the principles it has established are of much wider application to First Nations than those of the CBD.<sup>54</sup> However, neither WIPO (nor its committees) make law or even legally binding treaties. It can only establish principles based upon negotiations among the member states to whom it owes primary allegiance and accountability. State governments are not obliged to pass laws based upon these principles, but, because WIPO does extensive research into the “best practices” for states to meet their obligations under other international legal treaties, such as the *CBD*, *TRIPS*, and international human rights treaties, its work is very influential.

WIPO’s involvement with issues relating to TK and folklore goes back more than twenty years, although an explicit consideration of the needs of indigenous peoples is far more recent.<sup>55</sup> Recognizing that the protection of traditional cultural forms could not easily be accommodated within an IPR framework that primarily addressed newly created forms of individual creativity and innovation, WIPO and UNESCO held a series of intergovernmental meetings in the 1970s and 1980s that culminated in the drafting and adoption of *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*.<sup>56</sup> The possibility of developing an international treaty was also explored, but the states involved were unable to come to agreement and the proposal was withdrawn. Although (as Chapter 10 addresses) UNESCO continued to explore methods for safeguarding traditional culture, WIPO withdrew from this field of activity until 1997. In any case, these early initiatives appear to have been premised upon the assumption that the safeguarding of traditional cultures was a *state* concern and responsibility.<sup>57</sup> The rights of minorities and indigenous peoples, whose cultural traditions have in many instances been suppressed by state policies of assimilation, were submerged in these early discussions.<sup>58</sup>

Collaboration between UNESCO and WIPO in 1997 resulted in the World Forum on Folklore, in which the two bodies were encouraged by most state participants to pursue an international regime based upon regional consultations.<sup>59</sup> During this same period, WIPO was under pressure to consider means of protecting genetic resources and TK pursuant to the obligations states had assumed under the *CBD*. In 1998, a new WIPO unit called the Global Intellectual Property Issues Division was established: “The purpose of this new Division was to identify and respond to the new challenges for the intellectual property system of globalization and rapid technological change.

As part of this mandate, the Division sought to identify new beneficiaries of IPRs, including traditional peoples and communities. The Division researches and explores various issues including protection of traditional knowledge, innovations and creativity, and protection of folklore.<sup>60</sup>

The Division also assumed responsibility for IPR-related issues pertaining to biological diversity and its development. During 1998 and 1999, the Division embarked upon nine fact-finding missions around the world to consider local and regional needs and expectations with respect to knowledge, innovations, and culture. Arguably, it was as a consequence of these consultations that the concerns of indigenous peoples entered into WIPO's sense of its mandate, and indigenous delegations began to participate in its international deliberations.<sup>61</sup> In 2001, the IGC replaced the Division. It has become a central negotiating forum for a deliberation of the issues posed by the legal protection of TK and folklore.

In its early years, the ICG focused on the possibilities of amending patent laws to protect against acts of biopiracy in which TK had been appropriated and used in claims of exclusive rights.<sup>62</sup> Most of these cases involved knowledge pertaining to plants and their useful properties. Proposals were made to require patent applicants to reveal the source of genetic resources and associated knowledge, but this continues to be controversial. Developing countries believe such a requirement is necessary to bring patent laws into compliance with the *CBD*; some industrialized nations see this requirement as a violation of the *TRIPS Agreement*. Another initiative, strongly supported by developing countries such as India, was to increase the documentation of TK in the public domain and make it available to patent examiners to prevent further patents being issued upon TK.<sup>63</sup> A growing number of periodicals documenting indigenous and other TK are now incorporated into the prior art recognized by the International Patent Cooperation Treaty.<sup>64</sup>

The compilation of databases of TK has become a widespread practice. However, many peoples engaging in the creation of such databases appear to misunderstand their purpose. Putting TK into a publicly available database does not protect it. In fact, it may make it impossible to protect in the future.<sup>65</sup> It may be simply a matter of documenting what is in the public domain and thus available for everyone to use. However, if the knowledge is closely held, such documentation may bring it to public notice. There is now some doubt that these databases will even serve their putative purpose of preventing patents from issuing since "national and regional patent laws vary with respect to how information or material in the public domain should be presented or described in order that they constitute novelty-defeating prior art."<sup>66</sup> The book of traditional Ktunaxa/Kinbasket people's traditional plant use<sup>67</sup> available online, for instance, could preclude a person from obtaining a patent on technology that uses this TK in one jurisdiction but not in another, depending on the relevant domestic requirements for prior art.

There may also be conflicts about what is in the public domain and how it became public knowledge. Information about indigenous peoples that was shared with scholars and travellers in the past, for example, may have been inappropriately divulged or disclosed without authorization, in which case it is only in the public domain due to a breach of confidence.<sup>68</sup> The very concept of the public domain may be problematic in societies in which traditional holders of knowledge or particular elders have ongoing custodial responsibilities with respect to the use of it, whether or not the knowledge is secret, closely held, or known to thousands of others.<sup>69</sup> The unique responsibilities that individuals have to their kin, clan, and nation in indigenous communities are not easily encompassed by formal systems of IPRs, where rights over knowledge, innovations, and practices are either held by individuals (or corporations understood as individuals) or are in the public domain and thus free for anyone to use.<sup>70</sup> Individual rights to exercise responsibilities towards others, or rights accompanied by duties, as indigenous scholar Russell Barsh defines them, have not been accommodated.<sup>71</sup> This is one of the reasons why indigenous peoples continue to insist that their own custom-based systems for governing TK and traditional cultural expression be accorded respect and legitimacy in international efforts to create *sui generis* systems of law, as discussed in the previous chapter.<sup>72</sup>

The public domain concept poses still other problems. Some peoples may regard specific knowledge as in the public domain that other peoples consider integral to their culture. Knowledge may have a different status in different communities; forms of TK documentation considered harmless to one group may do harm to the cultural rights of others. In the Canadian context, where aboriginal title rights are based upon the "integral to a distinctive culture" test,<sup>73</sup> documentation that establishes that practices are common to a number of indigenous communities may extinguish potential rights. Indigenous peoples are cautioned against participating in initiatives that would document TK unless their communities are in control of these databases and have some means of maintaining their confidentiality. Clearly, the issue of documentation poses a tension; preserving knowledge for the community's use in the future must be balanced against the danger that it will be more accessible to outsiders and vulnerable to exploitation when in written form. Knowledge considered sacred should probably never be recorded or revealed without binding agreements of confidentiality being in place.

It is now acknowledged that positive protection for TK may require new laws, rather than the modification of existing IPRs, given the many principles that must guide its protection. For example, the IGC asserts that: "Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and

constantly evolving character within the community.”<sup>74</sup> The IGC has been careful to produce an inclusive definition of TK so as not to preclude any potential subject matter. For the proposed legal purposes, “the term ‘traditional knowledge’ refers to the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.”<sup>75</sup>

Any new protections for TK, according to the IGC, should be based upon an expansive interpretation of the legal principle of misappropriation. In short, “legal means should be available to suppress acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means.”<sup>76</sup> This includes exercising control over TK in violation of legal measures requiring prior informed consent and acquiring, claiming, or asserting intellectual property rights over TK-related subject matter and any commercial use of TK without just and appropriate compensation to recognized holders of TK.<sup>77</sup>

The concept of misappropriation should, in some cases, moreover, “be guided by the traditional context and the customary understanding of TK holders themselves. The traditional context and customary understandings may be apparent in a community’s traditional protocols or practices, or may be codified in customary legal systems.”<sup>78</sup> Several advantages of using the doctrine of misappropriation for protecting TK from wrongful appropriation are perceived. It would protect TK whether or not it was in the public domain, and TK would not need to be put in databases or to be fixed in any way to receive protection.<sup>79</sup> Most significantly, this is a doctrine that can protect TK without turning it into a form of private property, a matter of grave concern to many indigenous peoples and their advocates who fear the fragmentation, conflict, and commodification attendant upon a private property system.

Although some states may choose to enact specific legislation protecting TK using the principle of misappropriation, there are other possibilities. For example, Canada might choose to amend the *Trade-marks Act*<sup>80</sup> (which already includes prohibitions on some forms of misappropriation as acts of unfair competition) to address TK. It might modify legislation already governing aboriginal peoples, or it might simply provide such protection at

common law in the field of torts or unjust enrichment. Criminal law is also a possibility, as is the activity's inclusion in a general range of commercial offences. First Nations peoples might be encouraged to consider the form in which the inclusion of this principle in Canadian law would most benefit them. If left to common law, expensive litigation must be pursued to establish precedent. Specific legislation requires extensive political attention that is usually in short supply. Amendments to existing laws of unfair competition might be accomplished with less lobbying and less opposition, while putting commercial actors on notice that appropriations of First Nations heritage will be scrutinized.

The IGC has developed many sophisticated legal tools that would enable indigenous peoples and other communities to receive compensation, recognition, and rights to share benefits from the use of TK, while respecting the socially specific nature of its generation and use and the many ways in which it has value. They have also anticipated a range of potential beneficiaries, forms of compensation, and necessary exemptions. The provisions in the *Draft Policy Objectives and Core Principles*<sup>81</sup> developed to govern the legal protection of TK represent years of consultations with states, indigenous peoples, development and environmental NGOs, and other civil society representatives. These negotiations are ongoing, and the language in which these objectives and principles are expressed may continue to change. How and if member states will adopt these principles (by legislation or otherwise) remains to be seen, but their expression and elaboration in WIPO documents provides them with a new legitimacy and, thus, a new form of political leverage for First Nations peoples.

#### **From Folklore to Traditional Cultural Expressions**

If TK is most commonly used to refer to knowledge, innovations, and practices associated with properties and qualities of the environment, the category of folklore applies to a wider range of traditional cultural forms.<sup>82</sup> In UNESCO's *Recommendations on the Safeguarding of Traditional Culture and Folklore*<sup>83</sup> (1989), folklore (or traditional and popular culture) is defined as: "the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting ... its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts."<sup>84</sup>

Unfortunately, the common usage of the term "folklore" in most societies does not share this focus on tradition-based, collectively held, orally transmitted knowledge that provides a source of cultural identity for a people. Indeed, for many societies who have embraced modernity, the term instead

connotes primitivism, superstition, backwardness, and archaic knowledge rather than a living and evolving tradition.<sup>85</sup> This is not the way the term is understood within international law, but to avoid these connotations, many prefer to use the term "traditional cultural expressions" (TCEs); the IGC has agreed to consider it synonymous with "expressions of folklore,"<sup>86</sup> although it continues to use both terms.<sup>87</sup>

WIPO's objectives with respect to TCEs are sympathetic to but distinct from the political aspirations of indigenous peoples. It is obliged to consider TCEs globally, and its primary obligation is to provide guidance relevant to all member states. The IGC considers this initiative important within an international policy framework in which (1) preservation and safeguarding of tangible and intangible cultural heritage, (2) promotion of cultural diversity, (3) respect for cultural rights, and (4) promotion of creativity and innovation – including that which is tradition-based – are understood to be ingredients of sustainable economic development.<sup>88</sup> These policies are also part of UNESCO's domain, as is addressed in the discussion of cultural rights in Chapter 10. The traditions and cultural heritage of indigenous communities<sup>89</sup> are seen as important sources of creativity and innovation for communities. The kind of *protection* with which the IGC most concerns itself are measures to promote further creativity, to encourage public dissemination of work, and to enable creators to control commercial exploitation of their work and protect themselves against misappropriations that create misrepresentation and offence.<sup>90</sup> Other measures for *preservation and safeguarding* are considered more properly within the domain of cultural rights under UNESCO's jurisdiction. For example, forms of preservation that do not enable new forms of creativity to emerge and that totally prohibit all forms of sharing and dissemination within and between communities, or from which no forms of improvement in livelihood could be realized, would not likely be endorsed by the IGC, although some of them might be justified as a matter of cultural rights propounded by UNESCO.

To consider one example: because of the distinct nature of their language, some Ktunaxa/Kinbasket words are only understood by Ktunaxa/Kinbasket elders.<sup>91</sup> This makes the return of old audio recordings and interviews with elders, which are currently museum artifacts, extremely important to those for whom learning their language is an important step in reconnecting with group members who were separated from the community.<sup>92</sup> Community identity and longevity may be secured if the language can be protected for the educational use of the elders.<sup>93</sup> These published interviews and recordings are likely to be the property of the persons who published and/or recorded them. This does not mean, however, that the *content* of these records is owned by those who hold rights in the recordings, particularly if what is recorded is primarily the TCEs of ancestors.

Access to these artifacts appears to be essential to Ktunaxa/Kinbasket understanding of their own history, language, and social structure. The desire for possession of and rights over these items does not stem, at least in the first instance, from hope for economic gain or innovation, nor to enable contributions to the arts or sciences, but, rather, to help to understand and revitalize traditions that were lost, or that lost vitality, in the past. These are more akin to cultural rights than to IPRs as the latter are often reductively understood. However, to the extent that IPRs are a subcategory of cultural rights within the international human rights framework, their exercise should be congruent with cultural rights norms, which would give priority to Ktunaxa/Kinbasket needs to use these recordings in the service of the revitalization of their language and traditions and, thus, in the enjoyment of their cultural life. Since community rights to language are *also* civil rights, denial of access to significant archives of traditional language use constitutes another form of rights violation.<sup>94</sup> Nevertheless, difficult questions remain. Should Ktunaxa/Kinbasket have exclusive rights to possession of these records? Or would the provision of digital copies suffice to meet their needs? Does all knowledge of these traditions belong exclusively to them or is Ktunaxa/Kinbasket tradition part of a wider human history? If the latter, do Ktunaxa/Kinbasket have rights to determine how and under what conditions this history is shared? Are these questions any better addressed by considering these interviews and recordings as examples of TCEs?

To summarize the international debates on TCEs, there is a consensus that some mixture of conventional IPRs and the creation of new rights (*sui generis* rights, or rights of their own kind) will be necessary to provide an adequate range of protection.<sup>95</sup> Conventional forms of IPRs could be modified to provide additional protections such as providing copyright protection for works that have not been fixed in material form (orally transmitted stories and songs, for instance) and special remedies introduced for forms of copyright infringement that are culturally offensive. Recent reforms to conventional IPRs also provide new means of protection. For example, the WIPO *Performances and Phonograms Treaty*<sup>96</sup> of 1996 (adopted and ratified in Canada) provides for protection of the aural aspects of many traditional performances. Performers of traditional songs or chants, for example, already have the right to set conditions for the recording or fixation of the performance (or to prohibit this altogether) and to control the way in which any recording is distributed, including the capacity to prohibit commercialization (even if the underlying song or chant itself is not protected under copyright law because it is in the public domain).<sup>97</sup>

To protect themselves from wrongful appropriations, Gitanyow peoples might assert themselves as rights holders with respect to particular performances (spirit dances, feast rituals, the telling of *adaawk*, and dramas) that they prohibit unauthorized others from fixing in film, video, cassette, or by

photographing or duplicating them in performance.<sup>98</sup> Such rights currently pertain to individuals, but there is no reason why individuals cannot enforce these on behalf of their house responsibilities. Similarly, contemporary recordings made of Kwakw̱aka'wakw songs as well as unauthorized photographs<sup>99</sup> (if these were of rituals, ceremonies, or other performance-based expressions of culture) could be precluded, enjoined, or punished as violations of performers' rights already available in Canadian law.<sup>100</sup> Kainai informants indicate that songs sung in relation to the Sundance were holy and that the recording of Horn Society songs was prohibited;<sup>101</sup> this is another instance where precluding fixation seems appropriate. Remediation for performance, broadcast, telecommunication, or reproduction of performances that took place before performers' rights were in place, however, must rely either upon breach of fiduciary obligations or upon cultural rights grounds until TCEs are better protected according to principles established by IGC negotiations.

Those in the international community who argue for *sui generis* forms of rights want new protections for TCEs that the dominant legal system considers to be in the public domain, "although the communities concerned often challenge the public domain status of such material, especially when it has been recorded or written down without their informed consent."<sup>102</sup> The public domain is generally used to refer to elements of culture that are ineligible for private ownership and that are, therefore, under Western law, available for use by any member of the public.<sup>103</sup> Such new rights might take the form of rights to prevent or authorize others' use of public domain TCEs or simply provide for rights of remuneration to the community. These could be coupled with obligations of attribution to the originating community and rights to ensure that the integrity of such TCEs are respected. It should also be possible to prevent uses that are derogatory, libelous, defamatory or that misrepresent traditional cultures and to "protect sacred and secret expressions against all forms of use and commercial exploitation" as proposed by the draft South Pacific Model Law on the Protection of Traditional Knowledge and Expressions of Culture, 2002.<sup>104</sup>

The intangible cultural heritage of indigenous peoples is also currently under threat by new efforts of privatization on behalf of owners of the material objects that bear TCEs. For example, museums holding objects of indigenous origin may (wrongfully) assume the role of licensing the intangible cultural heritage associated with the objects they hold. Museums holding Navajo rugs collected early in the twentieth century, for instance, now purport to license the rugs' designs for use on consumer goods (such as computer mouse pads) and warn competitors against copying the designs. Such behaviour misrepresents the museum's legal rights. As holders of the physical object, they are unlikely to hold copyright in the design unless the rug pattern was individually authored and the author's copyright was assigned to

the museum. No such assignment could have been made if the designs were traditional in nature; the museum would have no rights that it could legitimately license. These museums are often using their capacity to control access to the original rugs in an attempt to control the use of the rugs' design. In so doing, they are effectively attempting to exercise rights over TCEs. Whether or not their efforts are designed primarily to deter market competitors from dealing with designs they believe to be in the public domain, they are also signalling to indigenous peoples that they have no rights to their own TCEs, while engaging in acts of misrepresentation with respect to their own rights. It is strongly recommended that when First Nations peoples know of museums that are holding cultural property they consider their own, they advise these museums in writing that they also consider the intangible cultural heritage associated with the object integral to their traditional knowledge, their indigenous intellectual property, and their cultural rights and that they will view any attempts to permit non-indigenous peoples to use these heritage forms as violations of their rights as peoples.

Those parties who oppose property rights protections for TCEs fear that they will stifle the capacity of both indigenous peoples and others to create and innovate based on tradition. Their focus is clearly upon protecting individual expressive rights. In multicultural societies, some people believe that social cohesion is best maintained by respecting the free exchange of cultural experiences and supporting ongoing processes of cultural hybridity and change.<sup>105</sup> Existing IPRs such as unfair competition, trademarks such as certification marks and collective marks, geographical indications and appellations of origin as well as trade secrets appear to them to provide adequate means for communities to prevent usages that falsely suggest a connection with a community or otherwise misrepresent it.<sup>106</sup> Prohibitions upon the use of sacred or secret TCEs could be established either through modification of trade secrets law (which would not require prior disclosure) or by use of a registration system. Thus there is no global consensus that new protections are necessary.

In light of these various concerns, the IGC produced draft provisions (Provisions) for substantive standards embodying policy objectives and core principles for the protection of TCEs in 2005 (which may provide the content of international standards for protecting TCEs against misappropriation and misuse, without requiring the assertion of new exclusive property rights over TCEs but accommodating this option should holders of TCEs elect it).<sup>107</sup> These Provisions supplement but do not supplant protection for TCEs already available under existing IPRs. The IGC has acknowledged that indigenous peoples, in particular, may find the Provisions too limited. The Provisions are recognized as complementary to international instruments and processes for the preservation and safeguarding of TCEs that may more properly be

considered the cultural rights of peoples (as discussed in the later chapter on human rights). In short, the provisions do not limit existing cultural rights.

Although the precise terms of these Provisions are likely to be further modified in intergovernmental negotiations, the draft Provisions have reached such a level of maturity in terms of the clarity of their expression and the balancing of interests they must effect that it seems appropriate to subject them to evaluation in terms of their capacities to serve First Nations interests. Although provisional in nature, their negotiation by member states and their assertion in the context of elaborating the cultural rights that member states like Canada are obligated to respect, may eventually result in their acceptance as principles of international customary law.

The proposed protections “recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values”; they aim to “promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and philosophical, intellectual and spiritual values of the peoples and communities” that preserve TCEs, meet the aspirations and expectations of indigenous peoples and traditional communities, and contribute to their welfare.<sup>108</sup> They also endeavour to provide peoples with practical means “to prevent the misappropriation of their cultural expressions and derivatives therefrom,” to “empower indigenous peoples … to exercise rights and authority over their own [TCEs]” and to “respect the continuing customary use, development, exchange and transmission of [TCEs] by, within and between communities,” and “where so desired by communities and their members, promote the use of [TCEs] for community-based development.”<sup>109</sup> They provide means of “precluding others from acquiring IPRs on [TCEs] or derivatives thereof to create an environment of greater certainty, transparency, and mutual respect between communities that hold [TCEs]” and “academic, commercial, governmental, educational and other” parties.<sup>110</sup>

All such “[m]easures for the legal protection of [TCEs] should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their [TCEs].”<sup>111</sup> These provisions are not meant to encroach upon or constrain traditional or customary laws, practices, and protocols.<sup>112</sup> Protections should not “hamper the use, development, exchange, transmission and dissemination of [TCEs] by the communities concerned in accordance with their customary laws and practices … [that] should guide the legal protection of [TCEs] as far as possible.”<sup>113</sup> The IGC agrees that these protections should be available without prejudice to rights and obligations

already established under international law, including human rights laws (which include cultural rights) and, presumably, international customary law (which may encompass international indigenous rights in the *Declaration* that have not been implemented through a legal instrument).

Although the Provisions establish that misappropriation and misuse of TCEs would be unlawful, national and regional authorities and communities are given flexibility with respect to the precise legal mechanisms that could be used to implement these rights of protection. Given the division of powers in the Canadian Constitution,<sup>114</sup> it would appear that these Provisions would be considered matters of civil and property rights and come under provincial rather than federal jurisdiction (although some offences might also be incorporated into federal copyright, patent, and trademark jurisdiction to prevent people from exercising IPRs over unauthorized use of TCEs). It might also be possible for self-governing indigenous jurisdictions to incorporate these provisions into regional law (but the current author lacks the constitutional expertise to provide a confident recommendation on this front). It is important to consider who the appropriate rights holders should be: "Some laws for the protection of [TCEs] provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the [TCEs] shall be applied towards national heritage, social welfare and culture related programs ... while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities or in an agency or office."<sup>115</sup>

Although the Canadian government is unlikely to choose to directly exercise control over protections for TCEs, First Nations have often experienced the creation of new public authorities for the protection of their rights that do not adequately represent their interests. As a matter of international law, however, indigenous peoples' rights over their own cultural heritage are their own to exercise and manage. One of the guiding principles affirmed by the ICG is that "Protection should respond to the traditional character of [TCEs], namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community."<sup>116</sup>

It is acknowledged that TCEs are not always created within firmly bounded communities but, rather, may be the products of cross-cultural exchange and influence and intra-cultural exchange within related peoples whose name or designation may vary across borders or frontiers. This means that house crests, for instance, although traditional to a number of First Nations

and perhaps to some Native peoples or tribal nations in the United States, would be protected, as would clan insignia shared by a people or nation whose territories straddle borders or who are otherwise divided into distinctive areas of residency. This test is thus far less stringent than the Supreme Court's insistence that a practice be "integral to a distinctive culture" to be the subject of an aboriginal right in Canadian law.<sup>117</sup>

TCEs are broadly defined as any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear, or are manifested, comprising verbal expressions, musical expressions, and active expressions such as performances, whether or not these have been reduced to material form and tangible expressions such as productions of art and architectural forms, providing these are products of creative activity (individual or communal), are characteristic of a community's cultural and social identity and cultural heritage, and are maintained, used, or developed (by a community or by individuals with responsibilities to do so) in accordance with the customary law and practices of that community.<sup>118</sup> The term "characteristic" implies that the protected expressions are attributes of a particular people, around which there is a tacit consensus of the community that these are generally a characteristic of them as a people. The use of the term "heritage" suggests that TCEs have been maintained and passed among more than one generation, although there is no consensus as to whether two or more generations must have maintained or used it.

A TCE can include a combination of both tangible and intangible items; this would respect both Kwakwaka'wakw and Kainai customs, in which objects often carry with them the rights to numerous intangibles such as songs, dances, names, and other rights. The intangible cultural property that Kainai members deem vital to their cultural practices and identity, for example, might be considered TCEs, but their ceremonial sites would only seem to be protected if there are some human constructions or creations in place that make these analogous to architectural or artistic forms. This appears to be the case in many instances – such as Ktunaxa pictographs and cave paintings – but in most of the case studies we are not given sufficient detail about the ceremonial sites to ascertain this. Other forms of protection, such as those afforded to parks and recognized cultural landscapes and heritage sites, however, may afford more direct protection to these sites.

The Provisions mention stories, legends, poetry, riddles, words, signs, names and symbols, songs, ceremonies, rituals, dances, textile designs, body painting, carvings, costumes, and musical instruments.<sup>119</sup> They appear wide enough to include nearly all of the items mentioned in the case studies as significant forms of cultural property. The intangible aspects of tangible artistic productions – such as the designs of the masks – will also be protected against forms of unauthorized reproduction, according to WIPO lawyers,

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but the language of the Provisions will have to be modified to make this clear.<sup>120</sup> The Provisions provide three layers of protection in art. 3 (i):

For secret, confidential or undisclosed TCEs they simply affirm that there shall be effective legal and practical measures to ensure that communities have means to prevent unauthorized disclosure, use, and the acquisition and exercise of IPRs over them. This merely affirms common law principles<sup>121</sup> and accords with indigenous peoples' expressed rights "to protect and control dissemination" of their knowledge.<sup>122</sup>

The Canadian government might be asked to further publicize these common law rights so that more members of the public are aware of them and/or to provide assistance to First Nations in such lawsuits. Tribal courts in the United States and courts of indigenous jurisdiction might also be encouraged to affirm these rights. Canadian common law is neither an effective nor a practical means for communities to enforce these rights, however, given the cost of court proceedings and the fact that judgments are limited to the jurisdiction of the court.<sup>123</sup> Still, the existence of remedies such as preliminary injunctions (that enable courts to stop infringing activities) might be considered in particular instances. The book published by the Kootenay National Park entitled *Nipika*, for example, used a Ktunaxa sacred name that was not to be used publicly or talked about generally.<sup>124</sup> This would suggest that this name was held confidentially even if it was not actually a secret. A common law court could be asked to enjoin the use of the name, prevent the distribution of the book, and possibly even seize copies of it if it could be demonstrated that the use was unauthorized. A greater problem may be posed by the necessity of demonstrating to a court that such a use causes significant harm and getting Western courts to recognize the kind of injury that is suffered by First Nations in these circumstances.

It is recommended that First Nations peoples consider what the most practical and effective means to prevent or to stop use of such TCEs would be in instances where no prior registration or notice to the public is desirable. In art. 3 (ii) the Provisions suggest that:

For TCEs that have not been registered and of which the public has not been notified that a community has a significant cultural interest, there shall be effective legal and practical measures to ensure that the relevant community is identified as the source of any work or other production adapted from the [TCE], any distortion, mutilation or other modification of, or derogatory action in relation to a [TCE] as well as any false, confusing, or misleading allegations in relation to goods and services that evoke a [TCE] and suggest an endorsement by the community can be prevented and/or is subject to

civil or criminal sanctions. Where any use of unregistered TCEs is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a state agency in consultation with the community.

Some parties, including the indigenous Saami, have expressed serious reservations about any such state authority acting on behalf of indigenous peoples. The IGC “underscores the need for any agency or authority to derive its entitlement to act from the explicit wishes and authority of the community concerned.”<sup>125</sup>

Among the Kwakw̱aka'wakw, rights to certain songs and dances impose an obligation to make use of them only in appropriate contexts.<sup>126</sup> Would use in an inappropriate context be considered a “derogatory” action? If so, it could be prohibited under these Provisions. The Kainai understand that holy and sacred songs are specific to their different societies and are integral to the transferring of rights in sacred items or objects.<sup>127</sup> The right to sing these songs is acquired through the proper transference of rights in the object. Kainai could assert these rights as a people or the societies might be considered the relevant community for holding these rights. This would suggest that the performance of such songs outside of such contexts would require, at a minimum, that the society be identified and that there be opportunities to prevent, prohibit, and enjoin improper usages considered derogatory. The Provisions would address many of the examples of Ktunaxa/Kinbasket names and words used in commerce. Certainly the use of the Ktunaxa word for the Creator to advertise mountain biking adventures or a bed and breakfast<sup>128</sup> may be seen as derogatory; it might also suggest to outsiders that these businesses have Ktunaxa endorsement. The possibility of having to share benefits from the business with the community might persuade commercial operators to cease using Ktunaxa words without consulting community authorities. Stronger protections could be obtained under art. 3 (iv) if these names and words were registered.

The strongest protection is afforded to TCEs (other than words, signs, names, and symbols) that are registered by communities who wish to notify others that their prior, informed consent is necessary for use of the registered TCE. This is, in effect, a notification to the public that, even when a TCE is widely known and appears already to have become part of the public domain, a community considers it to be characteristic of its cultural identity and of particular cultural or spiritual value. This includes rights to prevent reproduction, performance, fixation, broadcasting, and so on. It also includes rights akin to moral rights to prevent any use that “does not acknowledge in an appropriate way the community as the source of the [TCEs]” and to prevent “any distortion, mutilation, or other modification of, or other derogatory action in relation to the [TCE].” This right would grant a community

the right to prevent or to authorize on agreed terms, including benefit sharing, the use of the TCE. IPRs over the TCE could be prohibited, obtained by the community, or licensed.<sup>129</sup>

The misuse of the Ktunaxa/Kinbasket cultural symbols and sacred language by outsiders in stores and shops and as names of businesses could thereby be prohibited, particularly if these usages have a tendency to imply possession of religious practices and symbols.<sup>130</sup> Although it is unlikely that these indigenous words have been copyrighted (individual words and titles are not subject to copyright, and copyright is not a property one can acquire except through the act of origination and fixation), their use is misleading and potentially scandalous, and trademark law has historically refused to recognize both kinds of use.<sup>131</sup> Moreover, to the extent that they bring a nation into disrepute, such marks have been refused registration and/or expunged from trademark registries.<sup>132</sup> Existing intellectual property rights are already available to protect many First Nations peoples against what they refer to as their culture “being copyrighted.” Proposed rights with respect to TCEs take this protection even further.

The rights proposed in the Provisions would address concerns expressed by Kwakw̱aka’wakw participants about the appropriation of artistic styles and images representative of and associated with their community<sup>133</sup> if they were prepared to register these in a future registry or, alternatively, were prepared to claim these images as collective marks. Ancestral crests and emblems, even when they have already been appropriated and used commercially, could still be registered to indicate their cultural significance. It would thus be possible to put outsiders on notice that songs, dances, and masks integral to a family lineage identity cannot be used without consent (Kwakw̱aka’wakw peoples would need to determine who the appropriate persons to provide the consent would be in each instance). This would also address Ktunaxa/Kinbasket concerns about the use of their songs and the Gitanyow desire for acknowledgment of the ownership of songs.<sup>134</sup> It would thus be possible to prevent outsiders from recording, reproducing, or obtaining any rights with respect to them.

For TCEs comprising words, names, or symbols that are registered and notified, communities would be entitled to prevent any use (or modifications thereof) or the acquisition or exercise of IPRs over them that “disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute.”<sup>135</sup> This is akin to provisions in many trademark laws already in place in the Andean Community, New Zealand, and the United States.<sup>136</sup> According to one Kwakw̱aka’wakw community member, “the use of images, such as emblems and other family images, without proper permission [is] a form of wrongful appropriation that threatens the cultural integrity of the image.”<sup>137</sup> If they are known, family emblems might be considered symbols that could be registered to

obtain the greatest protections. Certain words or names could be registered, but it is highly unlikely that all of the words in a language, however unique, would be considered TCEs integral to the identity of a people.

The protections that require registration and notification (ii to iv) could be implemented by way of a national system of certification marks held by concerned communities, the registration and use of geographical indications by communities as well as by national legislation, common law, or remedies under commercial law. Gitanyow crest images might be registered as collective marks to prevent their use in inappropriate contexts and to certify their use by appropriate persons in accordance with Gitanyow tradition. It is recommended that First Nations peoples consider where the appropriate indigenous authority should lie for holding such rights and for managing them and whether they wish to proactively assert such rights on behalf of communities or merely respond to infringing activities.

All of the Provisions protections for TCEs, with the exception of secret or undisclosed TCEs, are subject to certain limitations. These protections cannot be used to hinder the use of TCEs "within the traditional and customary context by members of the relevant community" and extend only to "utilizations of [TCEs] taking place outside the traditional or customary context."<sup>138</sup> Outsiders' usages of TCEs are still permitted "by way of illustration for teaching and learning," in "private study," in "criticism or review," in "reporting or news coverage," and "in the course of legal proceedings" or for "non-commercial cultural heritage safeguarding purposes," provided that the relevant community is acknowledged as the source of the TCEs and that "such uses would not be offensive to the relevant community."<sup>139</sup> It is recommended that First Nations communities consider in what circumstances these permitted usages would constitute an offence to their communities. The Provisions put emphasis upon the prior informed consent of communities, which accords with concerns voiced in the examples given about consideration, consultation, permission, and respect.

### **Conclusion**

Traditions long disparaged as backward remainders of premodern times, have, more recently, been recognized as valuable sources of identity, adaptation, innovation, and resources for environmental stewardship and sustainable development in contemporary world conditions. Wrongful appropriations of traditional knowledge and cultural expressions have simultaneously been acknowledged as a form of injury. Existing forms of protection under IPRs and international cultural rights are available to prevent many of the objectionable appropriations of First Nations cultural heritage in the case studies. New ways of recognizing and remedying such injury are being formulated internationally. Indigenous peoples' advocacy has been central in this process, and the legitimacy of their participation in

the international arenas in which these negotiations take place has achieved a high level of respectful recognition. Nonetheless, considerable work needs to be done to convince the general public that new forms of protection are necessary if Canadian governments are to be compelled to adopt the principles and objectives formulated internationally and effectively incorporate these into laws that will provide tangible benefit to First Nations.

#### **Notes**

- 1 See Rosemary J. Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) 52 DePaul L. Rev. 1171; "The Recognition of Indigenous Peoples and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275; "Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?" (2005) 17 Fla. J. Int'l L., 115.
- 2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 295, UN GAOR, 651st Sess., UN Doc. A/RES/61/295 (2007) online: <<http://UN Declaration on the Rights of Indigenous Peoples>> <<http://www.Ohchr.org/English/issues/indigenous/declaration/htm>>. Discussed in further detail in Mohsen Al Attar Ahmed *et al.*, "Indigenous Cultural Heritage Rights in International Human Rights Law" in this volume.
- 3 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination against Indigenous People: Protection of the heritage of indigenous people: Final Report of the Special Rapporteur*, UN ESCOR, 47d. Sess., Supp. No. 3, UN Doc. E/CN.4/Sub.2/1995/26 (1995), online: Final Report of the Special Rapporteur on the <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c6646bc7fe89406f802566c0005cd3f0?OpenDocument>>.
- 4 *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 142, 31 I.L.M. 818 (entered into force 29 December 1993), online: biological\_english.pdf <[http://untreaty.un.org/English/UNEP/biological\\_english.pdf](http://untreaty.un.org/English/UNEP/biological_english.pdf)>.
- 5 *Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 1197 (annexed to the *Agreement Establishing the World Trade Organization*), online: WTO <[http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf)>.
- 6 *Supra* note 4 at art. 8(j).
- 7 See e.g., Frederik Willem Grosheide, ed., *Intellectual Property Law: Articles on Cultural Expression and Indigenous Knowledge* (Antwerp: Intersentia, 2002) at 20-28; Rosemary Coombe, "Preserving Cultural Diversity through the Preservation of Biological Diversity: Indigenous Peoples, Local Communities, and the Role of Digital Technologies" in Tony Bennett, ed., *Differing Diversities: Cultural Policy and Cultural Diversity* (Strasbourg: Council of Europe Publishing, 2001) at 169.
- 8 *Supra* note 4.
- 9 *Implementation of Article 8(j) and related provisions*, UNEP, 1998, Annex, COP Dec. IV/9, UN Doc. UNEP/CBD/COP/4/27, online: COP-04-27-en.pdf <<http://www.biodiv.org/doc/meetings/cop/cop-04/official/cop-04-27-en.pdf>> at 111.
- 10 Michael Blakeney, "Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law: The Australian Experience" in Grosheide, *Intellectual Property Law*, *supra* note 7, 151 at 151-52.
- 11 Maui Solomon, "Indigenous Peoples' Rights and Responsibilities" in Mary Riley, ed., *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Walnut Creek: Alta Mira Press, 2004) 221 at 247-48.
- 12 Graham Dutfield, "Protecting Traditional Knowledge and Folklore" in Grosheide, *Intellectual Property Law*, *supra* note 7, 63 at 89-90.
- 13 *Supra* note 4.

- 14 See *supra* note 4; and *Access and benefit-sharing as related to genetic sources: C. Role of intellectual property rights in the implementation of access and benefit-sharing arrangements*, UNEP/COP Dec. VI/24, UN Doc. UNEP/CBD/COP/6/20, online: COP-06-20-en.pdf <<http://www.biodiv.org/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf>> at 274.
- 15 Daniel J. Gervais, "Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003) 11 *Cardozo J. Int'l & Comp. L.* 467 at 476.
- 16 (Victoria, BC Provincial Museum, 1959); and Michael Bright, noted in Richard Overstall, "The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow" in Catherine Bell and Val Napoleon, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press 2008) 92 at 97 and 110. See also discussion of *adawx* in Susan Marsden, "Northwest Coast *Adawx* Study" in Bell and Napoleon, 114.
- 17 Brian Noble, "Poomaksin: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress and Heritage Law Making with Canada" in Bell and Napoleon, *ibid.* 258 at 261.
- 18 *Ibid.* at 294.
- 19 Catherine M. Tucker, "Land, Tenure Systems, and Indigenous Intellectual Property Rights" in Riley, *supra* note 11, at 127-29.
- 20 *Ibid.* at 130-31.
- 21 Catherine Bell and Heather McCuaig, "Protection and Repatriation of Ktunaxa/Kinbasket Cultural Resources: Perspectives of Community Members" in Bell and Napoleon, *supra* note 16, 312 at 336-40.
- 22 Katy Moran, "Benefit-Sharing under the Convention on Biological Diversity" in Riley, *supra* note 11, 153 at 153-55.
- 23 Secretariat of the Convention on Biological Diversity, "Traditional Knowledge and the Convention on Biological Diversity," online: Traditional Knowledge, Innovations and Practices <<http://www.biodiv.org/programmes/socio-eco/traditional/default.asp>>.
- 24 Moran, *supra* note 22 at 154.
- 25 *Ibid.* at 157-58.
- 26 *Ibid.* at 166-68.
- 27 Overstall, *supra* note 16 at 97-98. See also Marsden, *supra* note 16 at 115-25.
- 28 Overstall, *ibid.* at <xxx>.
- 29 *Ibid.* at 103.
- 30 Catherine Bell *et al.*, "Recovering From Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage" in Bell and Napoleon, *supra* note 16, 33 at 40 and 42.
- 31 *Supra* note 12 at 69.
- 32 *Supra* note 4.
- 33 WTO, General Council, *Preparations for the 1999 Ministerial Conference: Proposals Regarding the TRIPS Agreement (Paragraph 9(a)(ii) of the Geneva Ministerial Declaration)*, WTO Doc.WT/GC/W/282 (6 August 1999), online: WTO <<http://docsonline.wto.org/>> at II. Review of the TRIPs Agreement in the Year 2000, para. 2.
- 34 WTO, General Council, *Preparations for the 1999 Ministerial Conference: The TRIPS Agreement: Communication from Kenya on behalf of the African Group*, WTO Doc. WT/GC/W/302 (6 August 1999), online: WTO <<http://docsonline.wto.org/>> at para. 24.
- 35 WTO, General Council, *Preparations for the 1999 Ministerial Conference: Proposal on Protection of the Intellectual Property Rights Relating to Traditional Knowledge of Local and Indigenous Communities*, WTO Doc. WT/GC/W/362 (12 October 1999) online: WTO <<http://docsonline.wto.org/>> at para. 10(a).
- 36 Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33 *Case W. Res. J. Int'l L.* 233 at 273.
- 37 *Supra* note 11 at 224-25.
- 38 UNCTAD, Press Release UN Doc. TAD/INF/PR/068, "New Avenues Needed to Protect Traditional Knowledge, Urge Experts at UNCTAD Meeting" (11 March 2000), online: UNCTAD.

- org Year 2000 <<http://www.unctad.org/Templates/Webflyer.asp?docID=2670&intItemID=2068&lang=1>>.
- 39 World Health Organization, *WHO Traditional Medicine Strategy 2002-2005* (Geneva: World Health Organization, 2002), online: WHO\_EDM\_TRM\_2002.1.pdf <[http://whqlibdoc.who.int/hq/2002/WHO\\_EDM\\_TRM\\_2002.1.pdf](http://whqlibdoc.who.int/hq/2002/WHO_EDM_TRM_2002.1.pdf)> at 36.
- 40 World Health Organization, *Report of the Inter-Regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine* (Geneva: World Health Organization, 2001), online: WHO\_EDM\_TRM\_2001.1.pdf <[http://whqlibdoc.who.int/hq/2001/WHO\\_EDM\\_TRM\\_2001.1.pdf](http://whqlibdoc.who.int/hq/2001/WHO_EDM_TRM_2001.1.pdf)> at 34, 35.
- 41 Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights*, HCHR Res. 2001/21, UNHCHR, 53d. Sess., UN Doc. E/CN.4/SUB.2/RES/2001/21 (2001), online: Intellectual property and human rights <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument)>.
- 42 *Ibid.*
- 43 See Thomas Cottier and Marion Panizzon, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection" in Keith E. Maskus and Jerome H. Reichman, eds., *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) 565.
- 44 For an in-depth look at the impact of intellectual properties, see especially Susan Sell and Christopher May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property" (2001) 8:3 Review of International Political Economy at 467.
- 45 See e.g., William Lesser, "Intellectual Property Rights and Concentration in Agricultural Biotechnology" (1998) 1:2 The Journal of Agrobiotechnology Management and Economics at 56.
- 46 For a longer discussion of this "countercurrent" in intellectual property law, see Rosemary J. Coombe, Steve Schnoor, and Mohsen Al Atar Ahmed, "Bearing Cultural Distinction: New Expectations for Intellectual Property in a Neoliberal Era" in Jan Brinkhof and F. Willem Grosheide, eds., *Articles in Intellectual Property: Crossing Boundaries* (Antwerp: Intersentia, 2005) at 191.
- 47 See e.g., Julie Hollowell, "Intellectual Property Protection and the Market for Alaska Native Arts and Crafts" in Riley, *supra* note 11, at 55.
- 48 Kelly P. Bannister, "Indigenous Knowledge and Traditional Plant Resources of the Secwepemc (Shushwap) Nation" in Riley, *supra* note 11, 279 at 280.
- 49 Union of British Columbia Indian Chiefs, "Spirit of the Conference" *Protecting Knowledge: Traditional Resource Rights in the New Millennium held February 23-26, 2000*, online: spirit.pdf <<http://www.ubcic.bc.ca/files/PDF/spirit.pdf>> at paras. 1, 2.
- 50 J. Sanford Rikoon, "On the Politics of the Politics of Origins: Social (In)Justice and the International Agenda on Intellectual Property, Traditional Knowledge, and Folklore" (2004) 117:465 Journal of American Folklore 325 at 326-28.
- 51 *Ibid.*
- 52 See discussion in Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants and Indigenous Knowledge* (Vancouver: UBC Press, 2006) at 259.
- 53 WIPO GA, 26d Sess., 12th Extraordinary Mtg., WIPO Doc. WO/GA/26/6 (2000), online: WO/GA/26/6: Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore <[http://www.wipo.org/documents/en/document/govbody/wo\\_gb\\_ga/doc/ga26\\_6.doc](http://www.wipo.org/documents/en/document/govbody/wo_gb_ga/doc/ga26_6.doc)> at para. 14.
- 54 *Ibid.*
- 55 Blakeney, *supra* note 10 at 167-68.
- 56 *Ibid.* at 170-71.
- 57 *Ibid.*
- 58 *Ibid.*
- 59 *Ibid.* at 168-69.
- 60 Duffield, "TRIPS," *supra* note 36 at 273.
- 61 Silke Von Lewinski, "Traditional Knowledge and Folklore: A New Topic in the International Arena" in Grosheide, *Intellectual Property Law*, *supra* note 7, 181 at 185-86.
- 62 *Ibid.* at 186.

- 63 P.K. Vasudeva, "Amend Law to Patent Traditional Knowledge," the *Tribune*, Online Edition, 25 August 2003: <<http://www.tribuneindia.com/2003/20030825/agro.htm#1>>.
- 64 *Patent Cooperation Treaty*, 19 June 1970, 9 I.L.M. 978 (with regulations, entered into force 24 January 1978), online: Juris International – Patent Cooperation Treaty (with regulations) <<http://www.jurisint.org/doc/html/ins/en/2000/2000jiinsen201.html>>.
- 65 Richard Owens, "Digital Rights Management and Documentation of Traditional Knowledge: Strange Bedfellows?" in Grosheide, *Intellectual Property Law*, *supra* note 7, 201 at 203.
- 66 Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formation* (International Centre for Trade and Sustainable Development, 2002), online: Dutfield 2002.pdf <<http://www.iprsonline.org/unctadictsd/docs/Dutfield2002.pdf>> at 27.
- 67 Bell *et al.*, "Ktunaxa," *supra* note 21 at 322-23.
- 68 Bannister, *supra* note 48.
- 69 See *e.g.*, Robert K. Paterson and Dennis S. Karjala, "Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples" (2003) 11 Cardozo J. Int'l & Comp. L. 633 at 646-51.
- 70 Hollowell, *supra* note 47 at 55-56.
- 71 Russell Barsh, "Indigenous Peoples and the Idea of Individual Human Rights" (1995) 10:2 Native Studies Review 35.
- 72 See also Von Lewinski, *supra* note 61 at 198; and Erica-Irene Daes, "Intellectual Property and Indigenous Peoples" (2001) 95 Am. Soc. Int'l L. Proceedings 143 at 146; and Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection" (1999) 44 McGill L.J. 953.
- 73 For a discussion and review of the test, see Avigail Eisenberg, "The Distinctive Culture Test" (2005) 2:12 Human Rights Dialogue, online: The Distinctive Culture Test <<http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/5149>>. This test originates in *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
- 74 The negotiations of the IGC are ongoing; the principles presented here represent state party consensus as developed by 2005, but more recent WIPO documents will be available to readers online. *Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles*, WIPO IGC, 7d. Sess., Annex I, Doc. WIPO/GRTKF/IC/7/5 (2004), online: [wipo\\_grtkf\\_ic\\_7\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_5.pdf) <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_5.pdf)> at 4, A9.
- 75 *Ibid.* at 6, B3, s. 2.
- 76 *Ibid.* at 5, B1, s. 3(i).
- 77 *Ibid.* at 5, B1, s. 3(iv).
- 78 *Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles*, WIPO IGC, 7d. Sess., Annex 2, Doc. WIPO/GRTKF/IC/7/5 (2004), online: [wipo\\_grtkf\\_ic\\_7\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7_5.pdf) <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_5.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_5.pdf)> at 24, para. 56.
- 79 *Ibid.* at 19, para. 47.
- 80 *Trade-marks Act*, R.S.C. 1985, c. T-13, s. 1.
- 81 *Supra* note 74.
- 82 *Ibid.* at 182.
- 83 "Recommendation on the Safeguarding of Traditional Culture and Folklore" in *Resolutions: Records of the Twenty-Fifth Session of the General Conference*, vol. 1 (Paris: UNESCO, 1990), Annex I online: 08496e.pdf <<http://unesdoc.unesco.org/images/0008/000846/084696e.pdf#page=242>> at 238.
- 84 *Ibid.* at 239, A Definition of Folklore.
- 85 Rosemary J. Coombe, "Protecting Cultural Industries to Protect Cultural Diversity: Dilemmas for International Policy Making Posed by the Recognition of Traditional Knowledge" in Keith Maskus and Jerome Reichman, eds., *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005) at 599.
- 86 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Consolidated Analysis of the Legal Protection of Traditional Cultural*

- Expressions*, WIPO, 5th Sess., Doc. WIPO/GRTKF/IC/5/3 (2003), online: grtkf\_ic\_5\_3.pdf <[http://wwwOMPI.int/documents/en/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_3.pdf](http://wwwOMPI.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf)>. The nine-page analysis is followed by a 66 page Annex which contains the detailed analysis.
- 87 WIPO documents now use the acronym TCEs/EoF. In quotations from these documents, I have used TCEs as the expression likely to be preferred by First Nations peoples, but I put it in square brackets to indicate that the original uses the longer acronym.
- 88 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles*, WIPO, 7th Sess., Doc. WIPO/GRTKF/IC/7/3 (2004), online: grtkf\_ic\_7\_3.pdf <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_7/wipo\\_grtkf\\_ic\\_7\\_3.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf)>.
- 89 Like other UN bodies, WIPO avoids the contentious use of the term "indigenous peoples," and when discussing its work we will use its terminology. The category of indigenous communities covers a much wider number of peoples than those who claim recognition as Indigenous Peoples.
- 90 *Supra* note 53.
- 91 Bell *et al.*, "Ktunaxa," *supra* note 21 at 328-29.
- 92 *Ibid.* at 326-27. For a longer discussion of the ethics and equities of repatriating sound recordings, see Elizabeth B. Coleman and Rosemary J. Coombe with Fiona MacAlraut, "A Broken Record: Subjecting Music to Cultural Rights" in Conrad Brunk and James O. Young, eds., *The Ethics of Cultural Appropriation* (London: Blackwell, 2008).
- 93 *Ibid.*
- 94 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 27 (entered into force 23 March 1976), online: ccpr.pdf <<http://www.ohchr.org/english/law/pdf/ccpr.pdf>>.
- 95 *Supra* note 12 at 84-85. For a comprehensive overview of IGC activity with respect to TCEs, see Wend B. Wendland, "'It's a Small World (After All)': Some Reflections on Intellectual Property and Traditional Cultural Expressions" in Christopher B. Graber and Mira Burr-Nenova, eds., *Intellectual Property and Traditional Cultural Expressions: Legal Protection in a Digital Environment* (London: Edward Elgar Publishing, 2008).
- 96 WIPO: *Performances and Phonograms Treaty*, 20 December 1996, 36 I.L.M. 76 (1997), online: trtdocs\_wo034.pdf <[http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs\\_wo034.pdf](http://www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf)>.
- 97 *Ibid.* art. 5-10.
- 98 Overstall, *supra* note 16.
- 99 Bell *et al.*, "Recovering," *supra* note 30 at 63 and 77-78.
- 100 Copyright Act, R.S.C. 1985, C-42, ss. 15-16.
- 101 Catherine Bell *et al.*, "Repatriation and Heritage Protection: Reflections on the Kainai Experience" in Bell and Napoleon, *supra* note 16, 203 at 248-49.
- 102 *Supra* note 86 at para. 20.
- 103 *Ibid.* Annex at 7. The IGC is aware that the public domain is a construct of Western IPRs and that it fails to take into account "private" domains established by indigenous customary laws. This is acknowledged as a problem to be addressed in a promised study on the relationship between IP and customary and indigenous laws.
- 104 Don Marahare, "Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property" (2004) 8:2 J. S. Pac. L., online: Journal of South Pacific Law: "Towards an Equitable Future in Vanuatu: The legal Protection of Cultural Property <<http://www.paclii.org/journals/jspl/062004Volume8Number2/marahare.html>>.
- 105 Some of these arguments, and others, are canvassed in Michael Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2003).
- 106 *Supra* note 12 at 76-84.
- 107 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO, 8th Sess., Doc. WIPO/GRTKF/IC/8/4 (2005), online: grtkf\_ic\_8\_4.pdf <[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_8/wipo\\_grtkf\\_ic\\_8\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.pdf)>. Seven page summary followed by a 48 page Annex. The draft provisions are contained unaltered in the annex of documents considered in 2005, twice in 2006, and

- twice in 2007; however, no consensus about their acceptability as the basis for future work has been reached by member states.
- 108 *Ibid.* Annex at 3. This is a summary of the Objectives expressed in the Preamble to the Provisions.
- 109 *Ibid.* Annex at 3-4.
- 110 *Ibid.* Annex at 4.
- 111 *Ibid.* Annex at 7.
- 112 *Ibid.*
- 113 *Ibid.* Annex at 9.
- 114 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
- 115 *Supra* note 107. Annex at 17.
- 116 *Ibid.* Annex at 8.
- 117 *Van der Peet, supra* note 73.
- 118 *Supra* note 107, art. 1, Annex at 11.
- 119 *Ibid.*
- 120 WIPO counsel Wend Wendland has indicated to Coombe in correspondence that the provisions are meant to cover all unauthorized reproductions of TCEs and that, where the TCE is a tangible artistic production, the offending activity need not involve the original object. It is sufficient that the design or other features that define the TCE are copied, performed, and so on.
- 121 See, for example, *Foster v. Mountford* (1976), 29 F.L.R. 233. The Pitjantjatjara of Australia successfully halted the publication of a book entitled *Nomads of the Australian Desert*. The Pitjanjatjar Council argued that the book contained secret and sacred information that had been shared in confidence with the anthropologist Dr. Mountford and that the publication of this information would severely undermine and damage their cultural community.
- 122 Commission on Human Rights, Sub-Commission of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, UN CHR, 1993, UN Doc. E/CN.4/SUB.2/AC.4/1994/12, online: Mataatua Declaration <<http://aotearoa.wellington.net.nz/imp/mata.htm>> at s. 2.1.
- 123 Parts of the book subject to injunction in *Mountford, supra* note 121, for example, are still available on the Internet.
- 124 Bell *et al.*, "Ktunaxa," *supra* note 21 at 328.
- 125 *Supra* note 53, Annex at 25.
- 126 Bell, "Recovering," *supra* note 30 at 65-66.
- 127 Bell *et al.*, "Kainai," *supra* note 101 at 325, 229, and 248-49.
- 128 *Supra* note 124.
- 129 *Supra* note 116.
- 130 Bell *et al.*, "Ktunaxa," *supra* note 91 at <xxx>.
- 131 For a longer discussion of the use of trademark law to preclude marks that disparage indigenous peoples, see Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press, 1998).
- 132 This is a certain remedy for a registered trademark, but it would need to be coupled with arguments about confusion and "passing off" to defeat a common law mark.
- 133 Bell *et al.*, "Recovering," *supra* note 30 at 79-80.
- 134 Bell *et al.*, "Ktunaxa," *supra* note 21 at 328-31.
- 135 *Update on the Activities of the World Intellectual Property Organization (WIPO) in Cooperation with the Convention on Biological Diversity*, UNEP, 2006, Annex, UN Doc. UNEP/CBD/COP/8/INF/41, online: cop-08-inf-41-en.pdf <<http://www.biodiv.org/doc/meetings/cop/cop-08/information/cop-08-inf-41-en.pdf>> at 81.
- 136 *Supra* note 86 at 18.
- 137 Bell *et al.*, "Recovering," *supra* note 30 at 79.
- 138 *Supra* note 135 at 88.
- 139 *Ibid.*