

BEARING CULTURAL DISTINCTION: INFORMATIONAL CAPITALISM AND NEW EXPECTATIONS FOR INTELLECTUAL PROPERTY

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1. INTRODUCTION

Cultural or symbolic goods are increasingly important sources of capital accumulation in the world economy as manifest by the incorporation of intellectual property rights (IPRs) in the global trade regime via the TRIPs Agreement. This has been paralleled by a growing appreciation for the value of cultural diversity, an acknowledgment of the relationship between biological and cultural diversity, recognition of distinctive cultural traditions as the basis for alternative forms of sustainable development, and a revitalization of interest in cultural rights in the human rights arena. IPRs are clearly identified as cultural rights rather than property or economic rights within the international human rights framework. Their capacities are in no way exhausted by or limited to their predominant role in protecting corporate market shares.

If IPRs are fundamental to a new economy characterized by the rise of information capital, they are also being called upon to accommodate new valuations of cultural distinction and to adapt themselves as tools in struggles for rural development and social justice. We will argue that these two movements *are* integrally related but that the expansion of IPRs cannot be evaluated merely as the inevitable encroachment of and colonization by the commodity form. Although stimulating innovation and protecting investment has become the dominant ideological rationale for IPRs, there are other values embedded within IP regimes that permit us to protect traditional production systems, prevent commercial misrepresentation, keep valuable secrets, recognize non-pecuniary interests in works, respect public sensibilities, and enable

* Since Rosemary Coombe was not able to attend the conference the Coombe/Schnoor/Mohsen paper is presented here for the first time.

the valuation of local distinctions. This (possibly endangered)¹ 'counter-current' in IPRs has still untapped potential for the creation of new forms of IP that may ironically 'de-fetishise' commodities and/or enable communities to refuse the logic of the commodity form altogether. After summarizing the emergence of informational capital and its protection in international law, we will explore a series of examples in which IPRs are being used for new purposes and/or new IPRs are being forged. We stress that the use of 'culture as a resource'² is a strategy fraught with political dangers as well as social and economic possibility. Nevertheless, these dangers may be avoided if we insist that the exercise of IPRs, considered as cultural rights, entails respect for the full range of human rights norms.

2. INFORMATIONAL CAPITAL AND INTERNATIONAL TRADE

The globalization of the economy is fueled by developments in information technologies that enable information to flow instantaneously to control the production, distribution and circulation of goods. In a prescient and succinct discussion of informational capital,³ Arun Kundnani explains that all forms of cultural content can be compressed and made available through digital communications networks that create a world market conceived of as a unified information system. IPRs enable the informational and symbolic goods that 'flow' through these networks (films, music, programming, databases, software, etc) to yield a continuing stream of royalties or subscription fees. Meanwhile, industries in other sectors remain competitive via investment in the symbolic components of goods – design and branding, for instance.

¹ The prognosis of endangerment is supported by the fact that moral rights have not been incorporated into the TRIPs Agreement and in international trade deliberations most states still resist the expansion of geographical indicators to products other than wine and spirits, attempts to set limitations on patentable subject matter have been resisted, and domestic exemptions to infringement have been challenged. It is not surprising that in the trade arena aspects of IPRs that do not primarily facilitate or are perceived to impede commerce will be scrutinized. It is our contention, however, that there are other equally important IP deliberations taking place in arenas where parties are motivated by other considerations and that the efforts of WIPO in the full range of UN bodies promises to be more indicative than those of the WTO for the future of IPRs. The recent UN mandated appeal to WIPO to adopt a 'development agenda' and attempts by developing countries to legislatively implement new *sui generis* rights to meet environmental commitments and to protect minorities is also indicative of changing expectations for IPRs.

² George Yudice argues that 'culture as resources is more than commodity; it is the lynchpin of a new epistemic framework in which ideology and much of what Foucault called disciplinary society are absorbed into an economic or ecological rationality such that management, conservation, access, distribution and investment – in 'culture' and the outcomes thereof – take priority.' George Yudice, *The Expediency of Culture: Uses of Culture in the Global Era 1* (2003).

³ Arun Kundnani, *Where Do You Want to Go Today? The Rise of Information Capital*, 40 *Race and Class* 49 (1998/99).

The capacity to respond to market knowledge with new forms of symbolic distinction is now an indicator of competitiveness. Trademarks assume greater importance. Technological advances in DNA sequencing have also turned many elements of nature into informational goods, material resources become genetic resources from which information can be extracted and owned under patent.⁴

All informational goods are by nature non-rivalrous; only through the extension of IPRs do these cease to be public goods and become private monopolies that yield rents in global markets. Not surprisingly states housing industries highly dependent upon IPRs have a vested interest in intervening in foreign jurisdictions with traditions of respect for the public ownership of culture and knowledge.⁵ The coercive fashion in which a U.S. based industry coalition achieved the negotiation of the TRIPs Agreement under the umbrella of the World Trade Organization (WTO) is now well known.⁶ Expanded IPRs coupled with new broadcasting and telecommunications legislation ensured that the full capacities afforded by digital communications could be realized. In the process, as many critics note, states abandoned national sovereignty in the sphere of culture.⁷ As one trenchant observer notes:

... a central aspect of informational capitalism is the accumulation of hitherto socially-owned knowledge, culture and information in the hands of private corporations, whence they are repackaged as informational goods and sent around the world through the networks of information flow. These struggles do not simply involve an opposition between Third World traditions on the one hand and western modernity on the other. The key issue is between social ownership of cultures and their development versus private ownership.⁸

The TRIPs Agreement is one strand of a network of laws which attempts to create a legal and institutional framework favourable to the accumulation of capital in the era of globalisation by removing barriers to capital investment and mobility and dismantling forms of redistribution effected by market interventions and price stabilisations. Digital technology has given capital much greater flexibility in choosing

⁴ Bronwyn Perry, *Trading the Genome: Investigating the Commodification of Bio-Information* (2004).
⁵ See F. Willem Grosheide, 'General Introduction', in *Intellectual Property Law 2002: Articles on the legal protection of cultural expressions and indigenous knowledge* (F. Willem Grosheide & Jan J. Brinkhof eds., 2002), at 6.

⁶ Peter Drahos, *Global Property Rights in Information: The Story of TRIPs and the GATT*, 13 *Prometheus* 6 (1995), reprinted in *Intellectual Property* 419 (Peter Drahos ed., 1999); see also SUSAN K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property* (2003).

⁷ Shalini Venturelli, *Cultural Rights and World Trade Agreements in the Information Society*, 60 *Gazette: Int'l J. for Communications Studies* 47 (1998); John Frow, *Public Domain and the New World Order in Knowledge*, 10 *Social Semiotics* 173 (2000).

⁸ Kundnani, *supra* note 3, at 70.

places of production thereby freeing capital from the bargaining power of labour. Moreover, those who provide the creative material that is capitalized upon are either not recognized as 'authors' or inventors, pressured to assign their IPRs (and waive their moral rights) as 'content providers' or they are engaged in 'work for hire' – having their mental or creative labour expropriated by their employers.⁹

As Coombe has argued elsewhere, assertions of cultural distinction have emerged as a means of asserting rights by those who are disadvantaged in this new economy.¹⁰ The so-called level playing field for international trade ensures that some goods (genetic resources, materials, design, timber, textiles, techniques, know-how, practices and knowledges that are extracted from the 'less developed countries') flow freely, whereas others (genetically modified crops or industrially developed seeds, fabrics, fertilizers, pesticides, software, and pharmaceuticals) are channeled as IPR protected works that command rents for each use of their informational content even when they are derived from the 'work' of others.

If IPRs provide the legal means by which global flows of information are commodified, managed and policed, it also appears to be providing rhetorical resources for movements of social resistance to the violence of informationalisation. Tactics of branding, adding symbolic value and building recognizable distinctions of origin are capable of being extended to new beneficiaries and seized upon by new agents. For example, the drive to represent local peoples' knowledge, practices and traditional cultural expressions as innovative works, integrally related to a traditional lifestyle and deserving of *sui generis* IP-like rights asserts new claims of authorship for communities. Rural communities, indigenous peoples, subsistence farmers, forest dwellers, healers and other marginalised groups now struggle to prevent local knowledge and resources from being reduced to mere data for the information intensive industries of the new economy. They do so increasingly by representing their traditions as sources of innovation, describing their ecosystems as inscribed environments or cultural landscapes, or insisting that their cultural distinctions be recognized as sources of value.¹¹ Positions of historical and contemporary disadvantage may thereby be transformed into places of competitive advantage. IPRs – particularly trademarks, appellations of origin, certification and collective marks may be used to link goods

⁹ Corporations are also appropriating creative labour in hugely profitable new industries such as digital games by insisting upon ownership of – or rights to expropriate, the IPRs players of those games would otherwise hold in the works they create and contribute to the game space. See Andrew Herman, Rosemary J. Coombe and Lewis Kaye, *Your Second Life? The Performativity of Intellectual Property in Online Games*, 19 Cultural Studies (forthcoming 2006).

¹⁰ Rosemary J. Coombe, *Works in Progress: Traditional Knowledge, Biological Diversity, and Intellectual Property in a Neoliberal Era*, in *Globalization Under Construction: Governmentality, Law, and Identity* 273 (Richard W. Perry & Bill Maurer eds., 2003).

¹¹ See Grosheide, *supra* note 4, at 25-26.

and services more clearly to their place of origin, the conditions under which they are produced or the very identity of their producers. Such strategies may empower local communities they may engender creative activity, revitalize traditions and sustain or enhance local livelihoods;¹² they may also restrict people's freedoms, entrench the powers of local elites, and subject communities to greater state surveillance. Ultimately, we would argue, these new forms of symbolic capital accumulation need to be evaluated as forms of emerging governance, subject to requirements of transparency, accountability, and democratic values with respect to participation and equality of opportunity.

3. BRANDING SPACE: ADDING SYMBOLIC VALUE TO LOCATION

If capital and services have attained greater global mobility in the new economy, labour has become increasingly intransitive. Controls on the movement of labour have become entrenched, with new legal mechanisms devised to contain the flight of refugees from impoverished regions into the areas of capital investment.¹³ Globalisation has provided for increasing concentrations of capital in various developed urban centres, while many rural and peripheral zones find themselves on the 'outside', with inhabitants facing few apparent options other than urban migration for wage labour subsistence. States, however, find themselves without the means to provide the infrastructure necessary to support burgeoning urban populations or to cope with the social consequences of such unprecedented densities. As one report

¹² For an example see Wend B. Wendland *Intellectual Property and the Protection of Cultural Expression. The Work of the World Property Organisation (WIPO)* in Grosheide, Brinkhof *supra* note 4, 101.

¹³ At the same time that local impediments to capital investment have been removed and market-intervention-based laws of redistribution have been dismantled, a whole host of international legal conventions have collaborated to ensure that while capital becomes increasingly mobile, labour becomes increasingly confined. This is an unsurprising collusion of national and international legal measures, considering the migrations of labour which would likely otherwise flock from the impoverishment of underdeveloped areas towards concentrations of capital. Concomitant to increasing restrictions on visas, a primary means of confining labour has been pernicious attacks on liberal refugee regimes implemented after the Second World War. This has been manifested in a variety of ways, including heavy penalties levied against transportation companies who carry passengers without proper documentation, the establishment of rights-free 'international zones' in national ports of entry – facilitating easy and arbitrary removal of unwanted individuals, the establishment of so-called safety zones within war-torn countries – areas which while often terribly unsafe, discourage flights of refugees across the borders, the willingness demonstrated by many nations to return refugee claimants to the dangerous states from which they fled, strict criteria as to what constitutes refugee status, and the invocation of the 'safe third country' concept, by which asylum seekers are denied entry if, en route, they passed through another country where they could have conceivably made an asylum claim. See B. Chimni, *Marxism and International Law: A Contemporary Analysis*, Economic and Political Weekly 337 (Feb. 6, 1999).

summarizing three world conferences held during the World Exhibition EXPO 2000 phrased it, 'Stress was laid upon establishing a balanced partnership between urban and rural areas. Without keeping the people in the rural areas it will be more and more difficult to solve the problems of the urban areas.'¹⁴ Indeed, under the restructuring and structural adjustment policies imposed by the WTO and the IMF over the last twenty years, even the most basic of public services had to be privatized, according to neoliberal logic, to improve conditions for foreign capital investment. As one former World Bank manager acknowledged: 'Everything we did from 1983 onwards was based on our new sense of mission to have the south 'privatised' or die: towards this end we ignominiously created economic bedlam in Latin America and Africa.'¹⁵

Part of the drive to 'privatise or die' involved recasting intellectual property rights as private rights under the TRIPs Agreement – minimizing their social import and their role in national cultural policy. As an acceptable 'private' mechanism, then, it is not surprising that IPRs should be considered in terms of what economic opportunities they can offer peoples living in rural areas so as to reduce or control the tides of urban migration. If people cannot escape from the global peripheries to take advantage of the opportunities available in global centres and governments have an interest in preventing migration to provincial or national centres then rural development becomes a priority. However if labour is an increasingly less significant component of capital accumulation, and agricultural subsidies are becoming increasingly illegitimate under global trade norms, then some means must be found to add symbolic value to labour kept in place. Areas otherwise disadvantaged by transformations wrought by economic globalization need to find some way of capturing rents in informational capitalism. IPRs that provide protection for indicators of geographic source and appellations of origin enable these areas to turn locales and specific conditions of production into symbolic capital.

Geographical indications (GI) are a type of IPRs that lend themselves to this practice because they mark both the origin and the quality and characteristics of the product that are linked to its geographical origin.¹⁶ Ideally, GIs are to do more than simply

¹⁴ Michael Klaus and Holger Magel, *Rural Development in a Civil Society, in Integrated Local Community Development* 97-115 (Integrated Community Development Program, Asian Productivity Organization, 2000), available at <http://www.apo-tokyo.org/icd/papers/E-Publications/02.IntegLocCommDev/02.IntegLocCommDev.htm>.

¹⁵ Chimni, *supra* note 13, at 347, citing ANKIE M. M. HOOGVELT, *Globalisation and the Postcolonial World: The New Political Economy of Development* 172 (1997).

¹⁶ The first international agreement to address the protection of GIs was the Paris Convention for the Protection of Industrial Property of 1883. Though the agreement failed to define the conditions for protection, the Convention did require that members prohibit the importation or mandate the seizure of products that falsely identified the source of the product or misrepresented the identity of the producer. This article was amended in 1958, adding a further prohibition on indications deemed

signify the origin of the good; they are expected to 'guarantee [the] quality and distinctiveness [of the product as] derived from a combination of unique regional, environmental, and human influences, such as climate, soil, subsoil, plants, and special methods of production – particularly traditional, collectively observed farming and processing techniques'.¹⁷ If local practices can be shown to give the product its distinctive characteristics, rights to exclusively use a GI may provide producers of goods with a lucrative form of market distinction.

Within international trade law, GIs have largely been limited to distinct high-end agricultural goods, most notably wines and spirits. Many states, including the U.S., Japan and Canada would like to so limit their application if not abolish them altogether as obstacles to free trade. GIs may well be used to limit competition, preserve various forms of inequality, and 'overly empower local elites'.¹⁸ On the other hand, many developing countries want to embrace the possibility of having goods produced in traditional ways specific to an area or region internationally recognized as global brands so that they too can compete in this field. India, for example, is aggressively marketing 'traditional knowledge' products such as tea, silk, sarees, and various handicrafts.¹⁹ In Europe, GIs continue to proliferate. Italian associations of Parma ham producers successfully sued the British supermarket chain Asda for slicing and packaging Parma ham outside of the Parma region, thus damaging the ham's *characteristics*. According to the European Court of Justice: '[m]aintaining the quality

'liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods'. Although two subsequent international agreements have since been enacted to further define the protection of GIs – the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1891) and the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration (1958) – they have failed to secure wide international support, presumably because they expanded the original level of protection afforded to GIs under the Paris Convention. The language adopted in Article 22 of the TRIPs Agreement – 'indications which identify a good where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin' – is largely seen as either neutral in relation to the Paris Convention or slightly more inclusive. Despite the lack of international agreement, many states and groups of states continue to recognize rights based on the earlier Agreements and to protect as GIs marks that indicate distinctive methods of production and traditions of making goods thus considering cultural as well as natural factors. Developing countries are also introducing GIs into their trademark legislation to provide protection for traditional products and manufactures. For an account of the problems surrounding protection of GIs see Tunisia L. Staten, *Geographical Indications Protection under the TRIPs Agreement* 87]. Patent Trademark (Office SOG. 221/2005). See also José Manuel Cortés Martín, *TRIPs Agreement: Towards a Better Protection for Geographical Indications?* 30 *Brook. J. Int'l L.* 117 (2004).

¹⁷ Kevin M. Murphy, *Conflict, Confusion, and Bias Under TRIPs Articles 22-24*, 19 *Am. U. Int'l L. Rev.* 1181, 1185 (2004).

¹⁸ Rosemary J. Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 *Law, Culture and the Humanities* 35, 46 (2005).

¹⁹ See *Mysore Silk to Become Global Brand*, *Deccan Herald* (Bangalore, India) Aug. 18, 2004, available at <http://www.deccanherald.com/deccanherald/aug182004/i4.asp>.

and reputation of ... Parma ham justifies the rule that the product must be ... sliced and packaged in the region of production.²⁰

Anthropologist Robert Ulin shows how Michigan wine growers struggle to generate the kind of symbolic capital enjoyed by European wines by grafting narratives of 'tradition', 'authenticity', and quality onto their own appellations of origin thereby creating symbolic capital so as to enjoy the advantages which many so-called privileged regions of the world – such as Bordeaux – have enjoyed for centuries.²¹ Current structures of power – neo-liberal economic policy, international trade-based intellectual property law and conventions addressing cultural rights – present this window of opportunity, and invite its exploitation by those who may find themselves faced with scant options for leveraging rights claims and struggling for new forms of community development. Ulin rather naively celebrates these as activities of human agency that endow local worlds with new meaning in globalizing conditions, while he ignores the structures that enable them. Such windows of opportunity are not equitably distributed; they are made available by international law, shaped by its colonial history, and reflect its entrenchment of historical trade privileges.

We can see from this example how globalization is inviting the production of new localizations²² that may be marketed as offering unique alternatives to the homogenization of goods that is so often used to caricature globalization itself. These are not simple reflexes of global processes, but strategic acts of calculation within the restricted parameters shaped by international law. Such practices seem most widespread in Europe where the use of GIs and appellations of origin has a longer history:

Popular strategies involve reifying local traditions and burnishing images of rustic authenticity onto goods, some of which were marginal products only two generations ago. For example, in some Italian mountain areas, the creation of *tallegio* – a particular kind of cheese – has become central to local development strategies. It has also transformed subsistence family farming into an 'ecotourism' attraction as people produce images of a rural way of life for the consumption of others. The cheese is marketed with pictures of an idyllic, rural lifestyle set in a picturesque alpine landscape.²³

²⁰ Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA v. Asda Stores Ltd and Hygrade Foods Ltd, C-108/01 (Judgment of the European Court of Justice, May 20, 2003) [European Court reports 2003 Page I-05121].

²¹ Robert C. Ulin, *Globalization and Alternative Localities*, 46 *Anthropologica* 153 (2004).

²² This phenomenon is not limited to IPRs and trade law but also appears to be engendered by environmental law and policy as discussed in *Earthly Politics: Local and Global in Environmental Governance* (Sheila Jasanoff & Marybeth Long Martello eds., 2004).

²³ Coombe, *supra* note 18, at 44-45, citing Christina Grasseni, *Packaging Skills: Calibrating Cheese to the Global Market, in Commodifying Everything: Relationships of the Market* 259-288 (Susan Strasser ed., 2003).

Geographers continually remind us that places 'should not be regarded as enclosed spatial territories which have stable essential identities' but rather should be 'seen as dynamic and open entities whose meanings and identities are constituted within a cross-cutting network of often global social relations and understanding'.²⁴ What these examples suggest, however, is that there are strong global pressures at work to project place as having a stable and essential identity in a networked world of informational goods. Indeed, the growing field of expertise known as 'place branding' is based on the premise that places require brands that are 'authentic, being based on what a place is good at or what it does best'.²⁵ In an increasingly globally connected world, 'every place must compete with every other place for its share of the world's wealth, talent, and attention' and thus must distinguish itself based upon its physical, human, heritage and cultural capital. The brand for a place is being touted as 'a key component of its overall economic development strategy'.²⁶ Only brands that can be protected are valuable, however, and thus IPRs will play an important role in this quest to create symbolic value in productions of place.

Few of the available studies enable us to fully evaluate this as a rural development strategy. We need to understand how these efforts affect relations between communities and the state, enhance a rural community's recognition and political inclusion in the nation and consider what impacts these strategies have upon local power relations, distributions of wealth and availability of economic opportunity. In an analysis of emerging distinctions among forms of olive oil in Italy, anthropologist Anne Meneley addresses the issue more squarely. Tuscan extra virgin olive oil is a successful product, she suggests, because of its non-industrial production; the location and conditions of production are integral to the product. It is thus a 'de-fetishized' product. Place-specific artisanal modes of production are favourably contrasted to de-territorialized industrially produced oil. Although co-operatives all over Italy have conventions governing the growth, harvesting, and pressing of olives, as well as means of distinguishing olive oils from different regions, some traditional producers have gone much further in developing 'appellations of origin'. In 1990 a group of traditional producers (who appear to be holders of formerly aristocratic estates) banded together to create a restrictive set of production and quality controls for their oils. To bear the new appellation 'Laudemio' the spacing of trees, schedules for their pruning and picking and duration from gathering to crushing the fruit as well as acidity limits are all carefully controlled. Moreover, 'each estate bottles their oil in Laudemio's signature bottle, affixing their own distinctive estate labels'.²⁷ In other words, the new appellation

²⁴ Jens Lachmund, *Knowing the Urban Wasteland: Ecological Expertise as Local Process, in Jasanoff and Martello, supra* note 22, 241 at 242.

²⁵ Malcolm Allan, *Why Brand Places?* 64 *AGENDA* 2, 3 (February 2004) available at http://www.beyond-branding.com/Agenda_MSA_Article_Feb2004.pdf.

²⁶ *Id.* at 3.

²⁷ Anne Meneley, *Extra Virgin Olive Oil and Slow Food*, 46 *Anthropologica* 165, 169 (2004).

of origin not only fostered a new hierarchy of distinctions in Tuscany, it created finer cultural distinctions linked to the very estates on which the particular olives were grown. These are highly appreciated. Gourmands around the world claim that each of the 33 oils has its own flavour. Nonetheless, these oils are difficult to locate, even in large cities. If, as Meneley notes, even former aristocrats have difficulty finding means of marketing and distributing their oils in foreign markets, it is highly unlikely that such strategies would be feasible for regional collectives and family farms. Only, it appears, when producers also make wine and thus have access to liquor distribution networks, do these finer distinctions yield profit (and even then it appears that there is more income to be made from agricultural tourism and hosting cooking schools). Such strategies are unlikely to yield rural development returns without investments that link producers to global distribution networks.

4. MARKING NEW DISTINCTIONS: VALUING CONDITIONS OF PRODUCTION

Instead of obscuring conditions of production and thereby fetishising the commodity, it is now possible for conditions of production to become symbolically marked for consumption in niche markets. It might be more precise to suggest that the product or service is integrated back into the conditions of its production for marketing purposes; those conditions of production may be aestheticised or reified through the use of symbols and narratives that circulate as new forms of informational capital. Indeed, one highly successful example of this involves the use of a branding strategy to distinguish a local place of production from the predominant conditions characteristic of global divisions of labour.

Informational capitalism, we have suggested, is characterized by high concentrations of ownership and highly networked multinational firms who, by controlling IPRs and networks of distribution, reduce their reliance upon labour. As Kundnani phrases it: 'new technologies reduce the total contributions of labour to the production process and capital's increased mobility means that work can be outsourced ... With outsourcing the corporate brand name can be insulated from the seedy side of labour-capital relations'.²⁸ Other possibilities are emerging, however, as the next two examples illustrate.

The Los Angeles-based clothing company American Apparel is arguably one of the most successful examples in recent years of a company making the location and conditions of production a central component of the brand. The company has doubled its business in the past year alone – from US\$80 million in sales in 2004 to an estimated

²⁸ Kundnani, *supra* note 3, at 61-2.

\$150 million in 2005; its clothes are shipped to 40,000 wholesalers, as well as to its more than 75 retail locations, with new stores opening weekly.²⁹ Brain-child of 36 year old, Montreal-born entrepreneur Dov Charney, American Apparel manufactures simple, logo-free casual wear – mostly T-shirts – and is marketed primarily to youth. There are multiple colours to choose from, but no patterns or logos adorn any of their products. Every label sewn into every American Apparel product boasts the same company logo found on all of its other advertising material, from post-cards and catalogues to calendars and billboards: 'Made in Downtown LA – Sweatshop Free'. Here the commodity becomes de-fetishised in two ways: the locale of its factories in downtown Los Angeles is invoked as a way of appealing to the patriotism of the 'made-in-America-consumer' eager to support American industry in a time of unprecedented job loss due to outsourcing.³⁰ 'Sweatshop Free' informs the consumer that through the purchase of each product, they are supporting the American textile and apparel labour market – a remarkably rare feat given that 96% of clothing purchased in America is produced off-shore.³¹ Marketing the symbolic narrative 'made in America' by drawing attention to 'Downtown LA' has been a successful strategy garnering much coveted publicity, such as a 2004 special CNN feature in which the company was celebrated for defying the trend of using cheap labour markets overseas by "proudly bearing the label 'Made in America'".³² Other socially persuasive narratives involving the necessity of urban renewal in decaying American inner cities abandoned by businesses which fled to the relative safety and free parking of suburbia, are also called to mind.

'Sweatshop Free' baldly proclaims the conditions of production, appealing to the growing number of consumers increasingly concerned with the deplorable conditions in which their clothing is manufactured.³³ American Apparel markets itself to them as an ethical alternative. While downtown Los Angeles may be seen as a welcome alternative to Honduras or Bangladesh, Los Angeles can by no means be acquitted of the crimes for which the ethical consumer convicts sweatshops in developing countries.

²⁹ David Gutnick, *The Apprenticeship of Dov Charney* (CBC Radio broadcast, *The Sunday Edition*, Mar. 20, 2005).

³⁰ According to the US Department of Labor, Bureau of Labor statistics, over 2.8 million manufacturing jobs have been lost in America over the past ten years (Jan. 1995 – May 2005) – see <http://www.bls.gov/iag/manufacturing.htm>. The American Manufacturing Trade Action Coalition posits that 890,600 of those jobs were in the textile and apparel industries, lost to outsourcing over roughly the same period of time (Dec. 1994 – March 2005) – see *Textile and Apparel Job Losses, available at* <http://www.amtadc.org/pdf/index.asp>.

³¹ David Gutnick, *supra* note 29.

³² *Lou Dobbs Tonight* (CNN television broadcast, Feb. 9, 2004).

³³ For example, see Coombe, *Sport Trademarks and Somatic Politics: Locating the Law in a Critical Cultural Studies*, in *SportCult* 280-1 (Tony Miller & Randy Martin eds., 1999) for an account of the public backlash towards Kathie Lee Gifford, upon revelation that her clothing line was manufactured in sweatshop conditions – and right at home in America.

Kimi Lee, director of the Los Angeles Garment Worker Center – a labour rights advocacy organisation – calls LA the sweatshop capital of the United States, maintaining that most of the 5,000 garment factories housed in the city offer deplorable work conditions and illegal wages, with workers often working many more hours than they're paid for.³⁴ The US Department of Labor estimates that two-thirds of Los Angeles garment factories violate both federal and state labour laws, as well as health and safety standards.³⁵ In distinction, American Apparel pays its workers an average of \$13 per hour – double the wage of most other LA garment factories, and ten times what the mostly Mexican workers would make at home. The factory is purportedly clean, well-lit, heated and air-conditioned; workers are provided with health care, dental benefits, subsidised lunches, free use of telephones, paid vacation time, massages on the job (!) and free English classes after work.

Commenting upon the dehumanization engendered by most of the world's garment sweatshops, American Apparel prides itself on maintaining the dignity of all who are involved in the production process. Charney publicly maintains, '... (the benefits) are important, but they're secondary to the dignity ... This is basically the pitch: it's T-shirts that look good, T-shirts that feel good, and T-shirts that are made in a non-exploitative setting. Exploitation is not even an option – it's the third rail for us. We don't go there.'³⁶ Charney, who views himself as a modern-day Duddy Kravitz, defends his business model as both morally sound as well as economically efficient,³⁷ and one that he hopes will propel him to become the largest apparel operation in history.³⁸ As he puts it: 'American Apparel is not altruism. It is capitalism. We treat our workers well to advance our business, to create an environment of efficiency, where everybody

³⁴ Jeffrey Kaye, *Profits & Principles* (PBS television broadcast, *The NewsHour with Jim Lehrer*, Oct. 10, 2002).

³⁵ Linda Baker, *Made in the U.S. of A?* SALON.COM, 7 (Feb. 11, 2004), available at http://archive.salon.com/tech/feature/2004/02/11/dov_charney.

³⁶ Jeffrey Kaye, *supra* note 34; for a treatment of the exploitation of garment factory workers, see Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 65-75 (2004).

³⁷ American Apparel uses a unique modular vertical-integration manufacturing model, whereby workers work in teams as opposed to on an assembly line. Charney maintains this model maximises productivity as well as efficiency: the faster the teams produce, the more the workers earn; and the lack of the assembly line means that changes can be implemented with relative ease, with the new results produced relatively quickly – far more so than a large factory based on an assembly line model of production. Charney also defends his location in North America, which gives him rapid access to the bulk of his market. Critics claim that AA is only able to manufacture in the U.S. because the company produces only very simple garments and does not change its line seasonally. In other words, the demands that fashion imposes upon other garment manufacturers make AA's manufacturing model impossible to replicate elsewhere.

³⁸ See Linda Baker, *supra* note 35, 3; see also Jim Chapman, radio interview with Dov Charney, 94.9 CHRW, London, Ontario (April 13, 2005).

wins.³⁹ He is well aware of the branding capacity latent in the novelty of his approach: a huge banner drapes down the side of his Los Angeles complex, bearing the mantra, 'American Apparel Is an Industrial Revolution'.⁴⁰

Conditions of production and the occupational lives of workers are not rendered invisible here, but are highlighted as the symbolic value that attaches to the commodity in the brand strategy itself. Presumably, American Apparel has long since ceased to be generic and the company has exclusive rights to the term as a trademark and in the associated logos. Will 'Sweatshop Free' however, like other overused mantras cease to arouse reflection and curiosity and become, like other trademarked logos, not an index for its referents, but rather an icon unto itself with its own value as a piece of informational capital? Could it be licensed for use on goods that are produced in other conditions? Legally, yes, but it would be foolish not to preserve the integrity of the brand or to suffer the negative publicity sure to ensue. More insidiously, rights to a phrase that might ideally describe a growing range of goods and services can now be exclusively claimed unless Charney is generous enough to liberally license it to other like-minded producers. Ironically, however, because the actual characteristics of the goods are not due to their place of geographic origin (even if this were expanded to include human factors) American Apparel can claim no GIs, even though their entire branding strategy depends precisely upon the goods' conditions of origin as the basis of the symbolic value they assume in the market!

Igloo Diamonds (Igloo) provides another instance of this phenomenon of harnessing goodwill. Igloo is the current brand of a group of Internet diamond dealers that procures and promotes diamonds of Canadian origin as *ethical* investments. According to its promotional materials, their diamonds are 'mined in Canada with the utmost regard to the environment, following careful environmental impact studies and the placement of bonds in damage guaranties, by manpower enjoying high labour standards.'⁴¹ To substantiate these claims, purchasers of an Igloo diamond receive a certificate that attests to the diamond's authenticity and the conformity of its conditions of origin to these standards. As well as marketing its own standards of production, the company also purports to seek redress for the injuries created by the sordid history of the global diamond trade by contributing to various community projects such as the sponsoring of a landmine clearance program in Mozambique. These actions allow Igloo to boast that the purchase of one of their products aids in the 'rebuilding [of] a ravished community',⁴² the prevention of injuries (presumably

³⁹ Cited in Kimberly Lloyd, *False Tribalism – The Hallmark of Contemporary Luxury*, 2 M Publication 9 (2003). Alleged sexual harassment in the workplace, however, does undermine Charney's claims.

⁴⁰ Linda Baker, *supra* note 35, 1.

⁴¹ <http://www.diamonds.ca/curious/whyigloo.shtml>.

⁴² *Id.*

both to miners and victims of civil wars ignited by and financed by diamond mining), and the potential saving of lives. Igloo rather pretentiously claims that they sell diamonds that 'better the world'. Given their use in consumer societies as indicators of true love, devotion, and life-long commitment, the growing awareness of the conditions and consequences of diamonds' global production created a form of dissonance that made these particular commodities ripe for narrative reconfiguration. Although there is no evidence that Igloo produces the gems using methods any different from those dictated by Canadian law, the very existence of such laws has allowed the company to create a niche market for diamonds from the Canadian north. Once again ethics are juxtaposed with style to create both symbolic value and a saleable mark: 'Beyond being the newest fashion statement, your Igloo Diamond is a statement of social conscientiousness [sic] and care. It is a true ethical diamond.'⁴³

Ecotourism provides our final example. According to its critics, despite the short-term economic benefits of conventional tourism, it has caused substantial distress in many parts of the world because of the impact unsustainable levels of traffic and human extravagance have had on fragile environments and impoverished and vulnerable communities.⁴⁴ Environmental degradation, a common corollary to the enclave-based tourism model – including all-inclusive resorts, cruise ships, artificial lakes, and safari expeditions – disturb local ecosystems and undermine the livelihoods of those whose subsistence depends upon them. Moreover, the inequality of power and wealth that prevails in host-guest relationships negatively affects the self-esteem of local peoples, erodes cultural traditions and further decreases an already waning quality of life. Many critics feel that this reproduces relations akin to Western colonialism and imperialism.⁴⁵

Ecotourism emerged in the 1980s as an alternative tourism model capable of addressing some of these concerns while still taking advantage of the potential benefits of a prospering tourism economy. Although originally conceived as a kind of nature-based travel that saw enthusiasts adopt certain ecologically sustainable practices, ecotourism has come to signify both a concept and a model in which a very specific approach to *social* sustainability is advanced.⁴⁶

⁴³ *Id.*

⁴⁴ See Deborah McLaren, *Rethinking Tourism and Ecotravel* 1-21 (2003); David T. Schaller, *Indigenous Ecotourism and Sustainable Development: The Case of Río Blanco, Ecuador* (1995), available at <http://www.eduweb.com/schaller/Section2RioBlanco.html>.

⁴⁵ See for example Tamar Diana Wilson, *The Impact of Tourism on Latin America* (2005), available at <http://www.latinamericanperspectives.com/tourism.html>.

⁴⁶ <http://www.gdrc.org/uem/eco-tour/eco-tour.html>.

'Eco-tourism focuses on local cultures, wilderness adventures, volunteering, personal growth and learning new ways to live on our vulnerable planet. It is typically defined as travel to destinations where the flora, fauna, and cultural heritage are the primary attractions. Responsible ecotourism includes programs that minimize the adverse effects of traditional tourism on the natural environment, and enhance the cultural integrity of local people. Therefore, in addition to evaluating environmental and cultural factors, initiatives by hospitality providers to promote recycling, energy efficiency, water re-use, and the creation of economic opportunities for local communities are an integral part of ecotourism.'⁴⁷

At the heart of this model is an understanding of the close ties that exist between environmental conservation, economic development, cultural diversity, and inter-cultural exchange – an opportunity for people to learn about other peoples' cultures and lifestyles.

Early analyses of cultural tourism were quite critical and wary of the negative consequences of commodifying cultural forms for tourist consumption. Critics argued that ecotourism represented merely another form of capitalist appropriation in which 'the physical environment, and within it human societies and historical remains, [are becoming] subtly redefined as global patrimony – universal property'.⁴⁸ Once prominence is given to physical and human environments and peoples begin to market their own cultural distinctions, a potentially insidious self-branding process begins. To what extent does the marketing of cultural distinction demand that difference be artificially promoted and preserved to maintain its appeal? How do ecotourism proponents anticipate balancing the very fine line that exists between cultural valorisation and cultural essentialisation? What distinguishes ecotourism from earlier efforts at selling the exotic other? Again, evaluation often turns on questions of governance.

In France, for example, recent government tourist promotion focused on the Basque area. Marketing efforts developed the fiction of a pristine culture in which folklore and traditional customs dictated the lives of local peoples described as the 'Indians of Europe'.⁴⁹ Entirely state sponsored, this instance of cultural tourism denigrated and objectified people whose lifestyles it valorized while providing them with few benefits from this increased attention. Rather than promoting their development or improving

⁴⁷ <http://www.gdrc.org/uem/eco-tour/etour-define.html>.

⁴⁸ Magali Daltabuit and Oriol Pi-Sunyer, *Tourism Development in Quintana Roo, Mexico*, 14 *Cultural Survival Quarterly* 9-12 (January 31, 1990), available at <http://www.culturalsurvival.org/publications/csqr/index.cfm?id=14.1>.

⁴⁹ Julia Lacey and William Douglass, *Beyond Authenticity: The Meanings and Uses of Cultural Tourism*, 1 (2) *Tourist Studies* 5 (2002).

local economic opportunities, people in the region felt that they were being deliberately kept in an underdeveloped state – similar, as they saw it, to an impoverished Indian reservation. Seasonal employment based upon marketing folklore was experienced as lacking in dignity and relegation to a second-class citizenship; the promotion of ‘authentic imagery’ was denounced as ‘a tool of state oppression’.⁵⁰ Basic civil, political, and cultural rights appear to have been ignored here.

As the prime bearers of cultural distinction in the global imagination, indigenous peoples are key targets for and increasingly key players in this new industry. As one commentator asks: ‘Is there not an irony in the fact that at the very moment of inclusion of indigenous peoples in the global arena they are reaffirmed in their otherness?’⁵¹ Social critics fear not that the features of an authentic indigenous identity may hereafter be dictated by foreign market perceptions with pernicious effects on people’s self-perceptions. The reification of difference may contribute to the reinscription of colonial stereotypes so that those who bear cultural distinction must continue to occupy the ‘primitive slot’ of ‘tradition’ in counter distinction to the ‘progressive’ life of their ‘modern’ visitors. Certainly many states have demanded evidence of unbroken continuous ‘traditions’ as a precondition of recognizing aboriginal rights. Can ‘bearing distinction’ be an opportunity for cultural revitalization and economic betterment – an expression of pride rather than an unbearable burden of expectations?

Empirical studies of ecotourism (and cultural tourism to which it is closely related), suggest that the process is a more complicated one in which both traditional cultural meanings and conceptions of modernity may shift. They suggest that the meanings of tradition and modernity are themselves negotiated in tourist encounters that become sites of semiotic struggle or contestation. As Kathleen Buddle puts it, stereotypical expectations of primitivism are overcome in ‘mutually constituted mediascapes where modern Indigenousness dialogically interacts with official and global versions of Aboriginality and modernity’.⁵² Traditions may be revitalized when local peoples are enabled to focus on the distinctive ways in which they offer hospitality as a means of livelihood that also empowers them politically.⁵³ For some aboriginal peoples, tourism also provides a means to draw attention to the colonial history and

⁵⁰ *Id.* at 12.

⁵¹ Lisa Wilder, *Local Futures? From Denunciation to Revalorization of the Indigenous Other*, in *Global Law Without a State* 217 (Gunther Teubner ed., 1996).

⁵² Kathleen Buddle, *Media, Markets and Powwows: Matrices of Aboriginal Cultural Mediation in Canada*, 16 *Cultural Dynamics*, 29, 34 (2004).

⁵³ Patricia Pierce Erikson, *Welcome to this House: A Century of Makah People Honoring Identity and Negotiating Cultural Tourism*, 50 *Ethnohistory* 523 (2003).

the continuing legacies of marginalization that produce tourist expectations; in so doing these may be transformed.⁵⁴

More recent articulations of ecotourism conceive of the practice in terms of an alternative *development* model, in which the knowledge, practices, customs, lifestyles, values and opinions of local, often formerly marginalized, peoples are given precedence. Indeed, in Canada, aboriginal peoples have developed a model for tourism that claims as its vision, ‘to represent Aboriginal people as world leaders in tourism in harmony with our cultures’, expressing as its key principles commitment to the protection and preservation of Aboriginal traditions and ways of life, commitment to the protection and preservation of the environment, the stewardship of renewable resources, the authenticity of Aboriginal products, art and experiences, the communication of cultural pride and honouring spirituality and self-reliance.⁵⁵ These new business models anticipate a huge expansion of aboriginal branding and the use of IPRs such as collective and certification marks to facilitate the growth of this symbolic capital.⁵⁶

The United Nations characterizes ecotourism as ideally protecting natural areas by generating economic benefits for host communities managing natural areas with conservation purposes, thereby providing alternative employment and income opportunities and economic benefit for local communities. According to anthropologist Barbara Johnston, indigenous peoples in Costa Rica, Panama, and Ecuador have acquired greater political recognition and influence through their involvement in various ecotourism projects. The ‘emerging participation of indigenous peoples in studying, discussing, and devising strategies to control or capture control over the development decision-making process’⁵⁷ represents an attempt by indigenous groups to restructure imbalanced power divisions, regain control over traditional territories, and achieve new forms of political autonomy. Through ecotourism, local cultural differences are gradually being transformed into symbolic capital and leading to the re-empowerment of otherwise marginalized communities. Ecotourism can only be successful if host communities have land tenure, political control over the process and their legal rights are recognized. New IPRs are being developed to support these latter objectives.

⁵⁴ Siegrid Deutschlander and Leslie J. Miller (2003) *Politicizing Aboriginal Cultural Tourism: The Discourse of Primitivism in the Tourist Encounter*, 40 *Canadian Review of Sociology and Anthropology* 27 (2003).

⁵⁵ See Aboriginal Tourism Canada, *Strategic Plan 2003: Growing Canada’s Aboriginal Tourism*, at <http://www.aboriginaltourism.ca/documents/Strategic%20Plan%202003.doc>.

⁵⁶ See *Travelling with Wisdom: Aboriginal Tourism Industry in Canada* (September 29, 2004), at <http://www.aboriginaltourism.ca/documents/Blueprint%20Final%20Draft.pdf>.

⁵⁷ Barbara R. Johnston, *Breaking Out of the Tourist Trap* 14 *Cultural Survival Quarterly* 2, 5 (Jan. 31, 1990), at <http://www.culturalsurvival.org/publications/csqr/index.cfm?id=14.1>.

5. IPRs AND NEW CULTURAL RIGHTS

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge (TK) and Folklore (IGC) has become an important forum for the negotiation of principles to protect TK and to recognize, protect, and promote the creativity and innovation of peoples who have traditionally been excluded from or otherwise failed to benefit from the conventional systems of IPRs.⁵⁸ The lively participation of indigenous peoples and NGOs representing the interests of rural peoples, women, the disabled, traditional healers, farmers, consumers, and traditional artisans as well as food security, environmental and human rights interests have worked to bring a diverse set of new interests and agendas into international IPR negotiations. We will briefly mention two areas of IGC research, inquiry, and negotiation.

The protection of TK is a complicated and controversial area of law and policy; new *sui generis* IPRs are being legislatively created and conventional forms of IPRs are being modified to achieve this objective.⁵⁹ Many proponents of *sui generis* regimes of protection now acknowledge that means for recognizing, preserving, and compensating for the use of TK must be developed to empower local communities, promote cultural revitalization, and further objectives of political autonomy, sustainable development, and territorial rights as fundamental to indigenous survival – although the states in which indigenous peoples are resident may resist many of these claims. Significantly, indigenous representatives at international meetings insist that customary law provides a viable basis for new rights regimes to protect and recognize their TK for most purposes. WIPO nominally supports the need to acknowledge and strengthen customary law as a source for the management and protection of TK. Customary or traditional methods of managing intangible cultural expressions may eventually be accorded recognition and respect in international and domestic law.⁶⁰ Given the level of hostility expressed toward conventional IPRs by indigenous peoples it would be politically inexpedient to call these emerging forms of intellectual property. Nonetheless, it is an indication that new forms of legal pluralism with respect to the manage-

⁵⁸ For an account of the IGC see Silke Von Lewinski, *Traditional Knowledge and Folklore. A New Topic in the International Arena* in Groscheide & Brinkhof, *supra* note 4, at 186.

⁵⁹ The field of scholarship in this field is immense. See Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (2004) for a useful overview. A good case for the propriety of using IPRs to protect TK is made in Thomas Cottier and Marion Panizzon, *Legal Perspectives on Traditional Knowledge in International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Keith Maskus and Jerome Reichman eds., 2005) 565-594. It is oriented primarily towards agricultural knowledge.

⁶⁰ A good case for this is made by Anthony Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge* in Maskus and Reichman, eds., *supra*, note 59, 521-564.

ment of cultural resources may be emerging under conditions of informational capitalism.

Recognition of traditional cultural expressions (TCEs) – formerly known as ‘folklore’ – has also received renewed attention by the IGC for whom the initiative is an important dimension of recognizing the value that cultural distinction has achieved within the international policy framework. Amendments to existing IPRs and/or new IPRs will be necessary because i) preservation and safeguarding of intangible cultural heritage; ii) promotion of cultural diversity; iii) respect for cultural rights; and iv) promotion of creativity and innovation – including that which is tradition-based – are understood to be ingredients of sustainable economic development.⁶¹ Informational capitalism has made many traditional cultural forms available for new forms of cultural and commercial appropriation that may deprive people of economic opportunities or constitute unauthorized misappropriations that create misrepresentations as to origin, suggest sponsorship, harm reputations, are derogatory, or create offence. Draft provisions for the protection of TCEs are designed to recognize ‘that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value’, ‘provide peoples with practical means to prevent ... misappropriation’, ‘respect the continuing customary use, development, exchange and transmission of TCEs’, and promote their use, if desired, for community-based development, while creating ‘an environment of greater certainty, transparency, and mutual respect between communities’.⁶² The content of the particular proposed provisions draw upon legal principles such as copyright, moral rights, performance rights, unfair competition, trademark, certification and collective marks, fiduciary obligation, consumer labelling, and public domain management and are balanced by exemptions familiar in IPRs. The guiding principle, however, is a valuation of cultural distinction:

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.⁶³

⁶¹ See *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7-15, 2003. WIPO/GRTKF/IC/5/3 (May 2, 2003).

⁶² *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Eighth Session Geneva, June 6-10, 2005. WIPO/GRTKF/IC/8/4 (April 8, 2005).

⁶³ *Id.* at 8.

Some dimensions of these new proposals to provide protection for TCEs provide exclusive rights that may be capitalized upon in markets should communities seek to use their TCEs as the basis of economic development strategies. They also provide means to intervene in markets to demand remuneration and recognition of source or to insist that local customary protocols be followed. Significantly, some of these provisions enable communities to prevent expressions, indicia, or motifs that are characteristic of their cultural identity from being used in commerce altogether. This is a clear indication of WIPOs awareness that IPRs need to be shaped to respect the principles of cultural rights that are enshrined in the international human rights framework.

Finally, the emergence of rural social movements that express desires for greater local autonomy from global capital, respect from the state, and the human right to sustainable livelihoods on the basis of the value of their cultural distinction as peoples is perhaps the most radical reaction to informational capital and the one that is least likely to be addressed within the IPR framework (although rights that protect traditional cultural expression may have some appeal here).

There is growing evidence, particularly in the Americas, of the legal evocation of culture by indigenous peoples and peasantries seeking to control the nature and pace of their integration into global markets as well as in attempts to create place-based forms of alternative development that are in significant ways 'de-linked' from globalised capital and the hegemony of neo-liberalism. The best known of these movements involves the Zapatistas in Chiapas, but similar struggles can be discerned in Columbia, Ecuador, Bolivia and Peru. Peoples who have been historically marginalized by the state and have retained subsistence livelihoods are making demands for collectively held land, control over resources, and local political autonomy in cultural terms that stress the vital role of traditional knowledge and institutions in enabling them to assume their proper place in newly democratic states.⁶⁴ These assertions fit uneasily within the international human rights framework, but might be considered emerging cultural rights claims.⁶⁵

6. CONCLUSION

The terrain we have travelled is perhaps fresh and unfamiliar territory to many scholars of intellectual property. It is, however, necessary to begin to make the effort to map

⁶⁴ Coombe, *supra* note 18, at 49.

⁶⁵ Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, a Human Right, or Claims to an Alternative Form of Sustainable Development?* 17 *Florida J. Int'l L.* 115-136. See also Brice Robbins & Elsa Stamatopoulou, *Reflections on Culture and Cultural Rights*, 103, *South Atlantic Quarterly* 419 (2004).

it, for it seems inevitable that IPRs will become increasingly imbricated in new plans for social reform and thus in new fields of governmentality. We have shown that there are economic and political forces at work that put pressure on governments, regions, and local communities to find means of creating informational capital at the same time as international policy-making negotiations have put the preservation and maintenance of cultural distinction onto the agendas of governments, NGOs, and indigenous peoples.⁶⁶ IPRs lend themselves to these efforts. They can be used to protect both traditional and new forms of symbolic value produced in particular places as they circulate in global commodity markets and they are being adapted to protect traditional indicia of cultural distinction from unauthorized appropriation and distortion in those same markets.⁶⁷ This should not surprise us. As a cultural right, the 'right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production' is combined with rights to education and information, to cultural identity, to participate in cultural life, and rights to international cultural cooperation.⁶⁸ The new exercises of IPRs and the proposals for their expansion in scope we have explored here are all expressions of these cultural rights.

The use of IPRs in ethical marketing schemes, rural development projects, ecotourism enterprises, and cultural rights campaigns, however, appears to pose as many problems as those to which it provides solutions. As we have suggested, these are primarily questions of governance. If IPRs become the basis for new forms of commodity production, 'sustainable development', and/or political autonomy because of the growing necessity to sequester symbolic value and to view culture as a resource, then it is imperative that we begin to subject intellectual property management to new forms of scrutiny and its managers to enhanced standards of responsibility. Only if and when these new expressions and exercises of cultural rights are tempered with respect for civil and political rights will we have a basis for evaluating them as strategies to achieve greater social justice.

⁶⁶ The negotiations that produced the Draft Declaration on the Rights of Indigenous Peoples, the Daes Report, and the formation of the Permanent Forum of Indigenous Peoples appear to have been key processes in putting issues of intellectual property and cultural distinction into international policy discussions and influencing WIPOs new understanding of the scope of its mandate in the 1990s. There does not appear to be any scholarship on this topic.

⁶⁷ Wendland, *supra* note 12.

⁶⁸ Janus Symonides, *The Implementation of Cultural Rights by the International Community*, 60 *Gazette: International Journal for Communications Studies* 7, 11 (1998).

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2005