

INTELLECTUAL PROPERTY RIGHTS, LEGISLATED PROTECTION, SUI GENERIS
MODELS AND ETHICAL ACCESS IN THE TRANSFORMATION OF INDIGENOUS
TRADITIONAL KNOWLEDGE

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ABSTRACT

This dissertation arises out of deep concerns over how Indigenous Intellectual Property and Traditional Knowledge should be ethically accessed and used and reviews existing mechanisms of protection. It focuses on how Indigenous Intellectual Property and Traditional Knowledge should best be ethically, legislatively and legally treated in the public domain and in other public usage – and what mechanisms are required to protect it – particularly regarding Indigenous cultural expressions. The dissertation argues that existing regimes of protection – such as copyright, patent, trade secrets, trademark, commercial law, and international regulation and conventions – do not provide adequate protection for certain forms of Indigenous Intellectual Property and Traditional Knowledge; and that, therefore, new systems of protection need to be considered, developed and implemented.

The purposes of this dissertation are: 1) to outline and establish principles in the use of Indigenous Traditional Knowledge for commercial, industrial, and other public purposes, and in cultural practice, artworks and other tangible and intangible cultural expressions; 2) to establish theoretical frameworks on Indigenous peoples' transformation of Traditional Knowledge through their cultural practice; and 3) to develop useful models and concepts to regulate the use of Traditional Knowledge by third parties in the contemporary contexts. In order to achieve these purposes, this dissertation will review the history of Indigenous and European knowledge systems and the interface between the two systems. It will also examine the development of Indigenous, national and International regulatory mechanisms and how the current discourse is evolving at these levels.

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“Traditional Knowledge exists. Intellectual Property is invented.”

CHAPTER ONE: INTRODUCTION

This introductory chapter will begin with a section on definitions of terminology used in the Traditional Knowledge (TK) discourse followed by an explanation of how my educational, work and career path eventually led me to an interest in the protection and regulation of TK. It will also include a Statement of the Problem as this journey has led me to understand it. This journey has also led me to the Indigenous-based methodology I have employed; while, at the same time, been part of the methodology. This process is explained in the chapter's section on methodology and a section on my more recent personal experiences and interactions working in the area of my topic. The chapter will end with a literature review on the topic.

Definitions

This dissertation is laden with terminology that is derived from the emerging Traditional Knowledge discourse. Indeed, in many cases, the terminology is exclusive to the discourse. Many of these terms will be defined further as they are discussed in the text; however, the following basic definitions are provided below:

Access and Benefit-Sharing (ABS): The principle that when Traditional Knowledge is accessed, there should be a benefit-sharing agreement between the user and the Indigenous peoples who originated the Traditional Knowledge.

Customary Law: The ancient legal systems developed by Indigenous nations to regulate Indigenous societies. (These laws are also sometimes referred to as “protocols,” “cultural protocols” and “indigenous law(s)” in the literature. The four terms are sometimes used interchangeably in the literature.)

Erroneous Patents: Patents licenses that have been granted on Traditional Knowledge without the consent of the Indigenous group from which the Traditional Knowledge was originated.

Indigenous and Local Communities: A term first developed and used in the Convention on Biological Diversity to encompass Indigenous communities together with the many smaller land-based communities in the world who live similar lifestyles and have common interests, but may not be Indigenous.

Indigenous Knowledge(s): The bodies of knowledge developed by Indigenous peoples including: ancient Traditional Knowledge passed from their ancestors to the present generations; contemporary knowledge developed through the modern Indigenous range of experience; and a combination and blending of “old” and “new” knowledge.

Indigenous Knowledge Systems (IKS): A term used mainly in the South African context (though becoming more common in use) to denote that Indigenous knowledge is connected to political, social, spiritual, legal, environmental and other institutions and, therefore, the knowledge can not be viewed as a separate entity, but rather is part of a interconnected system.

Intellectual Property: The concept, developed in 16th Century Europe, represents that the creator of an idea has a form of legal ownership over the idea and all its derivatives and manifestations.

Intellectual Property Rights (IPR): The principle that the creator of an idea has ownership rights that have been developed into a legal regime(s) in 16th and 17th Century Europe to regulate Intellectual Property including copyright, trademarks and patents.

Mutually Agreed Terms (MAT): The principle that non-Indigenous peoples, corporations and/or third parties who use Traditional Knowledge should only do so based on

terms agreed to by corporations and/or third parties and the Indigenous group from which the Traditional Knowledge is originated.

Prior and Informed Consent (PIC): The principle that Traditional Knowledge cannot be used without first acquiring permission from the Indigenous group from which it is originated and fully informing them of the intended use. (The more specific term “Free, Prior and Informed Consent” (FPIC) further contends that the Indigenous group must not be coerced in any manner in the attainment of their permission.)

Sui Generis: A legal term literally meaning “without precedence”. In the context of the Traditional Knowledge discourse, the term is commonly used to describe new laws and legislation developed exclusively to protect Traditional Knowledge. In the discourse the term also carries the heavy and contentious connotation that the Intellectual Property Rights System is inadequate (with regard to Traditional Knowledge and possibly other forms of knowledge) and, therefore, cannot be a universal system.

Traditional Cultural Expressions (TCEs): The term is used to describe art works and craft works that Indigenous peoples have traditionally practiced as part of their cultures. This includes tangible and intangible expressions such as carving, dances, songs, paintings, stories, clothing,... At times the term is used interchangeably with the outdated term “folklore”.

Traditional Knowledge (TK): The term is derived from a longer term “traditional knowledge, innovations and practices” used in early international discussions in the Convention on Biological Diversity in the early 1990s. The term encompasses a broad range of Indigenous knowledge including ancient stories, songs and dances; traditional architecture and agricultural; biodiversity-related and medicinal, herbal and plant knowledge; ancient motifs, crests and other artistic designs; various artistic mediums, styles, forms and

techniques; spiritual and religious institutions and their symbols; and various other forms of Indigenous knowledge. (*The World Intellectual Property Organization definition, that has come to be regarded somewhat as a standard definition, is on pages 193-194*)

Three Important Points on Traditional Knowledge

- 1) Not all Traditional Knowledge is originated from Indigenous peoples. Other forms of knowledge such as Ancient Chinese Medicine, Caribbean Steel Drum making and music, ancient Belgian weaving and lace -making techniques, and ancient Swiss yodeling have been considered to be forms of Traditional Knowledge. It is the case, however, that well over ninety-five percent of Traditional Knowledge is derived from Indigenous Peoples.
- 2) The term “Traditional Knowledge” differs from the term “Indigenous Knowledge” in that it does not include contemporary Indigenous knowledge and knowledge developed from a combination of traditional and contemporary knowledge. The two terms are, however, sometimes used interchangeably. Certain voices in the discourse prefer the term “Indigenous Knowledge” because “Traditional Knowledge” can be interpreted as implying that “Indigenous Knowledge” is static does not evolve and adapt (i.e., Henderson, 2002). However, “Traditional Knowledge” is the term used in most national discourses and virtually all the international forums.
- 3) Although Traditional Knowledge can have fundamental characteristics that differ from European-based Intellectual Property, **Traditional Knowledge IS Intellectual Property**, and is treated as such within the Intellectual Property Rights system.

Journey to a Research Topic

This explanation of my work and publications makes reference to literary writing, magazine articles, edited works and essays, as they related to my educational and professional development and focus of interest. This summary of my past work is intended to show how working with and writing about various related issues has ultimately guided my gradual understanding of TK as the crucial component in the development and evolution of Indigenous peoples and their ultimate survival. Six of what I consider my key academic publications will also be referred to, all of which have contributed to my evolving interest in the protection of TK.

As an aspiring writer attending Carleton University in 1988-89, some of my poetry was published in an anthology called *The Seventh Generation* and the first volume of the journal *Gatherings: The En'owkin Journal of First North American Peoples*, both published by Theytus Books. At that time there was an excitement running through the Aboriginal community about the first journal in North America that would publish a current sampling of Aboriginal literature each year. At the same time, I was getting magazine articles published on Aboriginal issues in *Perception Magazine* and *Fuse* and had my first academic essay published in 1988, "A Comparison Between Administration of First Nations Education in Canada and Peru," in Volume 15 of *The Canadian Journal of Native Education*.

While at Carleton I worked for the Assembly of First Nations on the Committee of Inquiry into Indian Education and was contracted to write a number of research papers. After completing a BA and course work for a MA at Carleton University in 1990, I accepted the job of Managing Editor of Theytus Books at the En'owkin Centre. Young and inexperienced, I could not turn down the challenge of working with the first Aboriginal owned press in Canada; and I also became Editor of the annual anthology, *Gatherings*. From 1993-1997 I

also taught the University of Victoria extension course CW 206 *Publishing Practices and Procedures* at En'owkin.

From 1990-2004 I was intimately involved in the Indigenous educational, literary and publishing movement through my work, as well as the various discourses, such as cultural appropriation and repatriation, that were evolving. In 1994-1995 I was part of the principal writing team for the Royal Commission on Aboriginal Peoples. At the same time I published articles on Aboriginal literature in *Paragraph Magazine* and *The Quill and Quire*, both of which I intended to be my first input into the ongoing discourse over the cultural appropriation of Indigenous knowledge.

In 1996 I had an essay entitled "An Overview of Aboriginal Literature and Publishing in Canada" published in the *Australian Canadian Studies Journal* which summarized what I saw as the key issues around cultural appropriation. During that period, after editing several volumes of *Gatherings* and publishing and/or editing over three hundred Indigenous authors and about fifty Theytus titles, I had become perplexed over the number of editorial problems pertaining specifically to the publishing of material by and/or about Indigenous peoples. Gradually, as more and more problems came up in the course of editing, it became apparent that Theytus Books, as an Indigenous publisher, needed to establish editorial guidelines on several specific matters in order to set standards and ensure consistency.

Working at Theytus had provided several opportunities to discuss these editorial issues with Indigenous writers, editors, publishers, many who have offered their ideas, opinions and proposed solutions. There had also been several valuable discussions with non-Indigenous fiction and non-fiction writers, academics, journalists and editors concerning editorial problems that arise in writing on Indigenous subject matters. Many of those people had also indicated that a set of editorial guidelines would be of great use to them in their

work. Based on those discussions, it became apparent that a set of specific editorial guidelines adhering to Indigenous cultural, political and literary concerns was not only necessary for Theytus, but would also have a potentially wider application.

From 1997-2000 I also served both on the Canada Council Aboriginal Peoples Committee on the Arts and as the Indigenous representative on the BC Arts Council. Through these positions I was able to gain a broader perspective on how the issues of cultural appropriation in literature were similarly taking place in other areas of the Indigenous education, arts and culture. The repatriation discourse going on at the time helped me begin to realize that it was really the reclaiming of Indigenous knowledge that was at the heart of the issues we had been fighting for; and that cultural expressions and property were manifestations of Indigenous knowledge. I had also become deeply concerned that the Indigenous movements' constant opposition to cultural appropriation had a primary focus on literature and that we needed to articulate a broader discourse on all expressions of Indigenous knowledge in order to begin solidifying our positions.

In 1998-1999, I took a leave from Theytus to complete a Masters of Publishing degree at Simon Fraser University. I choose to do a second Masters because it was the only post-graduate program in Canada directly related to my area of work at the time. As the major research requirement for my MPub Program, I was able to write the Indigenous editorial guidelines I had wanted to do, in the form a house style for Theytus Books and a set of editorial guidelines for Indigenous literature and writing on Indigenous subject matters entitled, "Understanding Peoples on their Terms: A Rationale and Proposal for an Aboriginal Style Guide." A section of that study entitled "Talking Terminology: What's in a Word and What's Not" was published in *Prairie Fire Literary Journal* in the Fall 2000 Issue. Starting in 2001, I once again took leave of my duties at Theytus to begin my Ph.D. Program in the

Department of Educational Studies at the University of British Columbia. Also in 2001, I published an essay entitled “Aboriginal Text in Context” in the book *(Ad)Dressing Our Words: Aboriginal Perspectives on Aboriginal Literatures*.

In 2002, I was appointed Chair of the Indigenous Peoples Caucus of the Creator’s Rights Alliance (CRA), a new organization dedicated to the protection of artists’ Intellectual Property. My role at the organization was to focus on the protection of Indigenous Intellectual Property and TK. Through this role at the CRA I conducted a project called “Old Ways, New Paths: Ethical and Legal Considerations in the Transformation of Traditional Knowledge through Indigenous Cultural Expression” throughout 2004–2005 which included a series of regional symposiums, a research project and a national conference.

In 2003 my growing interest in issues of Indigenous Knowledge Systems lead me to write and publish an essay entitled “The Indigenous Tradition/New Technology Interface” in the *Journal of Indigenous Studies* (re-published in the 2005 book *Transference, Tradition, Technology: Native New Media Exploring Visual and Digital Culture*). In March 2004 I left my position as Managing Editor of Theytus Books after fourteen years in order to focus on my PhD program at UBC and my interest in TK. In my years at Theytus I edited and/or published over eighty books and had the honor of working with, editing and publishing many of the authors who initially inspired me to write, and some who inspired my interest in TK, including Jeannette Armstrong, Lee Maracle, Roland Chrisjohn, John Mohawk, Armand Ruffo, Beatrice Culleton, Howard Adams, Maria Campbell and Ellen White. My years at Theytus also allowed me to work under the direction of my mentor, Jeannette Armstrong, who along with my mother, Rosalyn Ing and my grandfather, the late John Young, have by example given me the ability to do the work I have been able to do so far.

Carrying Theytus through its second and well into its third decade also gave me a strong foundation to pursue my primary area of interest now – which is the protection and preservation of Indigenous Knowledge. In hindsight, I can say that what started as an aspiration to write literature gave way to a fortunate opportunity to edit and publish other writers, which then led to an interest in what all of this experience has enlightened me to see is the most important issue at the foundation of all this work.

In this research I have incorporated discussions with experts, case study subjects, and a wide international cross-section of Indigenous peoples and Elders.

The primary questions that led me throughout the course of this research are:

- What was the general state of the development of Indigenous nations knowledge systems prior to the arrival of Europeans in Indigenous territories?
- How were Indigenous knowledge systems traditionally regulated?
- How was the IPR system developed and for what political/social/economic reasons?
- How were Indigenous knowledge systems impacted through the colonization process (and the imposition of the Intellectual Property Rights system)?
- How has the issue of protection of TK played out in Canada, as opposed to other countries, and what are the current national initiatives to deal with the issue?
- What are the core principles and strategies that can be employed to develop national and international models for the protection and regulation of TK, particularly with regard to cultural expressions?
- What are the current international institutions, forums and model legislations, that regulate TK, and how do they impact TK?

My dissertation further investigates ethical and internal cultural issues in the transformation of TK through the expression of the culture and knowledge by Indigenous peoples. It further investigates ethical and legal issues in the use and transformation of TK by non-Indigenous peoples, corporations and third parties. Presently, a great deal of this type of TK use occurs under the following problematic set of circumstances: 1) the TK is found to

have commercial value; 2) non-Indigenous peoples, corporations and third parties produce products derived from the TK, 3) permission for the TK use is not acquired from the original Indigenous rights holders, 4) the original Indigenous rights holders do not acquire any benefits from the TK use; and, if all of that is not problematic enough, perhaps worst of all, 5) non-Indigenous peoples, corporations and third parties take legal ownership over the exclusive rights to the TK, often using the Intellectual Property Rights (IPR) system.

The dissertation will make the argument that existing regimes of protection do not work to protect certain forms of TK and, therefore, new regimes of protection need to be developed and implemented. Principles and existing models and for such new regimes of protection will also be discussed at for their potential to guide the way forward on these issues.

Statement of the Problem

From the initial contact periods, the interface between European and Indigenous Nations was characterized by ethnocentric and racist attitudes on the part of Europeans. Until the early 1980s, dominant Western perspectives tended to view TK as relatively insignificant for the industrialized world and commonly referred to it using the derogatory term “folklore.” In the 1980s, ownership of knowledge and artistic creations traceable to the world’s Indigenous societies emerged, seemingly out of nowhere, as a major social, economic and trade issue (Posey-1996). Throughout the 1990s and into the 21st century it has become increasingly apparent that TK not only has immense economic value but also salient intrinsic value that contains: cures to diseases and ailments; sustainable management of resources and ecosystems; means to spiritual, healing and health and lifestyle alternatives; and aesthetics, forms and techniques that produce some of the world’s greatest artworks.

This outside interest has also led to wide spread misappropriations and otherwise unauthorized and inappropriate use of TK. As a result, TK has now given rise to important Indigenous community, national and international issues that are under discussion in many countries and in The World Trade Organization (WTO), The World Intellectual Property Organization (WIPO), The Convention on Biological Diversity (CBD) and various other United Nations (UN) forums.

Indigenous Peoples have numerous internal Customary Laws associated with the use of TK that are intimately intertwined and connected with TK to form what are whole and complete, integrated and complex Indigenous knowledge systems that have existed throughout the world for thousands of years. Indigenous Nations are also considering how Customary Laws can evolve and be adapted and applied in the present and future. However, throughout the colonization process, and in the post-colonial period, the IPR system has been imposed on Indigenous peoples and their knowledge systems including their Customary Laws.

The first European notions of protection for knowledge and creative ideas can be traced back to the 16th century, in Venice and the 1710 Statute of Anne in the UK. Developments in eighteenth century France also led to concepts such as “moral rights” and “author’s rights” which influenced the development of the IPR system. Looking at the history of IPR with the benefit of hindsight, The Berne Convention of 1886 was the first indication of the Western world’s intention to make copyright (and the subsequent IPR system) a global regime.

In the process of transporting European institutions into various parts of the world occupied by Indigenous Peoples, Eurocentric law (including the IPR system) has now been imposed upon Indigenous law (including the TK system) and TK now raises serious

challenges for the current IPR system, which some argue is unable to respond to the concerns of the TK holders. The Public Domain itself also poses serious problems for TK. Under the IPR system, knowledge and creative ideas that are not “protected” are in the Public Domain (i.e., accessible by the public). Generally, Indigenous peoples have not used the IPR system to protect their knowledge; and so TK is often treated as if it is in the Public Domain – in disregard of Customary Law. The present reality is that **TK is, or will be, in the Public Domain and that the IPR system overrides Customary Law.**

Up until the mid-1900s WIPO, the key international body governing Intellectual Property, held the position that the organization had no mandate to deal with issues of Indigenous peoples. In 1994-1995 this position quickly shifted as the organization was confronted with issues of problems with the application of Intellectual Property to Indigenous knowledge. It gradually became apparent in the mid-1990s that an overwhelming number of patent licenses and many trademark licenses and copyrighted material consisted of TK being registered to non-Indigenous individuals and corporations. WIPO's *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (IGC) has taken an international leading role in dealing with the problem since its formation in 2000. The CBD has also taken on a leading role on defining TK rights on an international level. However, the processes are arduous and some member states use the consensus decision processes to stall and block progress. Meanwhile the *status quo* persists.

A recent prominent example is the Inukshuk logo designed by a Mexican-Canadian artist and chosen on April 24, 2005 as the logo for the 2010 Olympics in Vancouver. In recent years the idea of launching a test case on misappropriation of the Inukshuk has been under consideration among Inuit and other interested Indigenous groups. Violet Ford, former Vice-President of the Inuit Circumpolar Conference, had just previously explicitly raised the

issue of misappropriation of the Inukshuk in an intervention at the WIPO IGC stating, “If something is not done soon, non-Inuit ownership is going to be taken over our sacred Inukshuk” (Ford-2004). Remarks in the April 26, 2005 *Vancouver Province* in the editorial section from an Inuit person says the logo is “offensive” and goes against Inuit cultural practices. The trademarking of the 2010 Olympic logo is a shining illustration that IPRs override Customary Laws and that Indigenous interests in TK are not protected. In the same edition of *The Province* Chief Ed John was quoted as saying “...they are able to use our symbols without our permission. If we tried to use the Olympic Five Ring for anything, you can bet we would be sued faster than you can say Vancouver 2010.” Ford’s statement became a reality sooner and at a higher profile level than she probably imagined. This example and these succinct, yet insightful, and undeniably truthful statements, address the problem that will be dealt with in all its layers and complexities in this dissertation.

Empirical-Like Knowledge as an Indigenous Methodology

The vast majority of Western-based research has been conducted through the scientific process, which has in turn produced most of Western-based knowledge. Vine Deloria Jr. has characterized the effect of the scientific process as follows, “Eventually, we are told, the results of this research with many other reports, are digested by intellects of the highest order and the paradigm of scientific explanation moves steadily forward, reducing the number of secrets Mother Nature has left.”¹ In contrast to Western-based scientific research methodology, there are emerging principles of Indigenous-based research that draw Indigenous traditional methods of learning through lived experience including ecological and social interaction. Aspects of such methodologies can also be viewed in parallel with

¹ Deloria Jr., Vine, (1995). In Red Earth, White Lies: Native Americans and the Myth of Scientific Fact (pp. 42). New York, NY: Scibner.

Western-based theories of: 1) historical methodology, regarding primary sources and oral tradition, and 2) discourse analysis, as expounded by Vivien Burr (1995) and Kenneth Gergen (1985).

The historical method comprises the techniques and guidelines by which historians use primary sources and other evidence to research and then to write history. The question of the nature, and indeed the possibility, of sound historical method is raised in the philosophy of history, as a question of epistemology (Wikipedia-2006). Aspects of the historical method and Indigenous epistemology also converge in the use of Oral Tradition; whereby the oral transmission of information from person to person is considered a legitimate method of knowledge acquisition. Whereas oral testimony derived from a person who was present at (or otherwise involved with) a past event can legitimately inform present and future generations of history; oral transmission of cultural knowledge flowing from the past legitimately informs Indigenous heritage in preceding generations. In both cases, a form of exclusive expertise is extended to the person with empirical knowledge of the event, or the Elder with empirical and trans-generational cultural knowledge. In many cases, the historical method's Oral Tradition and the Indigenous Oral Tradition is often the most reliable method of knowledge acquisition, and, indeed, sometimes the best or only option.

With regard to discourse analysis, Burr and Gergen contended that, "Our ways of understanding the world are created and maintained by social processes" (Burr 1995: 4; Gergen 1985: 268). Discourse is a form of social action that plays a part in producing the social world – including knowledge. Knowledge is created through social interaction in which we construct common truths and compete about what is true or false.² Although some aspects of the methodology I have employed are also supported by discourse analysis, social

² Phillips, Louise & Jorgensen, Marianne W, O.B. (2002). In Discourse Analysis as Theory and Method (pp. 5). London, England: Sage Publications.

constructionist, and empirical and historical research models, most aspects are based fundamentally on Indigenous traditional methodologies that are now emerging as being useful to Indigenous research in contemporary contexts. Indigenous pedagogy paradigms are heavily based on the natural world and apprenticed relationships with Elders and other authoritative experts within Indigenous cultural confines. Within traditional Indigenous cultures, authority and respect are attributed to “Elders” – people who have acquired wisdom through life experiences, education (a process of gaining skills, knowledge and understanding), and reflection.³

Perhaps the single most important precept of the Indigenous worldview is the notion that the world is alive, conscious and flowing with knowledge and energy. In his paper, *An Organic Arising: An Interpretation of Tikanga based upon Maori creation traditions* Charles Royal states the following:

The natural world is not so much the repository of wisdom but rather is wisdom itself, flowing with purpose and design. We can say that the natural world is a mind to which all minds find their origin, their teacher and proper model. Indigenous knowledge is the fruit of this cosmic stream, arising organically when the world itself breathes through and inspires human cultural manifestation... Leading from this view of the world being alive, conscious and wisdom filled is the obvious conclusion that all that we need to know, all that there is know and all that we should know already exists in the world, daily birthed in the great cycle of life. That is, human cultural production is a natural organic expression arising from the contours, shapes and colours of the environments in which we dwell.

In order to carry this Indigenous principle into the contemporary context, it must be acknowledged that many Indigenous peoples no longer dwell solely in what was “the world” to their ancestors (i.e., the natural world). Many Indigenous peoples are now located in a world which consists of a complex physical and cultural layering of principles derived from nature and modernity. However, as emerging Indigenous research methodologies express,

³ Archibald, Jo-ann, (1997). In *Coyote Learns to Make a Storybasket* (pp. 63). Unpublished Doctoral thesis. University of British Columbia.

this does not mean that traditional models are not applicable and adaptable. Therefore, in contemporary research Indigenous models can be adapted in the following ways: 1) Interaction with the contemporary environment and the subsequent gained experience can be an important and relevant way of acquiring knowledge; and 2) Authoritative figures who have accumulated a wealth of experience over time on particular aspects of the contemporary world can be afforded an Elder-like status for the purposes of research.

This Indigenous model of learning through experiencing is articulated further in *Decolonizing Methodologies: Research and Indigenous Peoples* by Linda Smith (1995) as “intervening” and “connecting.” Smith contends that, “Intervening takes action research to mean literally the process of being proactive and becoming involved as an interested worker for change” (p.14). Intervening and getting involved in a process occurring in the world is therefore a legitimate method of acquiring knowledge through the benefit of an insider perspective to the process, while also engaging and affecting the process. With regard to connecting, Smith states, “Connectedness positions individuals in sets of relationships with other people and with the environment.”⁴

By being connected through relationships with people and working directly with and learning from people, another form of legitimate knowledge is therefore gained. Therefore, by adhering to these Indigenous principles, a significant part of my research methodology is based on my past fifteen years of experience working directly with issues of Indigenous cultural property and TK, and my relationships with others working in the field. Interacting and engaging with a range of people, including Elders, technical experts, lawyers, bureaucrats, administrators, community people and artists, also provides a significant part of

⁴ Smith, Linda Tuhiwai, (1999). In *Decolonizing Methodologies: Research and Indigenous Peoples* (pp. 147). London & New York: Zed Books.

the background research to this thesis. The work and processes that have contributed to my research through my direct involvement will be outlined below.

Experiencing and Interacting

After accepting the job of Managing Editor of Theytus Books I became directly involved in all of the contentious issues around Indigenous writers, literatures, voice and Indigenous editing and publishing from 1990-2004. I was also involved (at first peripherally, then ever-increasingly) in the wider Indigenous arts movement through my work, as well as the various discourses that were evolving, such as cultural appropriation and repatriation. At the same time I continued publishing poetry, including my book *The Random Flow of Blood and Flowers* in 1996. In hindsight, poetry and the magazine articles and essays on Aboriginal literature issues were, for me, partly an internal intellectual exercise to come to terms with complex issues surrounding cultural property.

The work on the Canada Council Aboriginal Peoples Committee on the Arts and as the Aboriginal representative on the BC Arts Council through the later 1990s gave me opportunities to engage with a broad range of Indigenous artists and Indigenous arts administrators. Through this committee work I was able to get a privileged insider gaze into institutions developing and implementing Indigenous arts policy and funding programs. Again with the benefit of hindsight, this experience gave me a sense of closure for my part in the cultural appropriation discourse and allowed me to move on to the broader issues of expressions of Indigenous knowledge.

DEFINING MOMENT AT THE BEGINNING OF RESEARCH: I could never forget, after being on a panel on TK at the ImagineNative Media Arts Festival in Toronto in 2002, when I was approached by my friend and dedicated Indigenous arts advocate, Elaine Bomberry, who said to me: “We need someone from the Indigenous community to really take up these issues, and that should be you.”

The thesis draws on my own experience, the secondary literature, and on a growing and significant body of research done by the various international forums in which TK issues are under discussion; namely: the CBD, the United Nations Permanent Forum on Indigenous Issues (UNPFII), The Food and Agricultural Organization (FOA), The World Health Organization (WHO), The United Nations Commission for Trade and Development (UNCTAD), UNESCO, and particularly the WIPO IGC.

In addition to my working directly in the Indigenous arts community on issues of cultural appropriation and ownership, as outlined above, there are also three recent projects that I have been personally involved with which have added to my experience working directly in the field. Two of these projects stem from work in my position of Chair of the Indigenous Peoples Caucus (IPC) of CRA. The CRA was formed in May 2002 as a new coalition of Canadian artists' associations and collectives responsible for managing and advancing creator's rights, particularly in relation to the protection of Intellectual Property at a national and international level. The organization also made an immediate commitment to the protection of TK and the rights of Indigenous communities and artists. Consequently, the IPC was established to carry out this aspect of the CRA's work. The mandate of the Caucus is to: (a) gather basic information about TK and copyright issues in relation to the work of Indigenous creators; (b) to survey current practices and protocols, and (c) to make proposals and recommendations to improve the protection of Indigenous cultural materials and expressions.

- 1) *Indigenous Artists Research Project*: The CRA IPC began with this initiative by holding two regional symposia in order to discuss the related issues with Indigenous artists in Saskatoon, December 2002, and Winnipeg, May 2003. In September 2003, representatives of the Industry Canada Intellectual Property Directorate (IPD) and the

CRA had discussions about directions for the continuation of this initiative with possible funding and input from the IPD. In further discussions between Industry Canada and the CRA it was decided that the Indigenous Artists Research Project would be funded and include four more regional symposia in Toronto, Vancouver, and Fredericton in 2004, as well as the national conference with a research component in Montreal June 3-5, 2004. The CRA IPC has documented the discussions at the regional symposia and June 3-5 Conference. The final report was submitted to IPD on March 18, 2005. This material/information was also augmented with a report on twenty telephone interviews, that was submitted September 24, 2004.

- 2) *The Indigenous Advocacy Support Project*: In September 2003 The CRA IPC received a grant from the Rockefeller Foundation to conduct The Indigenous Advocacy Support Project (IASP). The project involved attending international forums where TK issues were being discussed. I had already been regularly attending the WIPO IGC since 2002, but in 2004-2005 the IASP also allowed me to attend CBD and UNPFII meetings. At these meetings I have had an opportunity to lobby and share information with Indigenous advocates from around the world. I have also been able to speak directly with staff members of the various forums and be party to statements made by member states and NGOs on the floor of the meetings. In this capacity, I have also been party to regular ongoing discussions between the Canadian Government Delegation(s) and the Indigenous delegation(s) from Canada. An important part of my research was conducted through my work and by participating in these ongoing processes pertaining to my research topic. Through the international lobbying work I have been involved with in the past four years, I have been guided by Linda Smith's assertion, "Intervention is directed then at changing institutions which

deal with indigenous peoples and not changing indigenous peoples to fit the structures.”⁵

- 3) *The National Gatherings on Indigenous Knowledge*: The National Gatherings on Indigenous Knowledge (NGIK) is the last of the Department of Canadian Heritage National (PCH) Gatherings on important Aboriginal issues, adding to the legacy of The National Gathering on Aboriginal Artistic Expressions in 2002 and The National Gathering on Aboriginal Cultures and Tourism in 2003. From 2004-2005 I have been on the NGIK Advisory Committee. Our Committee has participated in the planning of these Gatherings in a series of monthly meetings with PCH staff beginning in August 2004. The NGIK gatherings took place in May–June 2005 and consisted of eight gatherings held in Rankin Inlet, Penticton, Wanaskawin, Edmonton, Yellowknife, Montreal, Eskasoni and Six Nations, as well as one On-Line gathering. As a Committee member I attended some of the gatherings and had access to the information gathered.

My involvement in all of this relatively recent work has played a significant part in both informing and inspiring my research.

Literature Review

In 1982 a Columbian anthropologist, Elizabeth Reichell, and a British anthropologist, Darrell Posey, were sitting together in Bogotá at an Earth Summit Conference on Planning for the Environment. At the time Reichell was primarily interested in studying the Indigenous peoples from her country and Posey was preoccupied with the study of insects and their relationship to the environment and people. After watching a presentation by an Indigenous

⁵ Ibid., 14

leader Posey turned to Reichell and said: “That presentation has made me realize that Intellectual Property is not protecting Indigenous peoples knowledge, and this is a huge problem.” Years later in London, Posey convinced his research assistant, Graham Dutfield, to begin working together with him on the book *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* which was published in 1996 (Reichell-2006).

DEFINING MOMENT AT THE END OF RESEARCH: In April 2006 I sat with Elizabeth Reichell at The World Intellectual Property Organization Headquarters in Geneva at the ninth meeting of The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. She recalled Posey’s 1982 observation in Bogotá, expressed her regret over his passing, and said: “I can’t believe we have come from that to this.”

The absence of literature up until the last ten years illustrates how relatively new the discourse on TK is. At the same time it must also be said that the ever-increasing amount of literature in the past ten year period, coming out of various corners of the world, indicates the emerging importance of the TK issues. Most researchers and others working on TK issues credit the British anthropologist, Darrell A. Posey, for bringing it to the mainstream in the early 1990s. Posey and Graham Dutfield published *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* in 1996. As with many great “first books” *Beyond Intellectual Property* provided a basic background and overview of most relevant issues, and remains a relevant contribution as such to date. Against the work that would follow, Posey’s opening contribution is a necessary conservative account that set the stage for some of the more innovative contributions to follow. Posey did not have the knowledge of what new models would be developed and proposed between 1996 and the present; in particular the proposals for non-IRP solutions. Posey’s worth is in the comprehensive initial analysis and suggestions of trying to adapt the IPR system.

Terri Janke and Michael Frankel's *Our Culture Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (1998) is a thorough account of how the issues played out in the Australian context. The Australian example became the most active and progressive national experience involving an organized Indigenous lobby, a public awareness campaign and a series of test cases leading to the development of a body of Common Law. Therefore, Janke and Frankel's contribution is an extremely useful document that covers the initial research and background of events that led to what became and still is an Indigenous "political movement" within the country. It illustrates that the IPR system can be stretched beyond its usual limitations to better serve the needs of TK stakeholders. It also could be interpreted as a model for other national experiences, and serves as an early complement to Posey's international perspective.

Janke's 2003 contribution *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* also complements *Our Culture Our Future* by providing a summary of case studies and an update of the various events that transpired in Australia since 1998. With *Minding Culture* Janke is not working in collaboration with a non-Indigenous author on a Government report (as she was with *Our Culture Our Future*) and she is able to provide a more critical analysis from an Indigenous perspective.

Marie Battiste and James Youngblood Henderson's *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (2001) is most valuable in that it provides an Indigenous, Canadian and international perspective. As with *Our Culture Our Future* Battiste and Henderson give a historical background on how TK issues developed in Canada through the cultural appropriation discourse in the 1980s and the repatriation movement on the 1990s. It also analyses the various relevant frameworks within Canadian law and policy that must be confronted, and gives some valuable updates on events within forums in the international

regime that Posey introduced five years earlier. Henderson himself has challenged Posey's inability to look beyond IPRs (despite the name of his book) and *Protecting Indigenous Knowledge and Heritage* represents a comprehensive analysis and discussion of *Sui Generis* (non-IPR) solutions and a revitalization of Customary Law (In *Aboriginal Tenure in the Canadian Constitution* 2000, Chapter 24 entitled "Aboriginal Knowledge and Heritage Enfold *Sui Generis* Aboriginal Law and Tenure" Henderson elaborates this in greater detail).

Despite being published by an academic press (Harvard University Press) Michael Brown's *Who Owns Native Culture* (2003) is written in a more popular literature style on the issues. Brown often makes reference to specific examples from his personal experience as an anthropologist. Many other examples of misappropriated aspects of Indigenous culture in the U.S. and around the world are also brought into the discussion. Brown's contribution is useful in reviewing the history of the issue in the U.S. and also in depth reviewing of TK discussions in international forums (which he is well aware of and very optimistic about). However, he does not give much relevance to Customary Law and *Sui Generis* approaches in his analysis.

Posey, Janke and Frankel Janke, Battiste and Henderson, and Brown are the key works written on the topic in the past ten years that have made major contributions to the ongoing academic discourse. However, there have been some other important contributions by Stephen Brush and Doreen Stabinsky, Catherine Hoppers, Donald L. Fixico, Ladislaus Semali and Joe L. Kincheloe, George J. Sefa and Bud L. Hall and Dorothy Goldin Rosenberg, Hirini Moko Mead, Sophia Twqarog and Promila Kapoor, Barry Barclay and Ikechi Mgbeoji, which are contained in the bibliography. These contributions have had a more marginal impact on the discourse for a variety of reasons: such as; they do not focus

directly on the topic, focus on a specific aspect of the topic, regional focus, or the work did not reach a wide audience due to limited and/or difficult access.

Brush and Stabinsky's *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (1996) is a collection of essays focusing on Indigenous plant and herbal knowledge. Sefa, Hall and Rosenberg's *Indigenous Knowledges in Global Contexts: Multiple Readings of Our World* (2000) is a collection of essays focusing on genetic resources, health, pedagogy and African issues. Catherine Hoppers' *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (2002) is a collection of essays, only available in Southern Africa, commissioned by the South African Government which set out the groundwork for the development of the 2006 Indigenous Knowledge Systems Policy. Fixico's *The American Indian Mind in a Linear World: American Indian Studies and Traditional Knowledge* (2003) is a philosophical approach to Traditional Knowledge focusing on aspects of how the cognitive process of Native Americans is impacted in the educational system and academia. Mead's approach in *Tikanga Maori: Living by Maori Values* (2004) is similar to Fixico's in that it focuses on the Maori cognitive and epistemological process, although Mead also covers aspects of Maori ceremony and ritual.

Twqarog and Kapoor's *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (2004) is a collection of essays published by United Nations Conference on Trade and Development that was predominantly published for and distributed within the United Nations (UN) system. Von Lewinski's *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, published Kluwer Law International in 2004, is a very cost prohibitive collection of essays written in high legalese and taking a strict legal approach. Barclay's

Mana Tuturu: Maori Treasures & Intellectual Property Rights (2005) focuses strictly on issues of Intellectual Property and Traditional Knowledge in film making. Mgbeoj's *Global Biopiracy: Patents, Plants and Indigenous Knowledge* (2006) was just recently published and focuses on the issue of patenting of Indigenous plant knowledge.

There have been many useful essays published on the topic including: Catherine Bell and Rob Paterson's "Aboriginal Rights to Cultural Property in Canada", published in the *International Journal of Cultural Property* (1999), Daniel Gervais' "Traditional Knowledge: A Challenge to the International Intellectual Property System" (2003-commissioned by the CRA for posting on www.cra-adc.ca), Megan Carpenter's "Intellectual Property Law and Indigenous Peoples: Adapting Copyright to the Needs of the Global Community" published in the *Yale Human Rights & Development Law Journal* (2004) and Gerald McMaster and Clifford E. Trafze's "Our Universes: Traditional Knowledge Shapes Our World" published by the Smithsonian Institution in association with National Geographic in *Native Universe: Voices of Native America* (2004) .

There are also some unpublished essays on Traditional Knowledge (some of which are referenced in this dissertation), numerous briefing and position papers, and research documents prepared by organizations, institutions and UN agencies. In particular an extensive body research documents and publications have been produced by WIPO. However, compared to most dissertation topics the body of literature is relatively recent and small. I have reviewed the literature and incorporated it into my research; however, I have also relied heavily on acquiring knowledge directly from experts and participating directly in processes related to the topic – as I have outlined in my methodology.

Chapters Overview

Chapter Two begins by first outlining the development and the nature of Indigenous knowledge systems in and connected regulatory regimes, concluding generally that Indigenous Nations developed complex and advanced knowledge systems that have made major contributions to humanity. Chapter Three considers how these knowledge systems have been diminished by European ethnocentric mythologies that have been supported and perpetuated through various mediums.

Chapter Four of the dissertation examines the development and the nature of the IPR system. European concepts such as moral rights, authors' rights copyright and conventions such as the Statute of Anne and the Berne Convention are also considered in this section. Chapter Five looks at case studies of interaction between Indigenous and European systems. The case studies are analyzed in terms of the insights they provide about the functionality of the IPR system and its ability to incorporate TK. It highlights concerns that existing regimes of protection are not able to protect certain forms of TK. The case studies show that an historical inequitable relationship between European and Indigenous systems persists resulting in the severe exploitation of Indigenous systems.

Chapters Six examines Indigenous and national initiatives considers Indigenous principles together with developing Common Law in Canada and Australia as to their relevance to the establishment of new regulation. This includes an outline of South Africa's recently established Indigenous Knowledge Systems Policy issues and summaries of judgments in Canada and Australia, as well as the development of Indigenous trademarks in New Zealand and Australia and some initiatives undertaken on the part of the Canadian government. Chapter Seven focuses on national frameworks in the African Union, Brazil, China, Costa Rica, India, Peru, Philippines, Portugal, Peru, The United States of America and

Thailand. This chapter on National Initiatives concludes that several useful models of TK protection exist.

Chapters Eight and Nine focus on the International Framework around TK, along with a brief outline of related discourses taking place in various international forums including WIPO, CBD, UNESCO and various other United Nations forums, and WTO. This research in these chapters illustrates that TK has become a subject of immense importance around the world and that a great deal of ongoing work is required in the area.

The concluding Chapter Ten provides an overview of ways to move forward on TK issues in Indigenous, national and global contexts. An analysis of the practices and works of one particular Indigenous artist, Bill Reid, is analyzed to illustrate how concepts from Indigenous and European Laws could be fused in new models regulating the use and transformation of TK through contemporary practice. The conclusions focus on how Indigenous Intellectual Property and TK should best be ethically treated and regulated in its use by Indigenous peoples, non-Indigenous peoples and in the public domain. The salient discourse over the establishment of *Sui Generis* protection vs. adapting the IPR system is also discussed and analyzed. The dissertation concludes that new laws and systems of protection for TK need to be developed and implemented at national and international levels, and that this work should progress based on analysis of the various existing models, legislation and laws.

CHAPTER TWO: INDIGENOUS KNOWLEDGE SYSTEMS

Prior to contact with Europeans between 300-600 years ago, Indigenous knowledge systems had developed and flourished over thousands of years in various parts of the world. These knowledges are rich and varied, ranging from soil and plant taxonomy, cultural and genetic information, animal husbandry, medicine and pharmacology, ecology, zoology, music, arts, architecture, social welfare, governance, conflict management, and many others.¹ This chapter will briefly outline a very small sampling of the manifestations of Indigenous knowledge systems that existed prior to European contact and colonization, most of which continue to exist and evolve.

Significant Contributions to Humanity: Devalued and Diminished

In the northern part of the continent of South America, Indigenous nations had charted the constellations, developed astrological charts and constructed elaborate pyramids that parallel the pyramids in Egypt. In the mountains near the mid-west coast of the Continent were complex city structures containing shaped stone buildings, stairs, walkways and irrigation systems that still stand today. The ruins show precision-crafted buildings with neat regular lines, beveled edges, and mortarless seams that characterize the best of Inca architecture.² In the interior of North America, Indigenous nations constructed gigantic mounds, some in the shape of animal and human figures that can only be identified from an aerial view. Entombed bodies and metal tools have been found inside these mounds

¹ Hoppers, Catherine, (2002). In Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation (pp. 11). Claremont, South Africa: New Africa Books.

² Weatherford, Jack, (1988). In Indian Givers: How Native Americans Transformed the World (pp. 59). New York, New York: Crown Publishers.

indicating, “a complex and advanced civilization at work.”³ Along the Northwest coast of the Continent intricate wood longhouses were constructed comprising village structures that continue to intrigue architects. The three hundred or so tribal groups who lived in North America when Christopher Columbus arrived built their homes and arranged their settlements according to similar patterns and principles passed from generation to generation.⁴

Far beyond architecture Indigenous design in North America had produced products including a variety of canoe designs, the kayak, snow shoes, sunglasses and a multitude of various farming and hunting implements. Gardening using hydroponics and advanced farming techniques were developed and practiced in various continents by Indigenous peoples producing a range of crops including corn, squash, beans, tomatoes, wheat, potatoes and varieties of fruits. Throughout the Amazon basin Indigenous farmers had overcome problems with termites and other insects by utilizing extracts from trees that act as natural repellent – which some Western scientists now struggle to understand and reproduce. Throughout North America and South America, Indigenous farmers had a profound understanding of genetics enabling them to experiment with new strains of potatoes. In the Andean region Indigenous farmers knew that by taking pollen from one variety of corn and fertilizing the silk of another variety, they could create a corn with combined characteristics of the two parent crops.⁵

Major advances in the realm of health and herbal medicines had been developed throughout the continents of the Indigenous world. Shamans and traditional healers practiced

³ Francis, Daniel (1992). In The Imaginary Indian: The Image of the Indian in Canadian Culture (pp.193). Vancouver, British Columbia: Arsenal Pulp Press.

⁴ Nabokov, Peter, & Easton, Robert, O.B. (1989). In Native American Architecture (pp. 12). Oxford, New York: Oxford University Press.

⁵ Weatherford, Jack, (1988). In Indian Givers: How Native Americans Transformed the World (pp.85). New York, New York: Crown Publishers

spiritual, herbal, and psychological techniques, including the placebo effect. Indigenous herbal specialists around the world gathered plants and studied and developed natural medicines that continue to surpass by far advances in herbology by non-Indigenous peoples.

Indigenous knowledge systems have also made many significant contributions to the arts and humanities of the world. The technique of acid etching of designs of Hohokam peoples in what is now southwestern Arizona (dating back to 500 b.c.) predates the technique in Europe by three hundred years.⁶ Stories of ancient times before human beings, stories of the Creation of Indigenous peoples and other stories of spiritual, mythological and legendary figures are rooted in the Oral Tradition of Indigenous nations and have been passed down through generations and continue to fascinate many of the peoples of the world. Elaborate Indigenous artistic techniques and designs in sculpture, painting, music, drama, dance, continue to thrive in traditional and evolved forms, and have intrigued art historians and the art world for centuries.

In the area of governance, complex political systems exist among Indigenous nations and include chieftainships, monarchies, and evidence of universal rights and democracy prior to any such concepts in Europe. The Haudenosaunee People of the Longhouse practice a democratic form of government and formed the League of the Six Nations Confederacy that would later influence the development of American and European democracy. Oral history among the People of the Longhouse place the origin of the league at about 900 b.c.⁷ Other united nations structures along the northwest coast, eastern seaboard and southern and northeast plains of North America developed between 2500 and 1500 years ago and far predate any such structures in Europe.

⁶ Francis, Lee, (1996). In Native Time: A Historical Time Line of Native America (pp. 14). New York, New York: St, Martin's Griffin.

⁷ Ibid.

Indigenous knowledge systems represent the accumulated experience, wisdom and know-how unique to nations, societies, and or communities of people, living in specific environments of America, Africa, Asia and Oceania. It represents the accumulated knowledge of seventy per cent of the earth's people—some ten thousand distinct peoples and cultures. In the past, Eurocentric knowledge has condescendingly associated Indigenous knowledge with the primitive, the wild, and the natural.⁸ This is the prevailing negative Eurocentric perception of TK that forms the basis for the status quo. Despite the advances made by knowledge systems throughout the Indigenous world, the Western world's general response throughout the colonial and most of the post-colonial periods was to dismiss the value of TK. Since only European people could progress, all Indigenous knowledge was viewed as static and historical.⁹

Indigenous knowledge is not only "technical" or empirical in nature, but also its recipients integrative insights, wisdom, ideas, perceptions and innovative capabilities that pertain to ecological, biological, geographical, and other physical phenomena. It has the capacity for total systems understanding and management.¹⁰ Yet these high capacity, time-tested Indigenous systems' have been devalued and diminished by having Eurocentric perceptions and institutions imposed upon them. In the process, many of the systems have been de-based through misrepresentation, misappropriation, unauthorized use and the separating of the content from its accompanying regulatory regime.

Customary Laws: Developed Legal Regimes Devalued and Diminished

Indigenous Peoples have numerous internal Customary Laws associated with the use of TK. These Customary Laws have also been called “cultural protocols” and are part of the

⁸ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.1). Unpublished.

⁹ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.6). Unpublished

¹⁰ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp. 2). Unpublished.

laws that Indigenous Nations have been governed by for millennia and are primarily contained in the Oral Tradition. Although, in lieu of the increased outside interest in TK and problems with interaction between TK and IPR systems, there is a current movement among Indigenous Nations to document their protocols in written and/or digital format.

Customary Laws around the use of TK vary greatly between Indigenous Nations, but include such regulations as:

- Certain plant harvesting, songs, dances, stories and dramatic performances can only be performed/recited and are owned by certain individuals, families or clan members in certain settings and/or certain seasons and/or for certain Indigenous internal cultural reasons;
- Crests, motifs, designs and symbols, and herbal and medicinal techniques are owned by certain individuals, families or clan members;
- Artistic aspects of TK, such as songs, dances, stories dramatic performances, and herbal and medicinal techniques, can only be shared in certain settings or spiritual ceremonies with individuals who have earned, inherited and/or gone through a cultural and/or educational process;
- Art forms and techniques, and herbal and medicinal techniques, can not be practiced, and/or certain motifs can not be used, until the emerging trainee has apprenticed under a master of the technique;
- Certain ceremonial art and herbal and medicinal techniques can only be shared for specific internal Indigenous cultural and/or spiritual reasons and within specific Indigenous cultural contexts.

These are but a few general examples of Customary Laws that Indigenous Nations around the world have developed over thousands years to regulate the use of TK. Indigenous protocols are intimately intertwined and connected with TK and form what can be viewed as whole and complete integrated complex Indigenous Knowledge systems throughout the world. For example, speaking about clan ownership in Nlakapamux Customary Law, Shirley Sterling states: “This concept of ownership by clans, nations and family groups and individuals of stories and other knowledge must be respected. The protocols for the use of collective

knowledge from each cultural area and each First Nation would have to be identified and followed.”¹¹

Indigenous Customary Law, like other sources of law, is dynamic by its very nature. Like its subject matter – culture, practices and traditions – it is not frozen in time, it has evolved with the social development of Indigenous peoples. Indigenous Customary Law also has an inextricable communal nature. The social structures that recreate, exercise and transmit this law through generations, and the protocols that govern these processes, are deeply rooted in the traditional territories of Indigenous peoples, and, understandably are inalienable from the land and environment itself.¹² Indigenous Customary Law is inseparable from Indigenous knowledge. In some Indigenous Nations, the abstract subtlety of Indigenous customary law is indivisible from cultural expressions such as stories, designs and songs. That is, a story may have an underlying principle of environmental law or natural resource planning.¹³ A song may explain the custodial relationship that a certain community has with a particular animal species. A design may be a symbol that expresses sovereignty over a territory as well as the social hierarchy of a nation’s clan system. A watchman’s pole may be considered an assertion of Aboriginal title, tell a story of a historical figure and have a sacred significance.¹⁴

Neither the common law nor international treaties place Indigenous customary law on equal footing with *other* sources of law. As a result, the TK is particularly vulnerable to continued destruction without substantive legal protection. Indigenous jurisprudence and law

¹¹ Sterling, Shirley, (1997). In The Grandmother Stories: Oral Tradition and the Transmission of Culture (pp. 39). Unpublished Doctoral thesis. University of British Columbia Press.

¹² Alexander, Merle, (2003). In Customary Laws: Applying Sharing within Communities to International Instruments (pp.9). Unpublished.

¹³ See Borrows, *supra* 1, at 17–20 for an interpretation of an Anishinabek resource law regarding *Nanabush v. Deer, Wolf et al.*

¹⁴ Alexander, Merle, (2003). In Customary Laws: Applying Sharing within Communities to International Instruments (pp.11). Unpublished.

should protect Indigenous knowledge. In relation to Eurocentric law, Indigenous jurisprudence of each heritage should be seen as an issue of conflict of laws and comparative jurisprudence. With regard to its authority over Indigenous knowledge, Indigenous law and protocols should prevail over Eurocentric patent, trademark or copyrights law.¹⁵ However, due to a series of historical realities that will be considered in the following chapters, the *status quo* is that Indigenous knowledge has become subjugated under European legal regimes.

¹⁵ Henderson, Sakej, (2004). In Indigenous Traditional Knowledge (pp.9). Unpublished.

CHAPTER THREE:

MANUFACTURING THE MYTHOLOGICAL “OTHER”

This chapter will include a summary and analysis of early texts on Indigenous peoples by explorers and missionaries, anthropological and archeological texts, and popular literature and film, with regard to their contribution to the construct of a *status quo* image of Indigenous peoples as unadvanced and in need of development through access to European knowledge. It will also focus on how TK was discounted and/or devalued in the process.

An Historical Overview of the Portrayal of Indigenous Peoples through Literature

Early writings about Indigenous peoples in North America were authored by explorers like Champlain and Cartier in the 1500s and 1600s, missionaries like John McDougall in the 1800s, anthropologists like Diamond Jenness and Franz Boas around the turn of the century, and literary writers such as James Fenimore Cooper and Stephen Leacock in the early to mid 1900s. The vast majority of these writers made reference to Indigenous peoples as an inferior vanishing race in a manner that is degrading and offensive to many Indigenous peoples, conveying little information about their cultural reality.

In *Indians of Canada*, for example, which was for decades considered to be the authoritative anthropological text, originally published in 1938, Diamond Jenness begins in the first paragraph writing,

When Samuel Champlain in 1603 sailed up the St. Lawrence River and agreed to support the Algonkian Indians at Taboussac against the aggression of the Iroquois, he could not foresee that the petty strife between these two apparently insignificant hordes of savages would one day decide the fate of New France.

Much of the literature written by explorers, missionaries and anthropologists provided little insight into the cultural realities of Indigenous Peoples, yet it influenced the intellectual

foundations for European-based society's perception of Indigenous peoples as basically primitive and under-developed. It has also been argued further, by Indigenous intellectuals such as Ward Churchill (1992) and John Mohawk (1988), that the common perception was also characterized, consciously or subconsciously, by Darwinian concepts that can be taken to suggest Indigenous peoples are located somewhere on an evolutionary scale between primates and homo-sapiens.

Later, imposters such as Sylvester Long (a.k.a. Long Lance 1922-1929) and Archie Belaney (a.k.a. Grey Owl 1931-1937) came to have considerable notoriety lecturing, writing and publishing while masquerading as Indigenous. Generally, these writers displayed a less condescending and more positive attitude toward Indigenous peoples; although their work tended to reinforce the stereotypical image of Indigenous peoples as glorified remnants of the past, *à la* Rousseau's (1928) concept of "the Noble Savage." As noted by Robert Berkhofer in his book *The Whiteman's Indian*, "Although each succeeding generation (of writers) presumed its imagery based more upon the Native Americans of observation and report, the Indian of imagination and ideology continued to be derived as much from polemical and creative needs of Whites as from what they heard and read of actual Native Americans or even at times experienced."¹ A review of the literature would reveal that high profile Canadian writers, such as Farley Mowat and Stephen Leacock, conveyed many of the perceptions created by explorers and missionaries. Even the charlatan tradition set by Grey Owl and Long Lance is evident in the work of contemporary writers such as Jamake Highwater, Lynn Andrews and Adolf Hungry Wolf.

A more recent development in the late 1980s and throughout the 1990s has been a wave of writing by non-Indigenous academics such as Frank Cassidy, Boyce Richardson,

¹ Berkhofer, Robert, Jr. (1979). In *The Whiteman's Indian: Images of the American Indian from Columbus to the Present* (pp. 27). New York, New York: Vintage Books.

Thomas Berger, Michael Ashe, Sally Weaver, Menno Bolt and Anthony Long. Many of these authors are involved with higher-level academic and government institutions and have established themselves as authoritative “Native Studies experts.” The majority of these writers are knowledgeable and supportive of Indigenous peoples’ political and cultural aspirations, and they must also be credited with some of the increased public awareness in recent years. However, while much of this body of work has observational and analytical value, it cannot express Indigenous knowledge, nor can it express Indigenous peoples’ unique internal perspective on contemporary political and cultural issues. Although this body of work is predominately well-intentioned, some Indigenous writers such as Lee Maracle (1996) and Leroy Littlebear (1992) have stated that it tends to reduce the emotionally, historically and culturally charged issues to dry information laden with legalized and/or academic jargon. As stated by the late Howard Adams, “Academia is slow to re-examine what has been accepted for centuries... These myths have been so deeply ingrained in the peoples’ psyche that even Aboriginals will have to go to great lengths to rid themselves of colonial ideologies.”²

As further observed by Churchill, “the current goal of literature concerning Indians is to create them, if not out of the whole cloth, then from only the bare minimum of fact needed to give the resulting fiction a ring of truth.”³ Here Churchill expresses a view commonly held by many Indigenous peoples — as well as many mainstream historians and academics — that a review of contemporary literature reveals an improvement in the portrayal of Indigenous peoples, but also a persistence of subtle inappropriate stereotypes and faulty academic paradigms. It has been argued by Indigenous intellectuals, that the common

² Adams, Howard (1995). In A Tortured People: The Politics of Colonization (p. 33). Penticton, British Columbia: Theytus Books Ltd.

³ Churchill, Ward, (1992). In Fantasies of the Master Race: Literature, Cinema and the Colonization of American Indians (pp. 38). Monroe, Maine: Common Courage Press.

perception was also characterized, consciously or subconsciously, by Darwinian concepts and that these faulty images have impacted the adverse colonial and post-colonial legislative treatment of Indigenous peoples.

The Indigenous Voice

The creation and/or expression of culture by Indigenous peoples through any traditional medium or any contemporary medium or any combination thereof, constitutes an expression of what can be referred to as the “Indigenous Voice.” Drawing from a blend of traditional and contemporary sources such as Oral History, traditional storytelling technique, inanimate, animal and spirit characters from legends, and contemporary existence, literary technique literature, or other mediums such as film or multi-media, the contemporary Indigenous Voice is a unique mode of cultural expression.

Throughout the past three decades Indigenous authors and artists have developed and expressed the Indigenous Voice by creating a body of work that now stands out as a distinct culturally-based contemporary body of work constituting its own literary canon and artistic standards. This important body of work is the most culturally authentic expression of Indigenous knowledge; although it has often been overshadowed by non-Indigenous writers who continue to develop a separate body of literature focusing on Indigenous peoples as subjects. At the same time it must be acknowledged that the significance of Indigenous literature is beginning to be realized by the Canadian literary and publishing establishments, after years of marginalization and lack of understanding and access. The lack of Indigenous knowledge portrayed through literature is similarly reflected in film, television, popular music, advertising, educational systems and various other mediums.

The paramount purpose of literature focusing on a specific cultural group should be to present the particular culture in a realistic and insightful manner, with the highest possible

degree of verisimilitude. As Franz Boas (1955-1960) argued in his progressive anthropological concept of “ethnocentrism” this purpose can ultimately only be achieved through a perspective of a culture from the inside. Jacques Derrida calls the “ethnocentrism of the European science of writing in the late seventeenth and early eighteen centuries a symptom of the general crisis of European consciousness,” and states further that “recognition through assimilation of the Other can be more interestingly traced... in the imperialist constitution of the colonial subject.”⁴ Indeed, the vast majority of the literature on Indigenous peoples tends to view them as “the Other” and thus fails to achieve an internal cultural perspective. This failure has been a long-standing concern of Indigenous peoples and other marginalized groups, and was identified by progressive anthropologists, like Boas, in the mid 20th century and by members of the Canadian literary establishment, such as Atwood, who wrote in 1972, “The Indians and Eskimos have rarely been considered in and for themselves: they are usually made into projections of something in the white Canadian psyche.”⁵ Although increased cultural awareness and the concept of ethnocentrism throughout the 1980s and 1990s has led to a marked improvement in the contemporary literature on Indigenous peoples, there is still a significant body of literature being produced that contains some of the old stereotypes and perceptions, and lacks respect for Indigenous perspectives.

This misrepresentation in many ways parallels the editorial advances that have been made in the late 20th century in writing about African Americans and women, and the development of concepts such as “Black History” and “Herstory.” One predominant assertion made by Indigenous writers, editors and publishers is that the experience of being an

⁴ Spivak, Gayatri Chakravorty (1994). In Can the Subaltern Speak?, Colonial Discourse and Post-Colonial Theory: A Reader (pp. 89). New York, New York: Columbia University Press.

⁵ Atwood, Margaret (1972). In Survival: A Thematic Guide to Canadian Literature (pp. 91). Toronto, Ontario: McClelland & Stewart Inc.

Indigenous person is profoundly different from that of other people in North America. Many Indigenous authors have cited cultural appropriation and misrepresentation through literature and lack of respect for Customary Laws as significant problems in writing and publishing. Indigenous peoples have frequently taken the stance that they are best capable and morally empowered to transmit information about themselves. However, whereas it must be acknowledged that there are established genres of writing and reporting on Indigenous subject matter, and Indigenous peoples would at least like to have an opportunity to have input into certain aspects of how they are portrayed.

Indigenous Peoples, along with various historians, academics and other cultural groups, have argued that it is important for any national and/or cultural group to have input into the documentation of its history, philosophies and reality, as a basic matter of cultural integrity. In some respects, Indigenous Peoples need to “tell their own story” and/or exercise some authority over how they are represented even more so than other national and cultural groups because of the way in which they have been misrepresented by various disciplines which have presented literature in a manner predominately inconsistent with, and often in opposition to, Indigenous cultural concerns.

The primary purpose of the Indigenous literatures and publishing should be to promote the Indigenous Voice by ensuring the highest possible Indigenous-based editorial standards, while at the same time developing and employing that guidelines need to be developed and established in order to respect cultural integrity and complement the emerging distinct Indigenous literary voice and perspectives. Indigenous material should be expressed with the highest possible level of cultural authenticity, and in a manner that maintains Indigenous cultural integrity. However, as stated by Linda Smith, “A critical aspect of the struggle for self-determination has involved questions relating to our history as indigenous

peoples and a critique of how we, as the Other, have been excluded from various accounts.”⁶

Overturing this tide, therefore, often involves navigating a combined process of “writing back” against the *status quo*; and appropriately representing Indigenous knowledge.

⁶ Smith, Linda Tuhiwai, (1999). In Decolonizing Methodologies: Research and Indigenous Peoples (pp. 28). London and New York: Zed Books.

CHAPTER FOUR:

EUROPEAN SYSTEMS: THE INTELLECTUAL PROPERTY RIGHTS SYSTEM

One of the greatest ironies of the *status quo* in the interface between European and Indigenous knowledge management systems is that Indigenous systems predate European systems by centuries. This point can be highlighted by the historical reality that when Christopher Columbus landed in the Americas hundreds of integrated knowledge systems complete with regulatory regimes had been functioning on the Continent for generations, while no such regulatory regimes were in existence in Europe. What would now be termed “piracy,” “unauthorized disclosure,” and “copyright infringement” was common practice in 16th century Europe. In the period of time leading up to mid-16th century, European authors’ works were produced and sold without permission (Crean-1993), and inventors began to boycott the trade fair circuit based around Frankfurt because they would commonly have their ideas misappropriated (McDougal-2001). This chapter will briefly outline the development of the some the important milestones in Europe that lead to the concept of “Intellectual Property” and the development of what became IPR system.

Copyright

The word copyright came into being as a reference to the sole right of The Stationers’ Company to copy texts, first enacted in the second half of the 16th century in England. The Stationers’ Company was a London-based booksellers’ cartel that enjoyed a legislative monopoly over the trade in books in exchange for assistance in the suppression of “seditious” and “blasphemous” texts. An idea akin to the modern notion of copyright was developed in 15th century Venice, predating the Industrial Revolution when creations were imbued with unprecedented social and economic value. The first such legislative award was made in 1486

to historian Marc Antonio Sabellico. The grant of copyright protection by Venetian authorities was meant to compensate inventors and stimulate invention. In 1545 the Venetian Council of Ten demanded that booksellers secure written proof that their publications had received authorial consent.¹

Copyright as we know it began in 1710 with the enactment in England of the Statute of Anne. Prior to this, publishing was regulated by means of the Licensing Act, which required all books be registered with the Company of Stationers. Thus copyright was not introduced to deal with concerns of authors, but to regulate the trade in books and to assuage the concerns of the booksellers and printers. The mention of the rights of authors in the preamble had more to do with window dressing than substantive protection.

The preamble stated:

Whereas Printers, Booksellers and other persons have lately frequently taken the Liberty of printing, Reprinting and Publishing or causing to be Printed, Reprinted and Published Books and other writings without the consent of Authors or Proprietors of such Books and Writings to their very great Detriment, and too often to the ruin of them and their families...²

With the Statute of Anne came a time limit on the rights of authors: twenty-one years for the books already on the Stationers' Register, and up to twenty-eight years for new books. It also introduced the concept of the Public Domain, a commons that encompasses documents and material of all kinds no longer protected by copyright. Regardless of ownership, once the term of copyright expires, Intellectual Property becomes the property of everyone. The physical embodiment of it may continue to belong to individuals or institutions, but the Intellectual Property falls into the Public Domain. However, if a new work is created which incorporates a work that is in the public domain, the new work is protected.

¹ Crean, Susan, Taylor, Caldwell & Young-Ing, Greg, (2003). In Handbook on Creator's Rights (pp 8). Toronto, Ontario: Creators' Rights Alliance.

² Ibid.,10

The enactment of this statute meant that two authorities governing the rights of authors existed in England: Common Law (the law created by decisions of judges), and Statute Law (the law created by legislation). The decisive case came in 1769 with the judgment in *Millar v. Taylor*. Millar was a London-based bookseller who brought the suit for copyright infringement against Taylor, a rival bookman who had published “The Seasons”, a poem Millar “owned.” Millar grounded his case in Common Law arguing that he had purchased the rights to the poem in perpetuity. Taylor based his defense on the Statute of Anne claiming that Millar’s copyright had run its course and the poem was in the Public Domain.

The judge decided in favour of Common Law and Millar saying, “It is just, that an author should reap the pecuniary profit of his own ingenuity and labour. It is just, that another should not use his name without his consent. It is just that he should judge when to publish, or whether he will publish. It is fit he should not only chose the time, but the manner of publication, how many, what volume, what print. It is fit, he should choose to whose care he will trust the accuracy and correctness of the impression...”³

The Millar Decision in favor of authorial rights stood for only five years. It was overturned in 1774 in the case of *Donaldson v. Beckett* (Donaldson being a pirate publisher, and Becket being an author) which established the notion of the balance of interests between creators and users in copyright.

Droit D’auteur and Droit Moral

Moral rights came into being in France in the 18th century. The moral rights theory holds that a creator is a sovereign individual and therefore his/her work is sovereign and must be so respected. The UN Declaration of Human Rights states that “*Everyone has the right to*

³ Ibid., 16

the production of moral and material interests resulting from scientific, literary or artistic production of which he is the author” in Article 27 (2). This is balanced by article 2 (1) which states that “*Everyone has the right to freely participate in the cultural life of the community to enjoy the arts and to share in its benefits*” (The UN Declaration of Human Rights - 1951) .

The Berne Convention for the Protection of Literary and Artistic Works of 1886 was the first international agreement on copyright in Europe. The Convention, enacted a moral rights clause at its Rome Congress in 1928. Article 6 states, “*Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation*” (The Berne Convention-1928).

The concept of *droit moral* (moral rights) was introduced which in turn led to the concept *droit d’auteur* (author’s rights). *Droit moral* theory holds that the author/creator is sovereign and, therefore his/her work is sovereign and must be respected as such. *Droit d’auteur* holds that the rights of the author/creator are natural and inalienable rights and that the author/creator must be identified with and credited for the work.

Originality

The key criterion for copyright protection is that the work be “original.” Originality does not mean that a work must be unique, one of a kind, unlike anything else, but rather that it be an original expression of the author, and not a copy of another work.

The explanation of one American jurist, Judge Learned Hand in 1936 is often quoted as a definition: “Borrowed the work must not be for the plagiarist is not himself pro tanto an “author”; but if by some magic a man who has never known it were to compose anew Keat’s

“Ode on a Grecian Urn”, he would be an “author”, and, if he copyrighted it, others might not copy that poem, though they might of course copy Keat’s.”⁴

Ownership

Copyright in a work belongs in the first instance to the creator. Subsequently, it may be licensed or assigned, for example, to producers, publishers, and distributors who manufacture and market the work. If a work is produced during the course of employment as part of the employee’s duties, however, the law stipulates that the rights are the employer’s. Similarly, if a photograph, portrait, engraving or print is commissioned, the person ordering the work and paying for it is deemed to own the copyright, unless there is an agreement to the contrary. There are thus two kinds of copyright owners operating in the cultural sector, corporations or businesses and individual creators.

In some countries, in order to have copyright protection a work must be registered. In Canada, when someone creates a work, it is automatically protected under the Copyright Act so long as the creator is Canadian or is resident here, or in a country which is a signatory to the international conventions, such as the Berne Convention, to which Canada belongs.

The so-called “Anglo-American copyright systems” (in Canada and the U.S. and influencing, and being adopted in other countries) have a primarily utilitarian logic. In return for enriching the public, creators are allowed to reap some of the fruits of their creative labours. But the monopoly thereby granted by the state is temporary, and the law expresses an interest in protecting the public’s right to copyright material in the long term through the concept of the public domain. Hence, copyright’s concern with “balance.” In public policy terms this can be understood as the tension between individual rights and public freedoms,

⁴ Ibid.

that is between the property rights of individuals and the right of society to its cultural heritage and to the freedom of information.

The Continental system is based on the concept of the *droit d'auteur* as the “natural and inalienable” right of individual creators. The interests of creators are paramount, not those of the public, and moral rights are central. Moreover, these are deemed to be human rights, attached to the individual creator. They indicate that besides being a product or service or a performance, a creation is connected to the person of its creator. Behind the painting, the text, or the film, lies the reputation of its author.⁵

Patents and Trademarks

The regulation of patents protecting industrial inventions, the oldest form of Intellectual Property, goes back to the Venetian Decree of 1474.⁶ However, the concepts of patents did not get wide spread recognition in Europe with the passage of the 1624 *Statute of Monopolies* in the U. K. The Statute of Monopolies of 1624 in the UK spoke of granting patents for “any manner of new manufactures.” *The Paris Convention for the Protection of Industrial Property* was passed in 1883. *The European Patent Convention* was passed in 1973.

Patents are granted to inventors in order to protect their inventions from being copied or used by others for a fixed time period, usually seventeen-twenty years. Most industrialized countries now have a Patent Office (PO) to administer the application and regulation of patents. The main criteria for the granting of patents are that the invention must be “new,

⁵ Ibid.

⁶ Vaver, David, (1997). In Intellectual Property Law: Copyright, Patents, Trade-Marks (pp. 1). Concord, Ontario: Irwin Law.

useful and unobvious ideas with practical application.” This can include “new machines, products, processes, or improvements on existing technology.”⁷

As European societies became increasingly industrialized, it became apparent that patents and copyright was not sufficient to protect all forms of Intellectual Property. In the eighteenth century, European countries in the process of industrialization developed the concept of “trademark” which was later legislated in the form of national Trademark Acts. Patent, trademark along with copyright, now make up the current IPR System. Trademarks are used to support a company’s claim that its products are unique as compared to similar products from other companies. The main criteria for granting trademarks is that the product is “authentic” and “useful.” Most industrialized governments now have agencies to grant and administer trademarks. Once a trademark is applied for in its country of “origin” the trademark applicant can apply to have it registered in other countries it may wish to export its products to. Some groupings of countries have multilateral trademark agreements, such as *The Madrid Agreement Concerning the International Registration of Trademarks* that enables an applicant to be granted trademark in the thirty signatory countries with a single application.

Ratification by Canada of the latest versions of the Paris Convention (1967) and Berne Convention (1971) requires Canada to bring its Intellectual Property laws in line with the conventions. In the Irwin Essentials in Canadian Law Series title *Intellectual Property Law: Copyright, Patents, Trade-Marks* (1997), David Vaver notes that “early in its history, Canada came to protect foreign authors and enterprises alongside its native born – at least its Native born descended from settlers.” Vaver further states, “Both the *Paris and Berne* conventions were highly Eurocentric treaties that ignored the culture of indigenous peoples.

⁷ Ibid.,120

Native culture was thought to be free for the taking, the product of many and so the preserve of none - except when it was transformed by the mediation of Europeans, whereupon it magically gained cultural legitimacy.’’⁸

⁸ Ibid., 2

CHAPTER FIVE: CASE STUDIES IN IPR/TK INTERFACE

This chapter will detail examples of TK that has been misappropriated and otherwise protected or unprotected under copyright, patents and trademarks. The case studies will be analyzed in terms of the insights they provide about the functionality of the IPR system and its ability to incorporate TK and the interests of the Indigenous peoples where the TK originates from. The chapter will highlight concerns that existing regimes of protection are not able to protect certain forms of TK; and, therefore, supporting the argument that new systems of protection need to be developed and implemented. The three main mechanisms of the IPR system, copyright, patent and trademark, will be examined through specific cases to show how they have impacted TK. Through the examination of the case studies some brief analysis of how each mechanism interacted with TK will also be provided.

Interaction Between TK and IPR Systems

As eluded to earlier, in the process of transporting European institutions into various parts of the world occupied by Indigenous people, the IPR system has now been imposed upon the TK system. Many issues have arisen in the past ten years regarding problems resulting from the existing IPR system's apparent inability to protect TK. The main problems with TK protection in the IPR system are:

- 1) that expressions of TK often cannot qualify for protection because they are too old and are, therefore, supposedly in the Public Domain;
- 2) that the "author" of the material is often not identifiable and there is thus no "rights holder" in the usual sense of the term; and,
- 3) that TK is owned "collectively" by Indigenous groups for cultural claims and not by individuals or corporations for economic claims.

The Public Domain Problem

Under the IPR system, knowledge and creative ideas that are not “protected” are in the Public Domain (i.e. accessible by the public). Generally, Indigenous peoples have not used IPRs to protect their knowledge; and so TK is often treated as if it is in the Public Domain – without regard for Customary Laws. Another key problem for TK is that the IPR system’s concept of the Public Domain is based on the premise that *the author/creator deserves recognition and compensation for his/her work because it is the product of his/her genius; but that all of society must eventually be able to benefit from that genius*. Therefore, according to this aspect of IPR theory, all knowledge and creative ideas must eventually enter the Public Domain. Under IPR theory, this is the reasoning behind the time period limitations associated with copyright, patents and trademarks.

The precept that all Intellectual Property, including TK, is intended to eventually enter the Public Domain is a problem for Indigenous peoples because Customary Law dictates that certain aspects of TK are not intended for external access and use in any form. Examples of this include, sacred ceremonial masks, songs and dances, various forms of shamanic art, sacred stories, prayers, songs, ceremonies, art objects with strong spiritual significance such as scrolls, petroglyphs, and decorated staffs, rattles, blankets, medicine bundles and clothing adornments, and various sacred symbols, designs, crests, medicines and motifs. However, the present reality is that TK is, or will be, in the Public Domain (i.e., the IPR system overrides Customary Law.)

Case Studies

After providing some background as to the key reasons behind the IPR systems deficiencies in protecting TK, the remainder of the chapter will now turn to some specific examples. Indeed, there are hundreds of such case studies many of which are referred to in

the literature and discourse. However, for the purposes of illustration, the number of case studies will be limited to two or three under the categories of copyright, trademark and patent. The cases will attempt to show that an intellectual/legal analysis of reasons for IRR deficiencies can be made simpler by looking at some concrete examples. An effort has also been made to provide a balance between positive and negative examples in terms of IPR/TK interaction in the selection of the cases.

Copyright Cases

This section will first contrast two cases where Indigenous stories have been published in children's books. The first case is one in which a non-Indigenous author overtly appropriated and copyrighted stories, and the second in one in which an Indigenous publisher attempted to adopt aspects of Customary Law into the publishing process. A third example of a case of music copyright is also included.

The Cameron Case

In 1985 the Euro-Canadian author Anne Cameron began publishing a series of children's books through Harbour Publications based on Westcoast Indigenous traditional stories. These books include: *The Raven*, *Raven and Snipe*, *Keeper of the River*, *How the Loon Lost Her Voice*, *Orca's Song*, *Raven Returns the Water*, *Spider Woman*, *Lazy Boy* and *Raven Goes Berry-picking*. Cameron had been told the traditional stories by Indigenous storytellers and/or had been present at occasions where the stories were recited. The original printing of the books granted Anne Cameron sole authorship, copyright and royalty beneficiary, and gave no credit to the Indigenous origins of the stories. As the discourse around Indigenous cultural appropriation emerged in the 1990s, Cameron's books came under severe Indigenous criticism; not only on the grounds of cultural appropriation, but the

Indigenous TK holders asserted that some of the stories and aspects of the stories were incorrect.

This led to a major confrontation with Indigenous women authors at a women writer's conference in Montreal in 1990. At the end of the confrontation Cameron agreed not to publish any more Indigenous stories in the series: however, she did not keep her word and the books continued to be reprinted and new books in the series continued to be published (Armstrong and Maracle-1992). Some minor concessions have been made in subsequent reprints of books in the series and new additions. Reprints of the books that were produced after around 1993/94 contained the disclaimer: "When I was growing up on Vancouver Island I met a woman who was a storyteller. She shared many stories with me and later gave me permission to share them with others... the woman's name was Klopimum." However, Cameron continued to maintain sole author credit, copyright and royalties payments. In a further concession, the 1998 new addition to the series *T'aal: the One Who Takes Bad Children* is co-authored by Anne Cameron and the Indigenous Elder/storyteller Sue Pielle who also shares copyright and royalties.

The Kou-skelowh Case

The Kou-skelowh Series, published by Theytus Books, could be viewed as proper and ethical process within Indigenous cultural confines. The Series are traditional Okanagan stories that have been translated into English, illustrated and made into children's books. The original Kou-skelowh Series was published by Theytus Books in 1984. The redesigned second versions of the series were published by Theytus in 1991. One of the most valuable aspects of the Series is how its development attempted to incorporate Indigenous cultural protocols into the publishing process. Firstly, in the early 1980s, on behalf of Theytus, Okanagan author Jeannette Armstrong approached the Okanagan Elders Council and asked if

some traditional legends could be used in the project. When the Elders gave permission for three legends to be used, Armstrong then condensed the legends and translated them into English. The English versions were then taken back to the Elders Council for examination and edited until they were approved.

The Elders Council was then asked if Theytus Books could have permission to publish the stories for the book trade. After lengthy discussions, Theytus was granted permission on the grounds that several conditions were met, including that no individual would claim ownership of the legends or benefit from the sales. The Elders Council was also then asked to name the series: Kou-skelowh, meaning “we are the people.” The series is authorless and instead each book contains the caption “An Okanagan Legend.” The series is also copyrighted to the Okanagan Tribal Council – as the Okanagan Elders Council is not an incorporated entity.

The methodology implemented in the Kou-skelowh Series could stand as a model in which concerns with Indigenous cultural protocols were considered, as well as a good example of the uniqueness of Indigenous editorial practice. The methodology that was used in the Kou-skelowh Series could also stand as an example of the uniqueness of Indigenous editorial practice.

The Mbube Case

In its original Indigenous version the “Mbube Song” is traditionally sung with a Zulu refrain that sounds, to English-speaking people, like “wimoweh.” Mbube was a big hit throughout Southern Africa selling nearly 100,000 copies in the 1940s in the recorded version by the South African Solomon Linda who was regarded as the master singer of the song. Linda recorded the tune in 1939 with his group the Evening Birds, and it was so popular that a style of Zulu choral music became known as “Mbube Music.” Decca Records

in the U.S accessed a copy of the recording in the 1950s and passed it on to the singer Pete Seeger, who was apparently enchanted by Mbube, especially the “wimoweh” refrain. Seeger then recorded it with the American folk group The Weavers. American musicologists claim the song really gained notoriety with The Weavers' live version at Carnegie Hall in 1957. Linda was not credited as the writer; it was credited to “Paul Campbell”, a member of the group. The Kingston Trio released their version in 1959 with the writer credit listed as “traditional; adapted and arranged by Campbell-Linda.”

A subsequent version by The Tokens was performed in an audition with the top RCA production team of Hugo (Peretti) and Luigi (Creatore) in 1960. Hugo and Luigi decided the song needed new lyrics. With George Weiss, they keyed in on what they saw as the songs “jungle origins” and wrote *The Lion Sleeps Tonight* including the “wimoweh” refrain that was just Seeger’s mistranslation of Linda's original. The Tokens recorded the quintessential pop version in May 1961 at RCA Studios. The song became a huge international hit and was give another round of popularity and financial benefit when featured as the theme song in the Disney epic *The Lion King*. Linda or his heirs have not received any substantial royalties from a song that is perhaps one of the most well-known worldwide hits.¹

Analysis

While the Kou-skelowh case shows that publishers and editors can make moral decisions to respect TK, the Cameron case shows that the copyright system does not protect traditional stories from appropriation should the “author” choose to continue to maintain copyright. The Indigenous TK holders of the original stories could find no recourse within copyright law. As such they could only make their grievances known and together with the Indigenous women authors make a moral appeal to the copyright holder. This appeal was

¹ Brent, Bill & Glenman, Fred. Translated Hits. Available <http://www.bobshanon.com/stories/hesofine.html>

only moderately effective in that it only lead to some minor concessions. Although the Kou-skelowh case is a more optimistic model for TK within copyright, it fundamentally only represents an innovative use of the system based on the good will of the publisher to respect TK protocols. In the Mbube case, Soloman Linda also had no recourse within copyright law. According to music copyright, a person(s) who does fresh work on an existing work may, however, claim to be the author of the resulting product. (Vader-1997).

Patent Cases

Misappropriation of TK through patents is the area in which the greatest number of misappropriations exists, as thousands of patents on TK have been licensed to corporations and individuals worldwide. At the 7th meeting of the WIPO IGC in March 2005, a representative from the Indian delegation quoted a recent study in which “a random selection of 300 patents in India revealed that over 200 contained TK” (intervention by Indian Delegation at WIPO IGC7 - 2005). The extent of the problem has become a major concern for WIPO, as the body who grants international patents. The organization has conducted several major research studies on the topic in recent years, some of which refer to such cases “erroneous patents” and propose mechanisms to revoke such patent licenses. Many of these controversial patent licenses pit small Indigenous communities against large national and multinational corporations. Noting that there are a wealth of test cases that could be selected, this section will examine two cases: one involving an Inuit corporations unsuccessful attempt to patent Inuit TK in Canada, and the case of the patenting of a plant from Southern Africa by U.S. corporations.

The Igloodik Case

An example of the failure of the Patent Act to respond to Inuit designs is the Igloodik Floe Edge Boat Case.² A floe edge boat is a traditional Inuit boat used to retrieve seals shot at the floe edge (the edge of the ice floe), to set fishing nets in summer, to protect possessions on sled when travelling by snowmobile or wet spring ice, and to store hunting or fishing equipment.

In the late 1980's the Canadian government sponsored the Eastern Arctic Scientific Research Center to initiate a project to develop a floe edge boat that combined the traditional design with modern materials and technologies. In 1988 the Igloodik Business Association (IBA) sought to obtain a patent for the boats. The IBA thought that manufactured boats using the floe edge design would have great potential in the outdoor recreation market. To assist the IBA with its patent application the agency, the Canadian Patents and Developments Limited (CPDL) initiated a pre-project patent search that found patents were already held by a non-Inuit company for boats with similar structures. The CPDL letter to the IBA concluded that it was difficult for the CPDL to inventively distinguish the design from previous patents and, therefore, the IBA patent would not be granted. The option of challenging the pre-existing patent was considered by the IBA, however, it was decided that it would not likely be successful due to the high financial cost and risk involved in litigation.

The Taumatin Case

Taumatin is a natural sweetener made from berries of a katemfe shrub that is traditionally used by Indigenous peoples in Central Africa. The protein is about 2,000 times

² Ford, Violet. The Protection of Inuit Cultural Property (pp. 20). Paper presented at the meeting of the Creator's Rights Alliance National Conference on Traditional Knowledge, June 4, 2004, Montreal.

sweeter than sucrose without any of the health risks. In 1993, researchers from the Lucky Biotech Corporation and the University of California acquired a US patent on all transgenic fruits, seeds, and vegetables containing the gene responsible to producing taumatin (Shand-1993). Although taumatin has still not reached the US and other markets, with the high cost and low production scale of growing taumatin on plantations in Africa, and a \$900 million per year low-calories sweetener market in the US, it is highly likely that African katemfe plantations will not be used; if so, the countries where katemfe is grown will not be able to benefit from exporting the berries.³

Analysis

The Igloolik and Tautimatin cases show that TK can be patented by non-Indigenous corporations, leaving the Indigenous originators with no financial benefits and no recourse other than litigation. Typically in patent challenge litigation, corporations have their own lawyers and financial resources to provide effective legal support, whereas local (Indigenous) communities rarely have such resources or advocates (Posey-1996). Even if a case goes to court, the company may well succeed in convincing the court that its product, use or process is sufficiently different from the original to constitute an invention.⁴

Trademark Cases

As most Indigenous communities are far behind in terms of establishing businesses most trademarking of TK involves a non-Indigenous corporation trademarking an Indigenous symbol, design or name. As Chapter Seven on National Initiatives will examine, this practice has been curtailed by laws in the Philippines, the U.S. and other countries; however

³ Posey, Darrell & Dutfleld, Graham, (1996). Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities (pp. 82). Ottawa, Ontario: International Development Research Centre.

⁴ Ibid., 94

it remains rampant in most countries around the globe (i.e., the 2010 Vancouver Olympic Logo). Again, many cases could have been examined in this section but only two have been chosen: one case involving the Snuneymux Band trade marking petroglyphs through the Canadian Patent Office, and one involving an international corporation's patent licence being the subject of an intense international Indigenous lobbying effort.

The Snuneymux Case

The Snuneymux people have several ancient petroglyphs located off their reserve lands near False Narrows on Gabriola Island, BC. In the early 1990s non-Indigenous residents of Gabriola Island began using some of the petroglyph images in coffee shops and various other business logos. In the mid-1990s the Island's music festival named itself after what had become the local name of the most well known petroglyph image, the dancing man. The Dancing Man Music Festival then adopted the image of the dancing man as the festival logo and used it on brochures, posters, advertisements and T-shirts.

The Snuneymux Band first made unsuccessful appeals to the festival, businesses and the Gabriola community to stop using the petroglyph symbols. In 1998 the Snuneymux Band hired Murry Brown as legal counsel to seek protection of the petroglyphs (Manson-2003). At a 1998 meeting with Brown, Snuneymux Elders and community members on the matter, The Dancing Man Festival and Gabriola business' and community representatives were still defiant that they had a right to use the images from the petroglyphs (Brown-2003).

On the advice of Murry Brown, The Snuneymux Band filed for a Section 91(n) Public Authority Trademark for eight petroglyphs and was awarded the trademark in October of 1998 (Brown-2003). The trademark protects the petroglyphs from "all uses" by non-Snuneymux people and, therefore the Dancing Man Festival and Gabriola Island business

and community representatives were forced to stop using images derived from the petroglyphs.

The Aveda Case

In 2000, The Aveda Corporation, headquartered in Minneapolis and New York City, introduced a cosmetic product line called “Indigenous” which included an aroma candle, essential oil and hair and body shampoo. The products in the line were infused with cedar, sage and sweetgrass and the symbol of the line featured on all labeling and promotional material is the Medicine Wheel. The trademark application No. 75/76,418 under the word “Indigenous” was filed with the US PO on September 9, 1999 and was granted November 15, 1999. The “Indigenous” trademark application was submitted to the Canadian PO on September 15, 1999 and granted on July, 16, 2003.

Indigenous lobbying against the “Indigenous” line began to grow throughout the 2000-2002 in the US, Australia and New Zealand. The lobbying efforts attempted to disseminate the message that the line was offensive to Indigenous peoples mainly because: the word “Indigenous” was trademarked by a non-Indigenous corporation; and, the Medicine Wheel symbol was being used in a culturally inappropriate manner. The cross-cultural issues were somewhat clouded by the fact that the cedar, sage and sweetgrass were obtained from Native Americans and other Native Americans endorsed the products, such as the following statement by Robby Romero (President of the Native Children’s Survival) on one of the brochures: “Indigenous TM express a reverence to Mother Earth, devotion to the environment, and an alliance with Wisdom Keepers of the World.”

Eventually Indigenous lobbyists from the US and Australia began working together and managed to get a meeting with Dominique Conseil, president of Aveda, in September

2003. In the meeting Conseil was persuaded to drop the line and the trademark and the following was stated by Aveda in a press release dated November 4, 2003:

Aveda Corporation today announced the discontinuation of its Indigenous product line as well as its intention to abandon the 'Indigenous' trademark. The Indigenous collection... will cease production immediately.... The decision was reached following a meeting among representatives of several indigenous nations of the Americas and Australia and representatives of Aveda... 'We are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources,' explained Dominique Conseil, president of Aveda. 'Aveda will discontinue marketing any products under the 'Indigenous' trademark and, to emphasize its respect, will begin the formalities necessary to abandon any rights it may have in this trademark,' Mr. Conseil added... 'By its action, Aveda also hopes to stand in solidarity with indigenous peoples in their quest for recognition of intellectual property rights in their traditional wisdom.'

Analysis

While the outcomes of the Snuneymux and Aveda cases appear to shed an optimistic light on trademark protection of TK, a closer examination of the cases still reveals problems with TK and IPR interaction. The Snuneymux trademark did "work" to protect the petroglyphs; however not as the trademark system is intended. According to trademark theory the system is intended to be "offensive" allowing the rights holder to freely use the mark for the promotion and advancement of the product into the marketplace. In the Snuneymux case the petroglyphs were trademarked for "defensive" purposes; i.e., so they would not be used. Like the Kou-skelowh case, the Snuneymux case represents an innovative use of the IPR system that negotiated within the systems limitations and found a way to make it work to protect TK.

The Aveda case may be a great Indigenous lobbying victory; but it is not such a great victory for TK protection within the IPR system. In the case, the extenuating circumstances of a strong and organized lobby, a company eager to protect its naturalist, purest, earthy

image, and an open minded President, lead to the canceling of the line and the trademark. However, like Cameron's minor concessions, the canceling was the result of a willing concession on the part of the rights holder based on a moral appeal. There is nothing within the IPR system that would have compelled Aveda to abandon the mark if it, for example, the company chooses to make an economic decision based on investment in developing and manufacturing the line, and ignore the moral issue presented before it.

Summary

The case studies have shown that serious conflicts exist between the IPR and TK systems and lead to the conclusion that it constitutes a major problem which Indigenous peoples must work out with the modern states they are within and the international community. In contrast to Eurocentric thought, almost all Indigenous thought asserts that property is a sacred ecological order and manifestations of that order should not be treated as commodities.⁵

It is clear that there are pressing problems in the regulation of TK. It is also clear that IPR system and other Eurocentric concepts do not offer a solution to some of the problems. There have been cases of Indigenous people using the IPR system to protect their TK. However, the reality is that there are many more cases of non-Indigenous people using the IPR system to take ownership over TK using copyright, trademark and especially patents. In some such cases this had created a ridiculous situation whereby Indigenous peoples cannot legally access their own knowledge.

One recent study undertaken on behalf of the Intellectual Property Policy Directorate (IPPD) of Industry Canada and the Canadian Working Group on Article 8(j) concluded:

⁵ Battiste, Marie, & Youngblood Henderson James, (2001). Protecting Indigenous Knowledge and Heritage: A Global Challenge (pp.145). Saskatoon, Saskatchewan: Purich Publishing.

“There is little in the cases found to suggest that the IP system has adapted very much to the unique aspects of Indigenous knowledge or heritage. Rather, Indigenous peoples have been required to conform to the legislation that was designed for other contexts and purposes, namely western practices and circumstances. At the same time, there is little evidence that these changes have been promoted within the system, i.e., from failed efforts to use it that have been challenged” (IPPD-2002). Such conclusions, along with other conclusions being drawn in other countries and international forums, and the case study examples discussed in this chapter, appear to support the argument that new systems of protection need to be developed. *Sui Generis* models have been proposed and developed in many countries and be discussed in following chapters.

CHAPTER SIX:

INDIGENOUS INITIATIVES AND INDIGENOUS/NATIONAL INITIATIVES

As the previous case studies have shown, non-Indigenous individuals and corporations have been able to appropriate Indigenous knowledge for their own means and, in many cases, the IPR system had provided protection and a justification. In such cases, non-Indigenous individuals and corporations have been able to remove TK from within Indigenous cultural contexts and transform it into other contexts unabated and without adhering to any moral or legal code – customary law, author’s rights, moral rights, or otherwise – except the IPR system. In contrast, when Indigenous peoples chose to access TK, for traditional use of, to transform it through modern technology or otherwise, they remain culturally bound by Customary Law and/or other Indigenous principles of community morality. This chapter will outline some of these laws and principles that Indigenous peoples adhere to and have adapted to transformative uses of TK.

Indigenous Paradigm

Indigenous peoples have distinct sets of ethos based on unique national identities that stems from their history, cultures and traditions. Indigenous peoples also have several responsibilities placed upon them through internal cultural imperatives that include portraying reality in a truthful and honest manner and with mindfulness of any impact on the community. Through consciousness of an Indigenous nations history and heritage comes the ultimate responsibility of being the link between one’s ancestors and future generations – a cultural precept that has been referred to as the “time-space continuum.” Although each Indigenous nation has evolved in an independent and sovereign manner, there are also many Indigenous universals that unify the vast array of Indigenous nations and converge

perspectives on many levels and issues. It is crucial for those attempting to engage with any aspect(s) of Indigenous cultures to have a clear understanding of how Indigenous peoples perceive and contextualize their traditional and contemporary cultural reality. Indigenous societies have undergone attempted genocide, colonization, constant technological revolution, and the imposition of foreign legal regimes, yet have dealt with these impositions and the introduction of new technologies, surviving with the foundations of their distinct cultures intact.

The predominant Western perspective has tended to view the Indigenous traditional culture and the modern technology interface as a paradox. However, Indigenous peoples have shown through their adaptation of technology that their dynamic cultures do not remain encapsulated in the past, static and resistant to development. Indigenous theorists Randy Ross (1996), Craig Howe (1998), and Western theorists Andrew Feenberg, Lewis Mumford, and Jacques Ellul (1996) have articulated theory on technology that can be applied to the interface between Indigenous cultural traditions and technologies. This chapter will refer to some of these theoretical models as they pertain to the Indigenous peoples' adaptation of new technologies.

In the ongoing discourse over technology, theories can be broken down into two main schools of thought: the substantivist view that technology is so substantial that it has a hegemonic power to the extent that it can control and undermine the intent of its users; and conversely, the instrumentalist view that the users of technology have the ability to determine the outcome of the use of technology. Randy Ross (1996) has contended that, "For Native people, the web of information networks and multimedia communications apparatus bring a

new dimension to our future survival.”¹ He refers back to the early 1880s when the inability to communicate across the nation was a key reason that Indian lands fell to the hands of the American Government, stating that, for the Americans, “the ability to communicate through telegraph to coordinate troops... was all possible through rapid telegraph exchange via Morse Code. For tribes on the other hand, the transfer rate was extremely slow.”² In summary, Ross argues that Indigenous peoples should take advantage of new technologies and use them for their own purposes. He poses the question, “Will the late 1880s play themselves out again with regard to Indian access to the telegraph, but this time it’s called the Internet.”³

Ross contends that new technologies can support Indigenous cultural and political initiatives; Mumford holds a similar determinist view with regard to technology and culture, writing that “technology is responsive to the ideological and cultural situation into which it is introduced,” and further that, “culture can control the development of its tools.”⁴ Indigenous peoples have always proven to be adept at adapting new technologies into their cultures. Cree hunters in northern Manitoba and Quebec, for example, found in the 1960s that pursuing moose by snowmobile could lead to significantly more successful hunting outings. However, they still practice such ancient traditional practices as: thanking the Creator, bringing the animal through the doorway backward so that the animal’s spirit can leave frontward, and hanging the animal’s bones over the doorway to honour its spirit.

In opposition to Mumford and Ross, Jacques Ellul would argue the substantivist view that technology is “uncontrolled and proceeding without plan” and according to “laws of

¹ Ross, Randy (1996). Native American Culture and the Emerging Internet Technology (pp. 11). First Nations Development Business Alert, September-October.

² Ibid., 12

³ Ibid., 13

⁴ Woodward, Ron, (1996). Defining Technological Determinism: The Role of Technology in Society (pp. 9). Unpublished.

development.”⁵ According to Ellul, then, the Cree hunters should have lost part of their traditional hunting practices with the introduction of the snowmobile and turned more toward hunting as an economic industrial activity. However, they clearly did not. (*Have you seen moose meat in the cooler at the Superstore?*) To the contrary, the Cree hunters continue today to practice the ancient ceremonies while hunting for sustenance, and, in fact, the snowmobile serves to enhance the cultural practice of moose hunting in making it more productive and efficient within the confines of the Cree culture. Ellul’s substantivist view would argue further that technology “adds something while taking something away.”⁶ Again, in this case, nothing of any cultural significance has been taken away. The way in which the Cree hunters have incorporated the snowmobile as a new technology into their traditional culture can also be held as a model for the incorporation of other mediums and technologies, including multimedia technologies, into Indigenous cultural practice.

Indigenous Experience with Print Media

Before examining Indigenous peoples’ interface with multimedia technology, it is useful to consider the Indigenous experience with print media. In the Canadian/North American historical context, early writings about Indigenous peoples were done by explorers, missionaries, anthropologists, and literary writers from the 16th to the mid-20th centuries. Most of this literature provided little or no insight into cultural realities, yet it became the status quo and influenced the intellectual foundations for European-based society’s perception of Indigenous peoples as underdeveloped.

Beginning in the 1960s, Indigenous authors started to develop an Indigenous literary voice drawing from TK and modes of expression (such as Oral Tradition and storytelling

⁵ Ibid.,13

⁶ Ibid.,16

technique) and contemporary Indigenous experience and perspectives. This body of literature, discussed previously in Chapter Four, has gradually developed and increased in scope and cultural importance, and now functions on three key levels: 1) as national bodies of literature building upon the TK base and oral history of individual Indigenous nations; 2) as a pan-Indigenous body of literature that can be claimed and identified with by Indigenous peoples within modern post-colonial nation states and/or throughout the world; and 3) as an authentic Indigenous voice that non-Indigenous peoples can access to gain understanding and insights on Indigenous cultural knowledge and perspectives, offering a more authentic alternative to the vast body of status-quo literature about Indigenous people by non-Indigenous writers.

The emergence of Indigenous publishing in the 1980s has further contributed to the Indigenous Voice by introducing Indigenous-controlled editing and publishing practices. Culturally based Indigenous editorial practices have established and incorporated guidelines that do not necessarily follow established European-based editorial rules and practices. An Indigenous literary style is, therefore, emerging using these unique editorial guidelines that respect cultural integrity and TK, and complement the emerging distinct Indigenous literary voice. Some of the culturally-based practices that are being used or adopted in editing Indigenous texts are: utilizing principles of the Oral Tradition within the editorial process; respecting, establishing, and defining Indigenous colloquial forms of English; incorporating Indigenous traditional protocol in considering the appropriateness of presenting certain aspects of culture; and consulting and soliciting approval of Elders and traditional leaders in the publishing of sacred cultural material.

This brief discussion on Indigenous peoples' experience with print culture has been focused on the Canadian/North American example. However, the experience has been

similar throughout the Indigenous and colonial world, with the noted exception that Indigenous publishing has not yet emerged in many parts of the Indigenous world.

Indigenous Customary Laws and Technology

The attempted genocide, colonization, and constant technological revolution, introduced by another society, has been the result of the impositions of European institutions on Indigenous institutions over the past five hundred years. This period has coincided almost exactly with the time period that Western society underwent its “Five hundred years of print culture” (as Guttenberg’s invention of the printing press and Columbus’ arrival in the Americas coincidentally occurred within a five-year period). Yet, even under these difficult circumstances, Indigenous peoples have dealt with the imposition of legislation and institutions and the introduction of new technologies, and, moreover, have survived, evolved, and developed with the foundations of their TK intact.

Craig Howe (1998) contends that Indigenous peoples should always “carefully consider the ramifications for tribalism (i.e., Indigenous traditional institutions) before advocating universal participation in the digital revolution in cyberspace (i.e. new technology).⁷ Indigenous peoples have adapted into their various unique and distinct contemporary forms by adhering to two important cautionary principles: 1) that incorporating new ways of doing things should be carefully considered in consultation with elders, traditional people, and community; and 2) if it is determined that a new technology or institution goes against fundamental cultural values and/or might lead to negative cultural impact, then it should not be adopted. These principles exist, in one variation or another, in most Indigenous groups dating back to ancient times.

⁷ Howe, Craig, (Fall 1998). *Cyberspace is No Place for Tribalism*. (pp. 2)[Wicazo SA Review](#).

Indigenous peoples found ways to incorporate traditional institutions and aspects of culture and new mediums into the contemporary context. The view that new mediums, such as text and print, can be adapted into Indigenous cultures and can support Indigenous political and social initiatives is consistent with instrumentalist theorists, such as Mumford who has stated, “Technology is responsive to the ideological and cultural situation into which it is introduced,” and further that, “culture can control the development of its tools.”⁸

Summary

Contrary to Feenberg’s statement that, “once the progress of technology is established it becomes a way of life with no way of turning back other than a complete return to a traditional simplistic order,” (1996) the practices of Indigenous authors, publishers and hunters illustrates that intelligent and carefully purposed projects can transform ancient traditions and cultural practices into the modern age uncompromised and with cultural significance and integrity upheld. Perhaps these cases of Indigenous peoples’ use of technology serve as a model for Western society as it begins to confront the many complex cultural issues brought on by the onslaught of multimedia. Indigenous peoples, too can enter the technological age in stride least they become, in the words of Randy Ross, “road kill on the Information Highway.”⁹

Making reference to Ross’s (in)famous statement, Craig Howe adds another cautionary note, stating that Indigenous peoples should, “use cyberspace to access and disseminate information on their own terms and for their own purposes [because] one can get connected and have a voice in the global village or else be neglected and become roadkill.”¹⁰

⁸ Woodward, Ron, (1996). Defining Technological Determinism: The Role of Technology in Society (pp. 9). Unpublished.

⁹ Ross, Randy (1996). Native American Culture and the Emerging Internet Technology (pp. 11). First Nations Development Business Alert, September-October.

¹⁰ Howe, Craig, (Fall 1998). Cyberspace is No Place for Tribalism. (pp. 2)Wicazo SA Review.

Just as there are phases of misrepresentation of Indigenous peoples through print media, Hollywood films, and other mediums, that were to the detriment of the image of Indigenous peoples, there is also misrepresentation and exploitation of Indigenous peoples and their knowledge in multimedia and other transformations of TK. However, just as with the Indigenous experience with print media, these new forms of exploitation and potential problems can be avoided through Indigenous creative and editorial control and awareness and respect of Indigenous cultural protocols.

Western society is in the midst of a major paradigm shift where the documentation, dissemination, and acquisition of knowledge is moving from a print-based to a multimedia model. The impact of this radical shift has caused deep stress around fear that society and the human condition will change dramatically along with it. Indigenous peoples' interface with technology, and other aspects of modernity, can be held as an example that, if the technological revolutions are intelligently managed, Western civilization should survive as we know it – for better or worse.

Indigenous/National Initiatives

This section will discuss initiatives to protect and/or regulate TK that have been developed and implemented by national governments together with Indigenous peoples. In some cases these initiatives have been harmonious, involving national governments and Indigenous peoples working together. In other cases the relationship has been adversarial, involving Indigenous groups confronting national governments through court cases or lobbying. It will begin with the recent Indigenous Knowledge Systems (IKS) Policy developed and maintained by South Africa. This section will also provide an historical

summary of how issues and legal challenges related to TK have progressed in Australia and Canada. The development of certification marks in Australia and New Zealand will be outlined, as well as protocol guidelines developed in Australia. It will also discuss some specific initiatives in Canada within Department of Canadian Heritage, Industry Canada, and Indian and Northern Affairs Canada (INAC). The unfolding discourse within Canada will also be discussed with regard to potential solutions to this central problem.

South Africa's Indigenous Knowledge Systems Policy

The Indigenous Knowledge Systems (IKS) Policy, developed and to be maintained by South Africa's Indigenous peoples, was passed by The Minister for Science and Technology of South Africa on February 2, 2006. The IKS Policy pervades the lives and the belief systems of a large proportion of the country's population. Such Indigenous Knowledge manifests itself in areas ranging from cultural and religious ceremonies to agricultural practices and health interventions. In the Policy "Indigenous Knowledge" (IK - as it is referred to in the Policy) is generally used synonymously with "traditional and local knowledge" to differentiate the knowledge developed by and within distinctive Indigenous communities from the international knowledge system generated through universities, government research centres and private industry.

Under apartheid, IKS in South Africa, as well as practitioners within such systems, were marginalized, suppressed and subjected to ridicule. During the apartheid regime, across every measurement of socio-economic status and well-being, and across all age groups, geographical circumstances and both genders, Indigenous peoples were severely disadvantaged. The IKS Policy was passed partly because many of the disadvantages continue and "have the potential to increase and further entrench the disparity between Indigenous and other sectors of society over the coming decades, unless greater effort is

made now to redress the ongoing inequalities, not least of which is in respect of the knowledge systems of indigenous communities and specific knowledge traditions within these, such as guilds of traditional healers and specific knowledge traditions held by women within communities.”¹¹

Juxtaposed against the backdrop of centuries of oppression exists an indisputable wealth of IK that has survived and in some cases, has even grown within the protective confines of African societies and communities. Much of the IK that has persisted has shaped and informed African thinking on issues such as art, music, religion and theology, governance, justice, health and agriculture. Personal and cultural identities, including social belief systems, have remained strong and vibrant through the repeated practice of observance of IK tenets, in spite of the very hostile socio-political environment characteristic of colonialism and apartheid. Frequently in South Africa women have been the custodians of these bodies of knowledge.

The creation of the IKS Policy has involved a range of Government Departments. For example, the Department of Arts and Culture has spearheaded a national language policy and is investigating the promotion and copyright of Indigenous music and art forms. Traditional Health Practitioner’s legislation has been developed by the Department of Health and mandates the establishment of a regulatory body to be known as the Traditional Health Practitioner’s Council that will preside over the activities of approximately 200,000 South African traditional healers. The Department of Science and Technology (DST) has established a programme to support research on medicinal plants and other aspects of IKS at the National Research Foundation. The Policy framework acknowledges that IKS, however, need a broader all-encompassing policy framework. Therefore, a coordinating mechanism

¹¹ Indigenous Knowledge Systems Policy pp.3. (2006, April 24-28). Geneva, Switzerland: Submitted to WIPO by South Africa, Geneva.

has been established through an Inter-Departmental Committee on IKS chaired by DST. This policy proceeds on the basis that IKS, by their very nature require a cooperative approach.

Complementary and contributory initiatives in other sectors are under active development and contribute to a fuller picture of the South African IKS environment. Clearly, it will not be possible to prescribe in detail to sectors that have unique features of their own. Nevertheless, it will be necessary to create several new cross-cutting functions to underpin the optimal performance of IKS in South Africa. The purpose of this aspect of the Policy is to affirm, promote and debate IKS, and to create a sense of community across a diverse range of practitioners. These functions are as follows:

- A high-level advisory function to Government on IKS matters reporting to the Minister of Science and Technology;
- An IKS development function, including scholarship, research development, the maintenance of a record system for IK and the promotion of networking structures among practitioners, to be located in the DST;
- Legislation and administration capacity to protect intellectual property associated with indigenous knowledge, to be administered by the Department of Trade and Industry;
- Establishment of an IKS Fund to support institutions that will assist Indigenous and local communities in the categorization and characterization of their biological resources, innovations, practices and technologies;
- A formal system to record IK must be created.¹²

South Africa's Indigenous Knowledge Systems Policy is the first official national policy on Indigenous Knowledge to be implemented in the world and will likely become a model for other countries. The Policy is intended to work in conjunction with the African Union's Model Legislation (discussed in the preceding chapter).

¹² Ibid., 7

Canada and Australia: Moral and Collective Rights

In 1931 Canada became the first of the copyright countries to enact a Moral Rights clause in its domestic legislation. The Moral Rights clause, Section 12 (5) was adopted by Canadian legislators as a requirement to this country's ratification of *The Berne Convention* in 1928. In fact, paternity and integrity rights of authors of dramatic and operatic works and musical compositions had been recognized by the Criminal Code, enacted in 1915 (Section 508B). Furthermore, Quebec's Theatrical Performance Act, passed in 1919, provided for the protection of the Moral Rights of authors along the lines of the Criminal Code's Section 508B, including penal sanctions for the violation of those rights (Crean, Taylor and Young-Ing-2003). There have also been some significant developments in the area of Common Law in Canada and Australia that should be examined for their relevance with regard to establishing TK regulations. The following section will examine these cases particularly for their disclosures for potential development of TK regulation. Two prominent cases have been advanced by non-Indigenous Canadian artists to test Moral Rights application to creative works: *Snow v Eaton Shopping Centre* and *Théberge v Galerie d'Art du Petit Champlain Inc.*

The Snow Case is one of the most widely noted Moral Rights cases in Canada involving action by sculptor Michael Snow regarding *Flight Stop*, a work comprising sixty bronze geese aloft in the atrium of the Eaton Centre. As part of the Centre's 1981 Christmas decorations a red ribbon was tied around the neck of each sculpture, although no permanent harm or change to the sculpture was intended. Snow claimed that the ribbons were prejudicial to his honour and reputation, constituting the requisite "distortion, mutilation or other modification" under the Canadian legislation. In 1988, the High Court of Ontario ruled in favor of artist Michael Snow, claiming that his Moral Rights had been infringed as the ribbons infringed on the integrity of his distinctive sculpture. Snow obtained a judicial order

requiring that the “ridiculous” ribbons be removed. Justice O'Brien of the Ontario High Court of Justice held that "prejudicial to honour and reputation" involves a subjective element or judgment on the part of the author, appropriate as long as it is reasonably arrived at. O'Brien noted that Snow was respected within the international artistic community.¹³

In March 2002 the Supreme Court of Canada (SCC) issued a decision in the case of Montreal artist Claude Théberge. In the Théberge Case the artist, Claude Théberge, sued an art gallery who had purchased one of his drawings. In the subsequent case the SCC illustrated perceived conflicts over the notion of Moral Rights in Canada's Civil Law and Common Law traditions. The Galerie d'Art du Petit Champlain acquired rights to make a small number of paper reproductions of art by Claude Théberge. However, it transferred ink from Théberge's paper-based works onto canvas, in doing so destroying each paper version. Théberge gained a pre-trial order seizing the resultant canvases. The SCC was asked to determine the extent to which an artist can control an authorized reproduction of a work used or displayed by a third party purchaser. Some judges on the Supreme Court held that there was no reproduction, because no ‘copies’ were made (transfer of ink was considered a modification rather than a copy). They criticized Théberge for preemptive action, commenting that evaluation of a potential breach of moral rights calls for the exercise of a good deal of judgment. A distortion, mutilation or modification of a work is only actionable if it is to "the prejudice of the honour or reputation of the author." The SCC ruled against Théberge saying that “respect must be given to the limitations that are an essential part of the moral rights created by Parliament” (*Théberge v Galerie d'Art du Petit Champlain Inc*- 2002).

¹³ Calson Analytics Note moral rights cases (1996). Available www.calson.com.

Moral Rights and Traditional Knowledge

Of these various European Intellectual Property concepts and regulations that have been applied to TK, and in lieu of the widespread non-Indigenous mis-appropriation of TK, Moral Rights draws close parallels with what Indigenous Peoples are seeking for the regulation of TK. Moral Rights capacity to protect artistic work against “any distortion, mutilation of, or derogatory action in relation to the said work which would be prejudicial to honour or reputation” is a concept that is also in line with aspects of Indigenous Customary Laws. However, the apparent contradicting messages in the Snow and Théberge decisions leaves Moral Rights in a diminished state in Canada at the present time. After these two cases it is not clear how Moral Rights law would serve to protect TK in Canada, and further test cases are required to provide clarification.

The Carpets Case

Imported carpets containing direct copies of the artworks of three Aboriginal artists were discovered coming into the Australian market in 1993. Banduk Marika, the only remaining living of the three artists, initiated a case against the importer Indofern, who was importing the carpets from a carpet company based in Viet Nam (a country which is not a signatory to *The Berne Convention*). Marika’s painting *Djanda and the Sacred Waterhole*, one of the images on the carpets, was contained in an educational portfolio produced by the National Australian Gallery. In the ensuing investigation surrounding the *M* vs Indofern* Case a copy of the portfolio was found in the Viet Nam carpet factory-establishing the portfolio as the source of the appropriation.

Marika argued that the image was under the communal ownership of the Rirratjingu Clan and was of great cultural significance as it forms part of the Rirratjingu Creation Story. She further explained that the traditional Rirratjingu custodians had granted her permission to

paint the image and reproduce it in the portfolio for the purposes on educating people on Aboriginal culture, but not for any commercial use. Therefore, the carpets constituted an “Unauthorized Reproduction under Customary Law.” And that, in addition, under Section 37 of the Copyright Act it “is an infringement to of copyright to import copies of artistic works without the license of the copyright owner for the purposes of sale.” Justice Von Doussa was satisfied that Indofern had constructive knowledge of the infringement in that a “reasonable person, particularly one about to engage in the business of selling carpets in Australia” had to have knowledge of the facts (Jenke-2003). Apart from the copyright infringement recognized in the Case, Justice Von Doussa also allotted damages for “Culturally-Based Harm”; however, as Moral Rights were not introduced in the Australian Copyright Act until the Copyright Amendment (Moral Rights) Act 2000, no specific Moral Rights implications for TK were brought into the case.

Bulan Bulan vs. Anor R & T Textiles PTY Ltd.

In 1996 fabric was discovered on the market in Australia that was derived from part of Aboriginal Artist John Bulan Bulan’s painting *Magpie Geese and Water Lilies at the Waterhole*, which depicted part of the Ganalbingu and Yolngu peoples TK. Mr. Bulan Bulan noted that, under Ganalbingu law, ownership of land has a corresponding obligation to create artworks, design, songs and other aspect of ritual and ceremony that go with the land. He argued further that unauthorized reproduction of the artwork threatened the whole system in ways that underpin the stability and continuance of Yolngu society (Jenke-2003).

Justice Von Doussa (the same judge as in the Carpet Case) recognized Bulan Bulan as the copyright holder of *Magpie Geese and Water Lilies at the Waterhole*; but did not recognize the claim of joint ownership (i.e. ownership by Bulan Bulan and the Ganalbingu community) on the grounds that it did not constitute a “work of joint authorship” under

Section 10 (1) of the Copyright Act (i.e. a collaboration between two or more authors).

Although the *Bulan Bulan Case* extended copyright protection for TK where a portion of the original work was copied and altered, it still does not extend that protection to TK in a non-material form, nor did it recognize the Indigenous group as copyright holders in perpetuity. Again, as with the *Carpets Case*, no significant Moral Rights issues entered the case as it was also within Australia's pre-Moral Rights era.

The Wai 262 Claim

The Waitangi Tribunal was established in New Zealand in 1975 and given the mandate to investigate claims by Maori under the Treaty of Waitangi as to whether or not and to what extent that the Crown or the New Zealand government, has honored the principles of the Treaty of Waitangi signed between chiefs and tribes and her Majesty Queen Victoria in 1840. The Wai 262 Claim is a claim introduced by six tribes in 1991 throughout New Zealand to the Waitangi Tribunal for recognition and protection of the cultural and intellectual heritage rights in relation to indigenous flora and fauna and their TK. The Claim includes all native species in New Zealand, Maori arts and designs and TK, and raises concerns in opposition to genetic tampering with the DNA structures of native flora and fauna (Soloman-2001). The Wai 262 claim itself arose from a concern of two elder women in 1988 when they discovered that a number of native cultivars of the kumara, the native sweet potato of New Zealand, brought here by the Maori, had been deposited in a research institution in Japan. The Wai 262 Claim also raises issues to do with international instruments like the draft Declaration of the Rights of Indigenous people, the Convention on Biological Diversity, and ILO Convention 169. Hearings to the Claim are ongoing and continue to raise issues to do with the government's responsibility to Maori under the Treaty.

The Australia Council/Aboriginal and Torres Strait Islander Arts Board Protocol Guidelines

High profile Indigenous lobbying in Australia together with various test cases has resulted in relatively high levels of success (compared to other countries) for the Indigenous TK movement in Australia in the late 1900s and afterwards. The momentum of the movement reacted in a strategic and well organized manner following up on the 1998 *Our Culture: Our Future* report, which also signaled that some agencies of the Australian Government were willing to work with Indigenous to resolve the issues. One of the tangible results from the Indigenous TK movement in Australia has been the 2002 Australia Council/Aboriginal and Torres Strait Islander Arts Board Protocol Guidelines. In the development of the Guidelines the Australia Council of the Arts worked closely with Australia Council/Aboriginal and Torres Strait Islander Arts Board which – being a relatively well supported and independent body (compared to the Aboriginal Secretariat of the Canada Council for the Arts, for example) – was able to consult widely with Indigenous peoples throughout the process.

The preamble to the guidelines states that, “In Indigenous cultures the artist is a custodian of culture, with obligations as well as privileges. Indigenous people’s right to own and control their cultural heritage is known as ‘Indigenous cultural and intellectual property rights’” (The term is used in *Our Culture: Our Future* to refer to those rights as they are developing within international law). In the *Performing Cultures* Guidelines the term “Indigenous heritage” is used to refer to these rights to bring the terminology more in line with language being used in international forums. The Guidelines define Indigenous heritage

as: “comprises all objects, sites and knowledge transmitted from generation to generation. Indigenous people’s heritage is a living heritage.”¹⁴

The Guidelines also state that: “An Indigenous person’s connection with the land, water, animals, plants and other people is an expression of cultural heritage. Writing, performing, song, the visual arts and more recently, new media, are ways of transmitting Indigenous cultural heritage. As primary guardians and interpreters of their cultures, Indigenous people have well-established protocols for interacting with their cultural material. New situations also require cultural protocols.”¹⁵ The Guidelines reflect the complexity of Indigenous Australian culture, and provide information and advice on respecting Indigenous cultural heritage. Although each of the guides address cultural protocols specific to an Indigenous art form, they are shaped by the same underlying principles – the backbone of the protocols. The five guides in the series are:

- Writing Cultures
- Performing Cultures (Drama/Dance)
- Visual Cultures
- Song Cultures
- New Media Cultures

The Indigenous protocol guides are intended to have relevance for everyone working in or with the Indigenous arts sector, including:

- Indigenous and non-Indigenous artists
- People working within related fields of
- Indigenous art form practice
- Federal and state government departments

¹⁴ The Australia Council/Aboriginal and Torres Strait Islander Arts Board Protocol Guidelines, 2002.

¹⁵ Ibid

- Industry agencies and peak organizations
- Galleries, museums and arts centres
- Educational and training institutions
- Indigenous media and targeted mainstream media

The Australia Council/Aboriginal and Torres Strait Islander Arts Board Protocol Guidelines represent a productive primarily Indigenous initiative developed with support by a national government agency. The guidelines are non-binding in that they do not have enforcement mechanism; rather they are a moral code which people in the country should be obliged follow in the use of TK.

The Use of Trademarks in New Zealand, Australia and Canada

Two particular types of trademarks, Certification marks and Official marks, have been used to protect TK in Australia and New Zealand and could serve as a model for Canada and other countries. Certification marks are a particular kind of trademark that are employed to identify wares or services which meet a defined standard. These can be owned by one person and licensed to others. If registered a mark can be used as a label to indicate certain qualities including the source of a product. Official marks refer to specific types of marks that are registered by governments and public institutions. Section 9(n)(iii) of Canada's *Trade-marks Act* defines an official mark as one that is: "adopted and used by any public authority, in Canada as an official mark for wares or services..." In one sense, official marks are less powerful than trademarks as they can remain in use by a private entity, if they were being used by that entity prior to the public authority giving public notice of an application for an official mark. An official mark must be used in association with wares or services before a request for publication can be made.

The toi iho™ was registered specifically to promote and sell authentic Maori arts and crafts and authenticate exhibitions and performances of Maori arts by Maori artists in New Zealand, to distinguish Maori crafts from other arts and crafts and to assist Maori retain control of their *taonga* – or Maori knowledge.¹⁶ The creation of the mark was facilitated by Te Waka Toi, the Maori arts board of Creative New Zealand, in consultation with Maori artists. The trademark was designed and created by Maori artists. The authenticity component of the mark guarantees that the product was created by a person of Maori descent. There are three versions of the mark. The toi iho™ maori made mark is accompanied by two companion versions known as the mainly maori mark and the maori co-production mark. The three versions of this design are the same with the exception that the maori made mark is blue and grey and the other two are red and grey. The toi iho™ mainly maori mark is grey and red for groups of artists, most of whom are of Maori descent, who work together to produce, present or perform works.¹⁷



The other toi iho™ maori co-production mark acknowledges the growth of innovative, collaborative ventures between Maori and non-Maori and is for Maori artists who create works with persons of non-Maori descent to produce, present or perform works across art forms. Business entities cannot apply to use the trademark. Only individual artists may apply and groups of artists working together to create single works may apply to use the Maori made mark. Authorized users of the Maori made mark may use the mark to promote and market their works for one year and must apply for renewal of their license annually.

¹⁶ Eikland, Mark, *Models for New Marks of Authenticity in Canada* (pp. 20). Unpublished.

¹⁷ *Ibid.*, 35

The trademark is administered by Te Waka Toi in Creative New Zealand who are the *kaitiaki* (guardians) of the trademark until it is well-established. Applications to use the mark are assessed by a panel of Maori art form specialists including board members. All applicants must prove they are of Maori descent and must provide samples of their product which is assessed in terms of Maori component; design and media; process and technique used; level of skill and expertise required to produce the work; and the aesthetics of the work. All licensed users must agree to abide by the Rules which govern all matters relating to the mark including the manner in which the mark may be used and any conditions applying to their licenses. The success of the trade-mark is clearly stated as reliant on Maori artists support, and effective marketing and promotion strategies.¹⁸

In Australia, trademarks are used by Indigenous peoples to identify a wide range of goods and services. These include arts, cultural services, food preparation, medicines, tourism services, Indigenous-run business, and Indigenous government agencies. For example, Indigenous words and designs; and English words that have a particular meaning or significance for Indigenous Australians (i.e. the words “dreaming” and “dreamtime” used to describe Indigenous traditional concepts) are found to be included on the Register of Trade Marks. Indigenous words and designs that are a continuous expression of the cultures of the Indigenous peoples and represent a connection between the Indigenous people and their land have also been trademarked. For example, language words and clan names such as *Eora*, *Arrente* (*Aranda*), *Monaro*, *Uluru* and *Wik* are important identifiers of Indigenous peoples. There have been several attempts by Indigenous groups to trade mark Indigenous words related to plants or animals to protect them against the commercial exploitation by non-

¹⁸ Creative New Zealand, New Zealand Arts Council (2003). Backgrounder [Creative New Zealand’s website]. Available www.toiho.com/aboutus.

Indigenous businesses. For example, the Bandjalang Aboriginal Corporation applied for registration of trademarks for the words “Gung-Guyar” and “Bulam” in the relevant class for soaps, perfumery, essential oils and body lotions.¹⁹

The Indigenous arts network is facilitated by arts centres that promote the creation, distribution and sale of Indigenous visual arts and craft throughout Australia. These centres use trademarks in the course of their trade. For example, Munupi Arts has a logo that it puts on letterhead, invoice and promotional material. The mark is not registered but has been in use by the organization for over ten years. Munupi incorporate the logo into the promotion and labeling of artistic works (Jenke-2003). Some Centres have registered their marks with Intellectual Property Australia. For instance, Desart is a regional arts organization based in Alice Springs. Desart has a registered trademark that is used by members of the organization on promotional material for original artistic works and for licensed manufactured products.

The most well-known application of this concept in Canada is the Igloo symbol, which is used to distinguish authentic Inuit art.

The Department of Indian Affairs and Northern Development (DIAND) registered the Igloo symbol as a trademark on September



5, 1958 and ownership rests with the federal government. The government registered the mark largely in response to increased market demand, the proliferation of imitations, and need to protect Inuit creators. Registering the mark also made it easier for customs to collect tariffs imitations and deter their entry into the country. The government has made certain commitments to owners of the Igloo trademark and incurs certain obligations. It has

¹⁹ World Intellectual Property Organization (2003). Minding Culture: Case Studies on Intellectual property and Traditional Cultural Expressions. (pp. 88). Geneva, Switzerland: Janke, Terri.

committed to promoting the trademark, which appears successful to date as the actual tag indicating authenticity has been copied (Eikland-2003).

The government plays a significant administrative role as the owner of the trademark. DIAND provides licenses to cooperatives, distributors and agencies who are then authorized and required to place the tag on authentic products. There are approximately ten licensees at this time, who also have obligations to meet in order to place the tag on a carving. Each product must have a label that states the artist's name, where and when the carving originated, and provide the title and number that was given to the carving. DIAND maintains a list, which it provides to foreign customs agencies and retailers to ensure the product is authentic and can be marketed in that manner.

Examples of entities that have met the *Trademarks Act* public authority test and established official marks include the Osoyoos Indian Band Council for "*Inkaneep*"; National Native Role Model Program; Kahnawake for a "Dream Catcher Design"; Campbell River Indian Band Development Program for the "Discovery Harbour" mark and design; and the Peigan Band Administration of Alberta for a "Hide and Feathers Design."²⁰

The issue of a protective mark was also raised frequently in CRA Indigenous Artist's Research Project in 2003-2004 (which was commissioned by Industry Canada). Most participants thought Certification marks could be useful, if they were accompanied with a proper public awareness campaign about the immorality of fakes in the market. A Gallery Director, for example, thought the Igloo Tag worked well for the Inuit carvers in the market. During the Project it was learned that Tsimshian artists started talking about a mark led by one of their senior artists, and that Haida artists have been discussing the development of a Haida artwork stamp. A concrete example cited in the symposiums to support Certifications

²⁰ Eikland, Mark, Models for New Marks of Authenticity in Canada, (pp. 14) Unpublished.

Masks is the Northwest Coast style carved masks that have come into the Northwest Coast market from Indonesia. Indonesian carvers have made the masks from photographs and now sell them into the Northwest Coast market at a lower price than the authentic masks (IARP Final Report-2004).

Comments from Indigenous artists on certification marks in the telephone interview portion of the Project ranged from the following:

“It would be difficult to administer, and who would decide if it’s authentic?”
(Artist 9)

“I don’t see how Certification marks could be regulated in Canada.” (Artist 3)

“Certification marks in Canada? Emphatically, YES.” (Indigenous Academic 2)

“I feel that this protection mark is a good idea- anything that supports the Native artist to make a viable living and stops Asian corporations from mass production. We need to market ourselves correctly. Make people want the real thing not the artificial simulation. I don't feel we need to prostitute ourselves off, we just need to be honorable and respectful and create a viable living.”
(Student 2)

(IARP Final Report on Telephone Interviews -2004)

Although the Certification Mark issue was not referred to directly in the recommendations of the Department of Canadian Heritage National Gatherings on Indigenous Knowledge, some of the following recommendations allude to it:

Canada needs guidelines or other means of authorizing use of things like the Inukshuk; the Government of Canada needs to support the respectful representation of Aboriginal peoples and products.

Establish councils responsible for certifying/approving authenticity of cultural items/products. Develop a rating system that could be applied to art galleries (akin to the star system to indicate quality of hotels and restaurants). The system would indicate levels of authenticity of Aboriginal art being sold through use of a gold, silver and bronze feather system. This could be included in tourism brochures and pamphlets (Draft Report of the National Gatherings on Indigenous Knowledge-2006).

More recently the discussion paper National Aboriginal Products Branding for 2010 prepared for DIAND by O'Neil Marketing & Consulting in March 2006 makes the following recommendations (among others):

- Rapid recognition of a Branding process concurrently with the Host First Nations (i.e., the four First Nations in Vancouver) and the national First Nations, Aboriginal and Métis Nations. Meet with the organizations and gain approval. Host a national focus group to fine tune a process, and confirm what the “brand promise” is. Keep this time line short. The Brand ideally would be launched four years out from 2010 to be able to participate in pre-event marketing initiatives and create a strong brand presence.
- A partnership agreement with the Host First Nations and VANOC (Vancouver Olympic Committee) to establish the brand is needed to recognize protocol, as well as to identify partnerships for participation.
- A non-political process that lays out clear criteria for participation in the program so that acceptance for participation can be easily determined in as fair a system as possible; and in addition to the Aboriginal definition, that this system recognizes the consumer's definition of “authentic” (National Aboriginal Products Branding for 2010, O'Neil Marketing & Consulting-2006).

The Igloo trademark in Canada was the first protective mark for TK in the world; however, it has virtually fallen into disuse. In the meantime protective marks in New Zealand and Australia, and protective law in the Philippines and the U.S. (discussed in the following chapter) have been developed with a high level of support and approval by Indigenous peoples. There has been some more recent discussion in Canada about the possibility developing a more significant protective mark. Industry Canada also commissioned a discussion paper on Protective Marks for Indigenous products by consultant Phil Bird in 2002. The calls for such a Certification Mark in Canada are coming from a variety of sources, the most time constrained and high profile is the production of a mark for the 2010 Olympic Games. Especially given the 2010 Vancouver Olympic Committee has already offended many Indigenous peoples with the Inukshuk logo. Whether a meaningful certification may be developed in Canada, it is certain that the idea has wide spread support;

the proposal for a 2010 mark has the potential to be one of the lasting “legacies” of the Olympic Games.

The Indigenous Artist’s Research Project in Canada

In the late 1980s and early 1990s, the Indigenous arts community in Canada was instrumental in bringing the issues of cultural appropriation and repatriation to the forefront of the national consciousness. The mobilization of Indigenous artists at the 1987 “Telling Our Own Story” Conference in Vancouver, protests by Indigenous artists against *The Spirit Sings* exhibit at the Glenbow Museum and the National Gallery of Canada in 1986-1987, and the lobbying effort of Indigenous members in the Writers Union of Canada in 1988, all contributed to an increased awareness among progressive elements in Canada. These efforts have led to increased recognition of the importance of TK in upholding the integrity of Indigenous peoples.

The CRA was formed in 2002 to represent the Intellectual Property interests of artists in Canada at a national and international level, and, therefore also, has an interest in TK issues and Indigenous artists. There have been presentations on the subject of TK each year at the annual meetings of the CRA. The Indigenous Peoples Caucus (IPC) of the CRA has maintained an effort to hold ongoing discussions with on TK related issues within the Indigenous artists community and government departments and agencies in Canada, and lobby for TK rights at WIPO, CBD and other UN forums. The Intellectual Property Policy Directorate (IPPD) of Industry Canada also has a domestic policy development work program on TK issues. The focus of their work to date has been on identifying long-term objectives at the national level by gathering information from a variety of sources, including from Indigenous communities and individuals at the grassroots level. The picture is not yet complete. IPPD’s work is still at the fact-finding stage and further work is needed to obtain a

more representative view of the diversity of stakeholders and concerns surrounding the issues.

The CRA approached representatives of the IPPD in 2004 for funding assistance to conduct three regional symposia dealing with TK related issues, as well as a national conference coinciding with the CRA annual meetings in Montreal in June 2005. The entire project, including the results of the two previous meetings held in Saskatchewan and Manitoba, was named the Indigenous Artist Research Project (IARP).

Throughout the symposia conducted for the IARP participants pointed out that TK raises serious challenges for the Intellectual Property system. Many argued that the current IPRs do not respond to the concerns of TK holders. One overarching problem identified is that the IPR system is designed to eventually release all Intellectual Property into the Public Domain after time periods of protection expire. Many participants insisted that Indigenous protocols dictate that certain aspects of TK are not intended for external access in any form, at any time. The IARP also highlighted how these potential conflicts between the TK and IP systems have given rise to numerous discussions at the local, national level and international level. In each region artists and others indicated the need for support from the federal government for organization around these issues at the local level in order to allow them to better contribute to these discussions. Additional views provided by participants through the follow-up telephone interviews largely complement the findings outlined. The IARP managed to bring together a wide range of individuals, federal government departments and organizations interested in finding answers to the complex and sensitive issues related to TK, in a positive and productive manner. It is the hope that the information gathered will be a useful contribution to current work on TK underway within federal government and

Indigenous communities and that collaboration will continue to take place in the future (IARP Final Report-2004).

The National Gatherings on Indigenous Knowledge

Traditions: National Gatherings on Indigenous Knowledge (NGIK) was the third in a series of national gatherings organized by the Department of Canadian Heritage (DCH) with the goal of continuing” engagement with Aboriginal communities across Canada on areas of mutual interest.” DCH proposes that “the findings of *Traditions* will help to build and enhance policies, programs and services that are supportive of Indigenous peoples in Canada and are relevant to their needs.” (NGIK Draft Final Report-2006)

The preamble to the Draft Report states that “*Traditions* acknowledges and celebrates the fact that an underlying strength of Canada is founded on the rich heritage of Indigenous societies and the extensive contributions they have made to our national identity. Dialogues with First Nations, Inuit and Métis identified the need for all Canadians to recognize these contributions and acknowledge the unique challenges faced by communities in the three areas of Indigenous knowledge targeted for discussion: languages and cultures; intellectual and cultural property; and artistic expression.”

The Gatherings provided a forum in which DCH came together with Indigenous communities and representatives from other government sectors to discuss a framework for the recognition, respect, protection and celebration of Indigenous knowledge in all the ways it is used and expressed. The NGIK also provided opportunities for delegates to meet others who share their perspectives and concerns. They allowed delegates to share information about best practices and support available from federal departments and agencies, and they encouraged open and relevant discussions of key issues and brainstorming on opportunities and strategies for change.

During the months of May and June 2005, national Gatherings on Indigenous knowledge were held in eight communities across Canada: Rankin Inlet, Edmonton, Penticton, Wanuskewin, Yellowknife, Wendake, Eskasoni and Six Nations. They brought together over 400 representatives of Indigenous communities with DCH and other government representatives. Each Gathering took place over three days and involved approximately fifty invited delegates. Gatherings consisted of small break-out circles and plenary discussions focused on the following themes:

- Indigenous Knowledge and Languages and Cultures
- Indigenous Knowledge and Intellectual and Cultural Property
- Indigenous Knowledge and Artistic Expression

Within each of the three themes, delegates were asked to consider: what issues should be considered priorities and what were the main vulnerabilities; the possibilities for action; and the roles and responsibilities for addressing the issues in diverse communities. The process of engagement used by the National Gatherings Secretariat is founded on key principles that have guided the DCH in coming together with federal departments, provincial and territorial governments, Aboriginal governments and leaders, and communities alike. According to the Draft Report, “these principles were not just for the national Gatherings, but will continue to guide the Department of Canadian Heritage in future processes of engagement.”

A common theme heard throughout the Gatherings was that communities would like to see the creation of, and financial support for, Elders’ Councils to advise both communities and government departments at various levels. Although each Gathering, and indeed each circle discussion, had its own unique conception of Elders’ Councils, the underlying message was that guidance and advice from Elders is essential because traditional laws and protocols

govern virtually all aspects of community life, including finding solutions and strategies to address critical issues. The need to raise awareness about the urgency and importance of these critical issues was raised at each Gathering. Indeed, the report is a testament to the importance of promoting, protecting and valuing Indigenous knowledge, while acknowledging the contributions that First Nation, Inuit and Métis peoples have made and continue to make to Canadian society and culture.

The National Perspective section of the Final Report has been divided into three equal parts to reflect the three themes related to Indigenous knowledge that were discussed in the Gatherings: languages and cultures; intellectual and cultural property; and artistic expression. In each part, the content of the discussions is presented by introducing issues and vulnerabilities, followed by recommendations for action and delineation of roles and responsibilities. The NGIK process was an example of a National government inviting Indigenous communities to take part in a process and express their views. DCH also established an Advisory Committee of Indigenous representatives to guide and provide advice on the process. It remains to be seen if the NGIK will have any significant impact of DCH and Canadian Government policy on TK. (At the time of this writing of this dissertation the NGIK Final Report is being held up in the Prime Minister's Office awaiting approval.)

Summary

There have been a variety of Indigenous/National Government collaborations on TK issues: with various degrees of success and control by either of the two parties. It is clear that there have also been a variety of forces and circumstances leading to the initiatives. The conclusion could be drawn that in terms of producing tangible results to the satisfaction of Indigenous peoples the outcomes of the initiatives could be ranked in the order they were

discussed: 1) South Africa, 2) Australia, 3) New Zealand, 4) Canada. The Canadian experience has shown some movement and potential of late after decades of stagnation. To be sure Canada has the benefit of learning from the Australian and New Zealand examples and the opportunity of building on recent initiatives and the 2010 Olympics. Canada appears to be at a similar stage that Australia was at a decade ago in that, after about two decades of Indigenous peoples raising TK issues, the state has slowly begun to acknowledge the problem. Perhaps the IARP, the NGIK and the potential of a 2010 protective mark could lead to of the beginning of a movement to act on TK issues more substantively in Canada.

While Canada has the examples of the South African, New Zealand and Australian experiences to draw from, Indigenous peoples in Canada also have the Australian test case models to consider as a means of forcing the state to act. Indeed, some analysts believe that Indigenous peoples are in a unique position of having the potential to advance Moral Rights recognition to the benefit of all artists (Crean-2002).

This chapter looked at national experiences that have produced policy, guidelines, protocols, and trade-marks to enforce standards, all of which could be interpreted as forms of non-binding protection, or what is referred to in the discourse “soft law.” The following chapter will examine countries that have gone beyond “soft law” and enacted specific binding legislation and laws to protect and regulate TK.

**CHAPTER SEVEN:
NATIONAL INITIATIVES**

National Models of *Sui Generis* Legislation/Laws

This chapter will briefly outline the ten national models of *Sui Generis* protection of TK listed below. These are the ten models that exist so far in the world as these ten countries have undertaken the initiative to introduce specific legislation and/or laws to protect and regulate TK within their borders. The ten models will be outlined under the following categories (which are categories used by WIPO in analyzing on *Sui Generis* regimes, and commonly used by other UN bodies): Policy Objectives, Conditions of Access to TK, Rights Holder, Registration Mechanisms, Sanctions and Enforcement, Access and Benefit-sharing, and Recognition of Customary Laws. In cases where the models have no provisions for a category, the category has been left out of the analysis.

- 1) *African Union* African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000;
- 2) *Brazil* Provisional Measure No. 2186-16 of 2001 Regulating Access to the Genetic Heritage Protection of and Access to Associated Traditional Knowledge;
- 3) *China* The Patent Law of 2000 and the Regulations on the Protection of Varieties of Chinese Traditional Medicine;
- 4) *Costa Rica* Law No. 7788 of 1998 on Biodiversity;
- 5) *India* Biological Diversity Act in 2002;

- 6) *Peru* The Peruvian Law No. 27,811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources;
- 7) *Philippines* Indigenous Peoples Rights Act of 1997;
- 8) *Portugal* Decree Law No.118 of 2002 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material;
- 9) *Thailand* Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E 2542;
- 10) *United States* Indian Arts and Crafts Act of 1990 and other relevant measures.

Overview of National Models

- 1) *African Union* African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000

The African Union introduced the “African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources” in 2000 as guidelines for its fifty-three member states. The Model legislation is to be followed by each member state respective of the “National Competent Authority” (NCA).

Policy Objectives: The main objectives of the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, are to ensure the conservation, evaluation and sustainable use of the biological resources, and knowledge and technologies in order to maintain and improve their diversity. The specific stated objectives of the African Model are:

- to recognize, protect and support the inalienable rights of local communities, including farming communities, over their ... knowledge and technologies;
- to recognize and protect the rights of breeders;
- to provide an appropriate system for access to community knowledge and technologies;
- to promote mechanisms for fair and equitable sharing of benefits arising from the use of knowledge and technologies;
- to ensure the effective participation of concerned communities in deciding on the distribution of benefits deriving from knowledge and technologies;
- to encourage national and grassroots scientific and technological capacity;
- to provide mechanisms for implementation and enforcement of rights of local communities and conditions of access to biological resources, community knowledge and technologies. (Part I)

Scope of Subject Matter: The scope of subject matter to which the legislation applies includes biological resources, their derivatives, “and community knowledge and technologies” (Art.2(1)(i-iii)) .

Conditions of Access to TK: In the application for access to the NCA the applicant shall provide a description of the innovation, practice, knowledge or technology, associated with the biological resource and propose mechanisms for benefit-sharing (Art.4.(1)(xi) and 4(1)(x). Local communities have the right to refuse access to their TK where such access will be detrimental to the integrity of their natural or cultural heritage (Art.19).

Registration Mechanisms: The Model Legislation establishes a National Information System which shall include “documentation of information on Community Intellectual Rights, Farmers’ Rights, ... community innovations, practices, knowledge and technologies;” (Art.64 (1) and 65(1)). It further states that “[l] local communities may also establish databases on... the knowledge and technologies of those communities” (Art.64 (2)). Access to information in the National Information System and the local databases shall be regulated by a charter setting out the rights of the owners of the data (Art.64 (3)).

Sanctions and Enforcement: The State shall establish appropriate agencies with the power to ensure compliance with the provisions of the Model Law (Art. 67.2). Sanctions and penalties may include: i) written warning; ii) fines; iii) automatic cancellation/ revocation of the permission for access; iv) confiscation of collected specimens; v) permanent ban from access to community knowledge and biological resources. The violation committed shall be publicized and reported by the NCA to the secretariats of relevant international agreements. When the collector conducts his/her operations outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the cooperation of the government under whose jurisdiction the collector operates. Finally, decisions on agreements regarding access to community knowledge may be appealed through appropriate administrative channels. Recourse to the courts shall be allowed after exhaustion of all administrative remedies (Art. 68).

Access and Benefit-sharing: The Model Legislation says, “any access to TK shall be subject to the necessary PIC of the NCA as well as concerned local communities (Art.3(1), 5(1) and 18). All access applications shall be submitted to the NCA and the NCA shall subject them to the PIC of the concerned community (Art.3 (3) and 11(1)). Any access granted without consultation with the local communities shall be deemed to be invalid and in violation of the PIC requirement (Art.5 (3)). Under the Model Legislation, the granting of access, including to TK, shall be carried out by the NCA in writing and carried out through a written agreement between the NCA and local community on the one hand and the applicant on the other (Art.7) Under the terms of the Model Legislation, the Agreement shall contain a commitment by the collector not to apply for any IP rights over the biological resource and over the TK without the PIC of the providers (Art.8 (1)(v)).

Recognition of Customary Laws: Customary laws and protocols are referred to in several provisions of the Law. It states that “This regime shall not affect the traditional exchange between indigenous peoples of as they are enshrined and protected under the norms, practices and customary law found in, and recognised by, the concerned local and indigenous communities, whether such law is written or not” (Art.17), and further that, “An item of TK shall be identified, interpreted and ascertained by the local communities concerned themselves under their customary practice and law, whether such law is written or not. (Art.23(2)).” In Article 21(1) the Model Legislation states that,

Local communities shall exercise their inalienable right to access, use, exchange or share their biological resources as regulated by their customary practices and laws. (African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000)

- 2) *Brazil* Provisional Measure No. 2186-16 of 2001: Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge

In 2001 Brazil enacted “Provisional Measure No. 2186-16 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge.” The Provisional Measure establishes a Management Council to administer it by establishing: (a) technical standards, (b) criteria for authorization of access and dispatch; (c) directives for drafting the Contract for Use of the Genetic Heritage and Benefit-Sharing; (d) criteria for the creation of a database for recording information on associated TK.

Policy Objectives: The stated objectives of the Provisional Measure are to legislate:

1. access to components of the genetic heritage
2. access to traditional knowledge relating to the genetic heritage;

3. the fair and equitable sharing of the benefits deriving from exploitation of associated traditional knowledge;
4. access to and transfer of technology for the conservation and use of biological diversity.

Scope of Subject Matter: The Law is intended to cover “traditional knowledge of indigenous and local communities relating to the genetic heritage” which it defines as “information or individual or collective practices of an indigenous or local community having real or potential value and associated with the genetic heritage” (Art.7(II)).

Conditions of Access to TK: Access to “associated traditional knowledge” within the Brazilian Measure is defined as the “acquisition of information pertaining to knowledge or individual or collective practices, associated with the genetic heritage, of an indigenous or local community for purposes of scientific research, technological development or biological prospection, with a view to its application in industry or elsewhere” (Art.7 (V)). The Management Council can deliberate on “authorization of access to associated TK, subject to the prior consent of the owner” (Art. 11(IV)(b)).

Under Article 16, access to associated traditional knowledge, shall be had by collection of information respectively, and authorization shall only be given to a national research institution in the biological and related fields by prior authorization. Access to TK associated with the national heritage shall be had by collection of information and authorization shall be given to a national institution that research in the biological or related fields by prior authorization (Art.16). Indigenous or local communities are also guaranteed the rights granted under Article 9 on the condition that they created, developed, held or preserved the TK.

Scope of Rights: The Provisional Measure protects TK associated to the genetic heritage “against illicit use and exploitation and other actions that are harmful or have not been authorized” by the Management Council or an accredited institution (Art.8) In turn, communities that create, develop, hold or preserve TK associated to the genetic heritage are guaranteed the right:

1. “to have the origin of the access to TK mentioned in all publications, uses, exploitation and disclosures”;
2. “to prevent unauthorized third parties from:
 - (a) using or carrying out tests, research or investigations relating to associated TK;
 - (b) disclosing, broadcasting or re-broadcasting data or information that incorporate or constitute associated TK.”
3. to “derive profit from economic exploitation by third parties of associated TK the rights in which are owned by the community” (Art.9).

However, the Measure states in Article 8 that TK protection “shall not affect, prejudice, or limit rights pertaining to intellectual property” and that protection shall not impede “preservation, use and development of TK.” Article 4 also states that “customary uses by communities should be preserved in all cases.”

Rights Holder: The Provisional Measure refers to the rights holder as “Indigenous Cultural Communities and Indigenous Peoples” (ICCs/IPs) which it defines in Article 7 as “a group of generations and through its own customs and preserves its social and economic institutions.” Any associated traditional knowledge may be owned by the community, even if only one single member of the community holds that knowledge (Art.9, Sole Paragraph).

Acquisition of Rights: The Measure does not specify procedures or formalities for the acquisition of rights. Article 11(II)(d) mentions the organization of a database containing

information on associated TK by the Management Council, but there is no requirement for TK to be included in the database in order to be protected.

Registration Mechanisms and Procedures: Under Article 11 of the Provisional Measure, the Management Council is responsible for establishing criteria for the creation of a database for recording information on associated traditional knowledge. Article 8 also states that TK may also be subject to a cadastral record, “as directed by the Management Council or provided in specific legislation.”

Access and Benefit-sharing: In Art.16 the Provisional Measure adheres to PIC stating that access to TK shall be granted with the prior consent of:

- (a) the indigenous community involved;
- (b) the competent body where access occurs in a protected area;
- (c) the owner where access occurs on private land.

Article 17 of the Measure stipulates that benefits arising from economic exploitation of a product or process developed from associated TK, shall be shared in a fair and equitable way between the contracting parties. The institution receiving associated TK shall facilitate transfer of technology for the preservation and use of that TK for the national institution responsible for access and dispatch of the TK (Art.21).

3) *China* The Patent Law of 2000 and the Regulations on the Protection of Varieties of Chinese Traditional Medicine;

“The Patent Law of 2000” and “the Regulations on the Protection of Varieties of Chinese Traditional Medicine” are two separate legislations administered by the State Council’s Patent Administration Department which is responsible for all patent related work throughout the country. For both legislations, which are intended to work in tandem, the

Patent Administration Department is responsible for: (a) technical standards, (b) criteria for authorization of access.

Policy Objectives: China's stated objectives for the Patent Law of 2000 are:

- To accelerate the inventor's enthusiasm, and stimulate technology innovation;
- To provide an important and effective means of traditional medicine intellectual property protection.

The stated objectives for the Regulations on the Protection of Varieties of Chinese Traditional Medicine are:

- To improve product quality;
- To normalize the market;
- To wash out low quality medicine.

Scope of Subject Matter: The two legislations govern "product, method, and use of medicines" which it defines as follows:

Product: a new pharmaceutical composition and preparation thereof, effective ingredient extracted/separated from traditional medicine, effective parts and preparation thereof, new preparation of changing the administration route, etc.;

Method: preparation method of the products mentioned above, new or improved technology of production, etc.;

Use: new indication of medicine, first medical use, the second use of the known medicine, etc. Chinese Traditional Medicine:

Conditions of Protection of TK: In accordance with the legislations in order to qualify for protection uses of TK must display:

- novelty: examining according to the principle of complete identity of technical solution;
- inventiveness: prominent substantive features and notable progress as compared with the existing technology;

- practical applicability: product having medical effect; methods can be carried out or exploited industrially; use can be realized industrially.

Rights Holder: “Manufacturing enterprises” only can be a rights holder under the two legislations.

Acquisition of Rights: Rights are acquired through the Patent Law of 2000 under Chapter III by filing an application for patent to the State Council’s Patent Administration Department.

Expiration and Loss of Rights: Under the Patent Law of 2000 the term of protection is limited to 20 years, counted from the date of filing the patent application. Protection can also be renewed after the 20 year time period.

Registration Mechanisms: Under Article 39 of the Patent Law of 2000 The State Council must register the certificate of patent for invention and announce it. (Provisional Measure No. 2186-16 of 2001 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge)

4) *Costa Rica* Law No. 7788 of 1998 on Biodiversity

Article 13 of Costa Rica’s “Law No. 7788 of 1998 on Biodiversity” establishes the administrative organization in order to fulfill the objectives of the law: a) the National Commission for the Management of Biodiversity (NCMB); b) a National System of Conservation Areas. Under Article 14 of Law No. 7788 the NCMB has the function to formulate and co-ordinate policies for access to biodiversity and associated knowledge. Under Article 14, the NCMB Technical Office has the function to negotiate and approve access applications, and to co-ordinate anything related to access with the private sector, indigenous peoples and peasant communities.

Policy Objectives: The stated objectives of Law No. 7788 are:

- to regulate access and in so doing make possible the equitable distribution of the environmental, economic and social benefits to all sectors of society, paying special attention to local communities and indigenous peoples.
- to recognize and provide compensation for the knowledge, practices and innovations of indigenous peoples and local communities in the conservation and sustainable use ecological of the components of biodiversity.
- to recognize the rights deriving from the contribution of scientific knowledge to the conservation and sustainable ecological use of the components of biodiversity (Art.10(1), 10(6), 10(7)).

Scope of Subject Matter: Two scopes of TK subject matter are defined in the Law: first, the scope of TK to which the Law regulates access, and, second, the scope of TK for which the Law provides exclusive rights (industrial property rights and *Sui Generis* community intellectual rights).

Conditions of Access to TK: The Law includes TK as an intangible component within in the term “biodiversity.” Article 7 defines that “intangible components, which are: the knowledge, innovations and practices, be they traditional, individual or collective, with real or potential value associated with biochemical or genetic resources, whether these are protected or not by systems of intellectual property or by *Sui Generis* registration systems.” Conditions of access are included in the regulation of access to biodiversity: “Access” is defined as “Action to obtain samples of components of Biodiversity ... or to obtain associated knowledge” (Art.7.1) The law recognizes the right of local communities and indigenous peoples to oppose access to their resources and associated knowledge (Art.66). The access policies proposed by the National Commission on the Management of Biodiversity constitute the general rules for access and for the protection of intellectual rights concerning biodiversity. Under Article 83 of the Law the requirements of *Sui Generis* community intellectual rights shall be determined by a participatory process with indigenous

and small farmer communities to be defined by the National Commission for the Management of Biodiversity.

Scope of Rights/Rights Holder: The scope of *Sui Generis* community intellectual rights shall be determined by a participatory process with indigenous and small farmer communities to be defined by the National Commission for the Management of Biodiversity in Article 83 which says, “the Right Holder Who will be the title holder of *Sui Generis* community intellectual rights shall be determined by a participatory process with indigenous and small farmer communities to be defined by the National Commission for the Management of Biodiversity.”

Registration Mechanisms: Under Article 84 of the Law, an inventory will be made of specific *Sui Generis* community intellectual rights that communities ask to be protected. The recognition of these rights in the register is voluntary and free. The registration should be done unofficially and at the demand of the interested parties, without being subject to any formality. A register of rights of access, including to TK, will be organized by the Technical Office of the Commission. The registered information will be publicly available, except for trade secrets (Art.67 and 7.1).

Access and Benefit-sharing: The basic requirements for access under the Law include: (1) PIC of the representatives of the place where the access will occur; (2) Approval of PIC by the Technical Office of the Commission; (3) the terms of technology transfer and distribution of benefits, where there are any, and the type of protection of TK (Art.63 (1)-(3)). The Technical Office establishes the obligation of the interested party to deposit up to 10% of the research budget and up to 50% of the bonuses which it collects, in favour of the National System of Conservation Areas, the indigenous territory or the private owner providing access. (Costa Rica Law No. 7788 of 1998 on Biodiversity)

5) *India* Biological Diversity Act of 2002

Article 8(1) of India's Biological Diversity Act of 2002 establishes the National Biodiversity Authority (NBA). The head office of the NBA is in Chennai and the NBA may establish officers at other places in India. The Act also regulates the Conditions of Service of the NBA Chairperson and members, the Meetings of the NBA, and the Committees of the NBA. The NBA issues guidelines for access to biological resources and for fair and equitable benefit sharing. Chapter VI of the Act regulates the establishment of State Biodiversity Board by the State Government (Section 22); the functions of State Biodiversity Board (Section 23) and the Power of State Biodiversity Board to restrict certain activities (Section 24).

Policy Objectives: The objectives of the Act are to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge

Conditions of Access to TK: Article 3 of the Act states “the obtaining of any knowledge associated to biological resources occurring in India is subject to previous approval of the NBA for certain persons for purposes of research, commercial utilization, bio-survey or bio-utilization” and, further, that “any person who intends to be obtaining of any knowledge associated to biological resources occurring in India is subject to previous approval of the NBA for certain persons for purposes of research, commercial utilization, bio-survey or bio-utilization .”

Scope of Rights: Article 36 of the Act maintains that the scope of rights granted by measures for protection, including *Sui Generis* systems, shall be “as recommended by the National Biodiversity Authority...”

Rights Holder: The Act does not define right holders, but defines in Article 2 the term “benefit claimers” to include “creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application.”

Acquisition of Rights: The Act provides that measures to protect TK “may include registration of the knowledge at the local, state and national levels,” but does not expressly define registration as the required procedure for the acquisition of the legal protection foreseen in the Act.

Sanctions and Enforcement: The Act provides that: (1) sanctions may extend to ten lakh rupees and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both; (2) whoever contravenes the provisions on Section 7 [Prior Intimation to State Biodiversity Board] or any order made under Section 24(2) [Power of State Biodiversity Board to Restrict Certain Activities] shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both. Section 56 regulates the penalty for contravention of directions or orders of Central government, State government, National Biodiversity Authority and State Biodiversity Boards.

Registration Mechanisms: Article 36 of the Act provides that measures to protect TK “may include registration of the knowledge at the local, State and national levels.” Article 41 further provides that “every local body shall constitute a Biodiversity Management Committee for conservation and documentation of biological diversity including ... the chronicling of knowledge relating to biological diversity.”

Access and Benefit-sharing: With regard to PIC, certain persons shall not obtain any knowledge associated to biological resources occurring in India for research or for

commercial utilization or for bio-survey and bio-utilization without previous approval of the NBA under Article 3(1) of the Act. Where any amount of money is ordered by way of benefit sharing, the NBA may direct the amount to be deposited in the National Biodiversity Fund. Provided that where knowledge was a result of access from specific individual or group, the NBA may direct that the amount shall be paid directly to such individual or group of individuals. (Art.21(3)). (India Biological Diversity Act of 2002)

6) *Peru* Law No. 27,811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources

Peru's "Law No. 27,811 of 2002" gives Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI) responsibility to administer the Law.

Policy Objectives: The stated objectives of the Law are:

- (a) To promote respect for and the protection, preservation, wider application and development of the collective knowledge of indigenous peoples;
- (b) To promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge;
- (c) To promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general;
- (d) To ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples;
- (e) To promote the strengthening and development of the potential of the indigenous peoples and of the machinery traditionally used by them to share and distribute collectively generated benefits under the terms of the regime established by the law;

- (f) To avoid situations where patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions.

Scope of Subject Matter: The Peruvian Law Article 3 affords protection to “collective knowledge of Indigenous peoples that is connected with biological resources.” Protection is conferred to collective knowledge that is not in the public domain. The term “collective knowledge” is defined as “the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity” (Art.2(b)).

Conditions of Access to TK: The Law establishes different conditions of access to TK, depending on the purpose of access:

1. Access for the purposes of commercial or industrial application, shall be subject to the signing of a license agreement in which terms are provided that ensure due reward for the said access and in which the equitable distribution of the benefits deriving there from is guaranteed (Art.7). A license contract for the use of collective knowledge is defined as “an express agreement concluded between the organization of indigenous peoples possessing collective knowledge and a third party that incorporates terms and conditions for the use of the said collective knowledge” (Art.2(d)). For details on licensing contracts for collective knowledge see ‘Mutually Agreed Terms’ in the Section on ‘Access and Benefit-sharing Elements’ below.
2. As a general principle, those interested in having access to collective knowledge for the purposes of scientific, commercial and industrial application shall apply for the

prior informed consent of the representative organizations of the indigenous peoples possessing collective knowledge (Art.6)

3. *Traditional knowledge developed by indigenous peoples*: “Indigenous peoples” means “aboriginal peoples holding rights that existed prior to the formation of the Peruvian State, maintaining a culture of their own, occupying a specific territorial area and recognizing themselves as such” (Art.2(a)).
4. *Traditional knowledge not in the public domain*: protection is only conferred to knowledge which is not in the public domain (Art.42). For the purposes of the law, collective knowledge is understood to be in the public domain when it has been made accessible to persons other than indigenous peoples by mass communication media such as a publication or, when the uses or characteristics of a biological resource are concerned, where it has become extensively known outside the indigenous peoples (Art. 13)

Rights Holder: The Peruvian Law identifies in Article 1 “indigenous peoples and communities” as the persons whose rights and power to dispose of their collective knowledge are recognized.

Sanctions and Enforcement: The Peruvian Law stipulates that Indigenous peoples may bring infringement actions against whoever violates their rights under Article 42. Under Article 45, Indigenous peoples may also bring actions claiming ownership and indemnification against the third party that uses their collective knowledge in a manner contrary to the provisions of the regime.

Registration Mechanisms: The Law establishes three types of registers, which states the following:

- (a) to preserve and safeguard the collective knowledge of indigenous peoples and their rights therein; to provide INDECOPI with such information as enables it to defend the interests of indigenous peoples where their collective knowledge is concerned (Art.16).
- (b) The collective knowledge of indigenous peoples may be entered in three types of register (Art.15)

Access and Benefit-sharing: Regarding PIC, the Law states in Article 6 that those interested in having access to collective knowledge for the purposes of scientific, commercial and industrial application shall apply for the prior informed consent of the representative organizations of the indigenous peoples possessing collective knowledge. The organization of the indigenous peoples shall inform the greatest possible number of indigenous peoples possessing the knowledge that it is engaging in negotiations and shall take due account of their interests and concerns, in particular those connected with their spiritual values or religious beliefs. The information supplied shall be confined to the biological resource to which the collective knowledge under negotiation relates in order to safeguard the other party's interest in keeping the details of the negotiation secret. or a renewable period between one and three years (Art.26).

The Law further stipulates that a statement of the compensation that the indigenous peoples will receive for the use of their collective knowledge, which shall include: (i) an initial monetary payment or an equivalent for its sustainable development, and (ii) a percentage of not less than 5% of the value, before taxes, of the gross sales resulting of the marketing of the products developed from the said collective knowledge.

Indigenous peoples may obtain benefits from their collective knowledge in two ways:

- Directly: through payment in two stages pursuant to license contracts;

- Indirectly through the Fund for the Development of Indigenous Peoples:

The purpose of the Fund is to contribute to the development of indigenous peoples through the financing of projects and other activities (Art.37). The Fund was created to allow all indigenous peoples – participation in a license contract - to enjoy the benefits derived from the use of their collective knowledge.

Article 8 states that a percentage of no less than 10% of the value of the gross sales resulting of the marketing of the products developed from a collective knowledge shall be set aside for the Fund. If the collective knowledge has passed into the public domain in the last 20 years, an unspecified percentage of the value of the gross sales resulting of the marketing of the products developed from this knowledge shall be set aside for the Fund .

Recognition of Customary Laws: Customary laws and protocols are referred to in several provisions of the Law as follows:

- This regime shall not affect the traditional exchange between indigenous peoples of the collective knowledge (Art.4).
- The rights granted under the regime shall be independent of those that may come into being within the indigenous peoples, who may use their traditional systems of distribution of benefits (Art.10).
- Indigenous peoples shall be represented by their representative organizations, due regard being had to the traditional forms of organization of the indigenous peoples (Art.14).
- Indigenous peoples may organize local registers in accordance with their practices and customs (Art.24).
- To the extent possible, the Administrative Committee of the Fund shall use the mechanisms traditionally used – by indigenous peoples - for sharing and distributing collectively generated benefits (Art.39).
- To settle the disputes that may arise between indigenous peoples in connection with the implementation of this regime... indigenous peoples may use their customary law and their traditional forms of dispute settlement (Art.46). (Peru Law No. 27,811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources)

7) *Philippines* Indigenous Peoples Rights Act of 1997

The National Commission on Indigenous Peoples (NCIP) is the primary government agency, located under the Office of the President, which is responsible for the formulation and implementation of policies, plans and programs to recognize, protect and promote the rights of Indigenous Cultural Communities and Indigenous Peoples (ICCs/IPs) in the Philippines.

Policy Objectives: The objectives of the Indigenous Peoples Rights Act of 1997 are:

- To recognize, protect, and promote the rights of Indigenous Cultural Communities and Indigenous Peoples;
- To provide for a system of community intellectual rights protection in respect of the innovative contribution of both local and indigenous cultural communities in the matter of development and conservation of genetic resources and biological diversities.

Scope of Subject Matter: The subject matter which ICCs/IPs have the right to control, develop and protect under Section 34 of the Act includes “their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.” The subject matter that is to be protected by the State under Section 32 includes “the past, present and future manifestations of their [ICCs’/IPs’] cultures.”

Conditions of Access to TK: In the Act access to Indigenous knowledge related to the conservation, utilization and enhancement of biological and genetic resources shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community under Section 32; which states, “The State shall ... protect ... the right

to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.”

Scope of Rights: The scope of rights made available to ICCs/IPs in the Act includes:

- the right to practice and revitalize their own cultural traditions and customs (Section 32);
- the right to the restitution of cultural, intellectual religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs (Section 32).
- the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations (Section 34).

Rights Holder: Indigenous Cultural Communities and Indigenous Peoples under Section 3(h) of the Act are defined as “people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have... became historically differentiated from the majority of Filipinos.” Section 5 declares the community ownership of traditional resource rights.

Sanctions and Enforcement: Section 65 of the Act states when disputes involve ICCs/IPs, “customary laws and practices shall be used to resolve the dispute.” Additionally, Section 66 states “The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs: Provided, however, that no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws. For this purpose, a certification shall be issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the

NCIP.” Furthermore, Chapter XI of the IPRA declares in Section 72 the Punishable Acts and Applicable Penalties and in Section 73, Persons Subject to Punishment.

Access and Benefit-sharing: In Section 35 the Act outlines access to Indigenous knowledge related to biological resources, within ancestral lands and domains is subject to PIC of ICCs/IPs. PIC which is defined further in Section 3(g) as “the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.”

Recognition of Customary Laws: Section 2(b) of the Act reads, “The State ... shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain. The term “customary law” is defined as “a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs” (Section 3(f)). Section 15 of the Act states, “ICCs/IPs shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights.” The provision on application of laws states that “Customary laws, traditions and practices of the ICCs/IPs of the land where the conflict arises shall be applied first with respect to property rights, claims and ownerships, hereditary succession and settlement of land disputes. Any doubt or ambiguity in the application and interpretation of laws shall be resolved in favor of the ICCs/IPs” (Section 63). (Philippines Indigenous Peoples Rights Act of 1997)

8) *Portugal* Decree Law No.118 of 2002 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material.

Portugal's Decree Law No.118 of 2002 includes the Register of Plant Genetic Resources (RRGV) is created in the General Ministry of Agriculture, Fisheries and Rural. Other institutions from the Ministry of Environment, Regional Agricultural Services and Municipal Chambers also have partial responsibility for administration.

Policy Objectives: The stated objectives of the Law outlined in the Preamble are:

- To recognize, preserve and maintain the knowledge, innovations and practices of small farmers and local communities embodying traditional lifestyles;
- To stimulate and contribute to their conservation for coming generations as a part of the national heritage and the heritage of mankind;
- To promote the conservation, legal safeguarding and transfer of autochthonous plant material of current or with potential interest to agrarian, agroforest and landscape varieties and spontaneously occurring material.

Scope of Subject Matter: Traditional Knowledge is defined by the Law in Art.3(1) as comprising “all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations.” That includes, but is not limited to, knowledge of methods, processes, products and designations with applications in agriculture, food and industrial activities in general, including traditional crafts, commerce and services, informally associated with the use and preservation of local TK, which is defined in Article 3(1) as comprising “all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic

manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations.”

Conditions of Access to TK: The provisions on Access to and Allocation of Benefits applying to TK are outlined in Article 3(7). Accordingly, access to traditional knowledge for purposes of study, research, improvement or biotechnological applications shall be subject to prior authorization by The Ministry of Agriculture (CoTeRGAPA), the owner of the registration having been heard. (Art.7(1)). Access requires the fair allocation of the benefits resulting from such use, by prior agreement with the owner of the registration (Art.7(4)).

Conditions of Protection of TK: Subject to different conditions, the Decree grants two levels of protection.

1. All TK as defined in Art.3(1) shall be protected against reproduction or commercial or industrial use, subject to the following conditions:
 - the TK shall be identified, described and registered in the Register of PGR;
 - the description shall be so phrased that third parties may reproduce or utilize the TK. (Art.3(2)).
2. TK may be afforded certain additional protection, subject to fulfilling either of the following conditions:
 - the TK has not been used in industrial activities, or
 - the TK is not publicly known outside the population or local community in which it originated (Art.3(4)).

Scope of Rights: The Law also grants two scopes of rights for different types of registered TK:

- Owners of registered TK which has not been industrially used or is not publicly known outside the originating local community shall have the right to: protect the TK “against reproduction or commercial or industrial use” (Art.3(2)).

- Art. 3(3) confers on owners of TK the right to choose to keep it confidential, “with the protection conferred by registration being limited to cases in which it is unfairly acquired by third parties” (Art.3(3)).

Rights Holder: Under Article 9 of the Law the owner of the rights can be any entity, whether public or private, Portuguese or from another country, represents the interests of the geographical area in which the local variety is most widely found or where the spontaneously occurring autochthonous material displays the greatest interest for genetic variability. In the case of TK the owner must represent the interests of the region from where such knowledge is originated. The Preamble specifies that applicants for the legal registration of local varieties and spontaneously occurring “autochthonous” material “may be public or private bodies of any kind, such as self-supporting businesses, farmers’ associations, regional development associations or individuals.”

Sanctions and Enforcement: The use of registered plant material, plants or parts thereof, in a manner contrary to the rights conferred to the owner of the register, and specified in the law, and in the regulations under this Decree, as well as the infringement of the provisions of this legislation on traditional knowledge, constitute violations punishable with a fine of between €100 and €2,500. Negligence is punishable. In the event of responsibility for the violation resting with a corporate entity, the maximum amount of fines shall be €30,000 (Art.13).

Registration Mechanisms: The State Council is responsible under the Act to register the certificate of patent for invention and announce it. The Law establishes the Register of Plant Genetic Resources (RRGV) and the National Directory of Registrations of Plant Genetic Resources in Article 4 to carry out registration which is a condition for the acquisition of rights.

Access and Benefit-sharing: Article 4 requires that the registration of the material confers on the owner thereof the right to a share in the benefits derived from its use. Access to TK for purposes of study, research, improvement or biotechnological applications shall be subject to prior authorization by CoTeRGAPA. Access as defined in Article 7 requires the fair allocation of the benefits resulting from such use, by prior agreement with the owner of the registration. The registration of the material confers on the owner thereof the right to a share of the benefits derived from its use in Article 4. (Portugal Decree Law No.118 of 2002 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material)

9) *Thailand* Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E 2542

The “Act on Protection and Promotion of Traditional Thai Medicinal Intelligence” establishes the Committee on Protection and Promotion of Traditional Thai Medicinal Intelligence. The Director of the Institute for Traditional Thai Medicine is a member and secretary of the Committee under Section 5. The Act also establishes the Institute for Traditional Thai Medicine under the Ministry of Public Health, having the authority to carry out duties concerned with protection and promotion of intelligence on traditional Thai medicine and herbs. The Institute is also responsible for the administrative and technical work of the Committee (Section 12).

Scope of Subject Matter: Traditional Knowledge is defined in Article 3 as comprising “all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic manner by

local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations.”

In general, “traditional Thai medicinal intelligence” means “the basic knowledge and capability concerned with traditional Thai medicine.” “Traditional Thai medicine” is defined as “the medicinal procedures concerned with examination, diagnosis, therapy, treatment or prevention of, or promotion and rehabilitation of the health of humans or animals, obstetrics, traditional Thai massage, and also includes the production of traditional Thai drugs and the invention of medical devices, on the basis of knowledge or text that has been passed on from generation to generation” (Section 3).

According to Section 16, “there shall be three types of traditional Thai medicinal intellectual property rights as follows: (1) the national formula of traditional Thai drug or the national text on traditional Thai Medicine; (2) the general formula of traditional Thai drugs or general traditional Thai medicine document; and (3) the personal formula of traditional Thai drugs or personal text on traditional Thai Medicine.”

Conditions of Protection of TK: The Thai Act does not include express provisions on conditions of protection, but the definitions in Section 3 contain certain conditions for traditional Thai medicine to be included in the scope of the Act. For example, the definition of the term “traditional Thai medicine” contains the qualification that the medicinal procedures, massage, production of traditional drugs or the invention of medical devices has to rest “on the basis of knowledge or text that has been passed on *from generation to generation.*” (Section 3) The definition of “text on traditional Thai medicine” states that the technical knowledge must, as a condition of inclusion under the definition, have been “passed on from generation to generation.”

Scope of Rights: Section 34 of the Act confers the rights holder “the sole ownership on the production of the drug and the sole right over the research, distribution, improvement or development of formulas on traditional Thai drugs or intellectual property rights of traditional Thai medicine under the registered text on traditional Thai medicine.” However, these rights are limited and do not apply to the following: (1) any act that is of benefit for studies, findings, tests or research according to the regulation specified by the Minister; or (2) preparation of specific drugs according to prescription of holders of registration certificate on; or (3) production of drugs for household use or production of drugs by state hospitals or government or state agencies, for use in state hospitals, or the use of text on traditional Thai medicine for benefits in treatment of patients in state hospitals, provided that it should be in accordance with the Rules issued by the Minister.

Rights Holder: Section 3 defines the term “right holder” as “those who have registered their intellectual property rights intelligence under this Act.” Right holders are national individuals and also, according to Section 43 of the Law, persons with the nationality of other nations who agree to permit persons with Thai nationality to have the protection of intellectual property rights protection on traditional Thai medicine. Section 35 states, “The intellectual property right on traditional Thai medicine under this section shall not be transferred to others, except for the case in which it is passed on by succession.” Right holders are national individuals and also, according to Section 43 of the Law, persons with the nationality of other nations who agree to permit persons with Thai nationality to have the protection of intellectual property rights protection on traditional Thai medicine.

Sanctions and Enforcement: The concerned party or the public prosecutor may file complaints with the court to revoke registration over IPRs on traditional Thai medicine that had been registered unfairly or contrary to Section 21 or Section 22 of the Act . In case the

person permitted with the IPR on traditional Thai medicine exercise their rights against public order or good morals or violate or do not comply with the conditions specified in the Ministerial Regulation issued under Section 36.2 or exercise their rights which may cause serious damage to an IPRs on traditional Thai medicine that has been registered, the registrar has the power to revoke the permission to the IPRs on the traditional Thai medicine.

Registration Mechanisms: Section 13 states that The Director of the Institute for Traditional Thai Medicine is the Central Registrar and the provincial health chiefs are the provincial registrars. The Committee on Protection and Promotion of Traditional Thai Medicinal Intelligence establishes rules concerned with standards and procedures on registration of IPRs on traditional Thai medicine under Section 6. The Institute for Traditional Thai Medicine under the Office of the Permanent Secretary, the Ministry of Public Health, having the authority to carry out duties concerned with protection is responsible for overseeing the registration process. (Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E 2542)

10) United States of America Indian Arts and Crafts Act of 1990 and other relevant measures

Two mechanisms have been established in the US to work in conjunction:

1. The Indian Arts and Crafts Board was established in 1935. It operates as an agency within the Department of the Interior and administers the Indian Arts and Crafts Act (IACA). The Board interprets potentially unlawful conduct for enforcement purposes. It can, for example, refer complaints of criminal violations to the Federal Bureau of Investigation and recommend to U.S. Attorney General that criminal proceedings be instituted.

2. The Database of Official Insignia of Native American Tribes is maintained by the United States Trademark and Patent Office (USPTO). USPTO Database of Official Insignia of Native American Tribes was established as a result of the Trademark Law Treaty Implementation Act (1998).

The 1990 Native American Graves Protection and Repatriation Act (NAGPRA) also protects certain aspects of TK. NAGPRA mainly has to do with the protection material culture but it does protect American Indian and Native Hawaiian culture in many respects through its concern with sacred objects, the illicit sale of religious artifacts and the protection of sacred sites. American law does not generally recognize moral rights but the federal Visual Artists Protection Act also gives artists (including Native American artists) moral rights-type protection in certain instances (Patterson-2006).

Policy Objectives: The stated objectives of the mechanisms are as follows:

(1) IACA:

- To promote the development of Indian arts and crafts and to create a board to assist therein, and for other purposes;

(2) Database of Official Insignia:

- To address issues surrounding the protection of the official insignia of federally and State recognized Native American tribes (Section 302(a), Trademark Law Treaty Implementation Act).

The legal protection provided in the United States is, in summary, intended:

- To protect and preserve cultural heritage;
- To prevent commercial interests from falsely associating their goods or services with indigenous peoples.

Scope of Subject Matter: Section 309.2(d)(1)) of IACA states, “The Implementing Regulations for the Act provide that, in general, the term “Indian product” means “any art or craft product made by an Indian.” The Regulations furthermore illustrate that Indian products

include, but are not limited to: (i) art works that are in a traditional or non-traditional Indian style or medium; (ii) crafts that are in a traditional or non-traditional Indian style or medium; (iii) handcrafts, i.e. objects created with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product (Section 309.2(d)(2)).

In the Database of Official Insignia the term “Official insignia of Native American tribes” means the flag or coat of arms or other emblem or device of any federally or state-recognized Native American tribe, as adopted by tribal resolution and notified to the United States Patent and Trademark Office.

Conditions of Protection of TK: To be protected under IACA a product must meet the following requirements:

- it must be an “Indian product” as defined in the Act and the Implementing Regulations;
- it must have been produced after 1935;
- the producer of the concerned Indian product must be resident in the United States.

The Database of Official Insignia provides protection:

- if signs or symbols contain tribal names, recognizable likenesses of Native Americans or symbols perceived as being Native American in origin they are included in the database.

Scope of Rights: Under Section 104(a) IACA prohibits the offering or displaying for sale or selling of any good, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States. In Section 2 the Board has the power to create Government trademarks of genuineness and quality for Indian products and the

products of particular Indian tribes or groups. The scope of rights arising from the creation of such a mark is set out in the Trademark Act of 1946, as amended.

The Database of Official Insignia provides registered tribes with evidence of the relationship between the tribe and their insignia, and could serve as a cause for denying an application for registration of a trademark

Rights Holder: In Section 6 of IACA the term “Indian” is defined as “any individual who is a member of a tribe and for the purposes of this section is certified as an Indian artisan by an Indian tribe.” The term “Indian tribe” means: “(a) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or, (b) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.” The term “Indian arts and crafts organization” means any legally established arts and crafts marketing organization composed of members of Indian tribes. In the Database of Official Insignia, the beneficiaries of the Database are federal and state recognized tribes.

Acquisition of Rights/Registration Mechanism: Section 2 of IACA states that, “The Board may create Government trademarks of genuineness and quality for Indian products and register them in the United States Patent and Trademark Office without charge. With the Database of Official Insignia rights are granted to member of a tribe by virtue of having the insignia registered in the Database.

Sanctions and Enforcement: Within the United States, the IACA empowers the IACB to refer violations to the Federal Bureau of Investigation. The IACB may independently recommend to the Attorney General of the United States that criminal

proceedings be instituted. The IACB may also recommend that the Secretary of the Interior refer a matter to the Attorney General for civil enforcement action. The criminal and civil penalties for violating the IACA are as follows: first time individual offenders are subject to fines of up to \$250,000 or five years' imprisonment; businesses are subject to fines of up to \$1,000,000; subsequent violations expose individual offenders to fines of up to \$1,000,000 or fifteen years' imprisonment, while business offenders face up to \$5,000,000 in fines. (U.S. Indian Arts and Crafts Act of 1990 and other relevant measures)

Summary

The *Sui Generis* models analyzed in this chapter constitute a wide range of policy choices made by the countries with regard to the protection of TK. Most of the models define the policy objectives they aim to implement in respect of the protected subject matter. Numerous laws or measures on TK protection share certain policy objectives, such as the conservation of TK and associated biological diversity. In some national contexts, different aspects of TK protection are being covered by distinct and complementary *Sui Generis* measures. Numerous *Sui Generis* measures are linked to the legal regulation of access to, and use of, tangible subject matter that is associated with TK, such as genetic or biological resources. An important part of these measures are the exceptions and limitations through which their application is circumscribed.

Most *Sui Generis* measures for TK combine two basic legal concepts to govern the use of TK: (1) the regulation of access to TK, and (2) the grant of exclusive rights for TK. This combination reflects the two major legal frameworks within which most measures are adopted and implemented: intellectual property frameworks and access and benefit-sharing arrangements. In many cases, access regulation for TK is part of larger access and benefit-sharing frameworks that apply also to genetic or biological resources.

The national *Sui Generis* measures combine diverse conceptual and policy tools to customize legal protection for TK. These conceptual and policy tools include: (1) the regulation of access to TK, (2) the grant of exclusive rights for TK, (3) concepts from the law on the repression of unfair competition, and (4) references to customary laws of indigenous and local communities. Most of the national *Sui Generis* models also delimit the scope of subject matter which they cover through combinations of three criteria:

- sectorial distinctions: for example, traditional medicine traditional agriculture, etc. Some laws include distinct sets of rights for such sectoral areas. For example, the African Model Legislation provides for farmers' rights in the agricultural sector, in addition to community intellectual rights for all sectors;
- association of the TK with tangible subject matter;
- to genetic resources, TK related to any properties of biological diversity, TK related to any aspects of ecosystems, etc.

The African Union Model Legislation is the only model that is intended to be broad enough to allow the different nation states in the Union to adapt the model to suit their needs, but does maintain that PIC must be respected. Brazil's Provisional Measure is the only model that pertains specifically to Genetic Resources; therefore only concerning TK as it related to Genetic Resources; but also specifically states that any TK protection should not limit IPR laws. The Costa Rican, Indian and Peruvian Laws are all limited to TK protection as it is associated with biological resources and all draw heavily from CBD provisions. However, they differ in that Costa Rica's Law has strongly provisions for farmers rights; while India uses strong enforcements of fines and jail terms for unauthorized use (also designed somewhat to protect farming and harvesting, particularly rice harvesting); and Peru's complex Law contained PIC provisions, but is intended only for TK not in the Public Domain (therefore, no retroactive protection for already expropriated TK); and royalty provisions for payments to Indigenous groups and/or an Indigenous fund.

Both Thailand's and China's Laws are intricate and designed only to protect the ancient and lucrative Asian medicine traditions in the respective countries, both also relying on existing IPR laws. The U.S. Act dating back to 1935 is the oldest *Sui Generis* model in the world has unique trademark protection provisions for insignia and the most severe financial and incarceration provisions in the world for TK infringements: with maximum 5 years prison terms or \$100,000 fines for individuals and \$5,000,000 for corporations. Of all the existing national models the Philippines Act is the most comprehensive in terms of protection for a wide range of TK including genetic resources, plants, Oral Traditions, literature, designs, religions, visual and performing arts, and includes provisions requiring PIC and Customary Laws to resolves disputes.

It should be noted that most of these ten models were implemented in this new millennium and represent the first "group" of national *Sui Generis* models for TK protection in the world. Most of these legislations and laws are relatively recent and many of the countries are just beginning to analyse the affects of their practical applications. Weather these mechanisms function effectively within the countries and Indigenous communities is also a matter for further analysis over time. However, these countries should be commended by Indigenous peoples and the international community for their progressive and groundbreaking work on the issues. The application of these national legislations and laws are also being closely observed by international forums as models for the development international instruments for the protection of TK (World Intellectual Property Organization, Current National Models for Sui Generis Legislation, Geneva 2002).

CHAPTER EIGHT: INTERNATIONAL INITIATIVES

This chapter will review the state of discourse in the various international forums that are undertaking discussions on TK in the world. These forums include: the UN Permanent Forum on Indigenous Issues (UNPFII), United Nations Educational, Scientific and Cultural Organization (UNESCO) and various other UN forums, and WTO. Although these forums have been engaging in important TK discussions, they have not been as active on TK issues as the CBD and the WIPO IGC – the two international forums who have taken leading roles in defining TK rights at the international level. The TK discourse has been so significant in the CBD and the WIPO IGC that these two forums will be discussed together in the following chapter.

Background

The first Indigenous rights advocate to approach an international forum was Chief Deskaheh, a Cayuga orator from the Haudenosaunee Six Nations Confederacy. In 1914 he lead a delegation to Ottawa to assert that the Haudenosaunee had a treaty with the British Crown and the Canadian Government had no jurisdiction over Haudenosaunee people and lands. In 1921 Deskaheh, appointed “Speaker of the Six Nations Council,” presented as travel credentials a passport authorized by his nation and crossed the Atlantic to seek British aid.¹ Deskaheh spoke to the League of Nations in Geneva in 1922 asking the League to try to prevent Canada from appropriating Haudenosaunee lands. Deskaheh’s attempt failed but did get some support from a few countries including the UK who spoke out in the forum against Canada’s mistreatment of Indigenous peoples under the UKs rule.

¹ Mohawk Nation, (1978). Basic Call to Consciousness. New York, New York: Akwesane Notes.

In 1924 Deskaheh along with Haudenosaunee delegation petitioned the League of Nations to be admitted as a member with the support of the Dutch Government. When presented with the challenge from Indigenous Peoples, the member-states closed ranks to exclude the petition for admission.² Another Haudenosaunee delegation approached The League of Nations forum in San Francisco in 1944 which was attempting to form a new international organization which later became the United Nations. As a new world order was emerging at the end World War II, The League of Nations was eventually dissolved in 1946 as the UN had emerged in 1945 as the primary international body to represent the Nations and peoples of the world and uphold the principles of Human Rights.

Subsequently various UN conventions, treaties, institutions and forums have been developed and continue to be developed to represent the common principles of humanity and establish a body of International Law to regulate the conduct of Nations. Many of these conventions, treaties, institutions, forums and international laws have a direct impact on the rights of Indigenous peoples and have dealt directly with issues of TK.

The International Labor Organization (ILO) had been dealing with some issues of Indigenous peoples as workers dating back to 1936 under the League of Nations. With its relatively recent status as a UN affiliated organization in 1957, ILO passed Convention 107 entitled “The Indigenous and Tribal Populations Convention.” Notwithstanding its limitations, ILO Convention 107 performed the valuable task of inscribing for the first time in International Law the category of indigenous and tribal peoples, whom it correctly represents as deserving special attention.³ ILO Convention 107 would later be replaced with ILO Convention 169 in the 1980s.

² Venne, Sharon, (1992). Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples (pp. 30). Penticton, British Columbia: Theytus Books Ltd.

³ Ibid., 34

The Human Rights Base

Indigenous peoples' rights initially came into the UN System as an element of Human Rights. The two key UN Human Rights conventions are *The International Convent on Civil and Political Rights* (1967) and *The International Convent on Social, Cultural and Economic Rights* (1967). Article 1 in both conventions is the primary source of Indigenous rights recognizing that "all peoples have the right to self-determination." *The International Convent on Social, Cultural and Economic Rights* further recognizes that "all peoples have the right to social, cultural and economic development." Indigenous peoples rights are, therefore, recognized initially in the UN as rights of "peoples" under Human Rights Law. Just prior to the adoption of the two conventions, the UN Commission into Permanent Sovereignty Over Natural Resources (PSONR) concluded that Indigenous peoples have PSONR and resulted in UN General Assembly passing Resolution 18(05) recognizing that (PSONR) belongs to both 1) "peoples" and 2) "states." Indigenous peoples have consistently stated that their right to self-determination and PSONR includes the TK rooted in their peoples and territories (Trask-2002).

The International Framework

The main international forums that have emerged as impacting and dealing directly with issues of TK are the CBD and WIPO. In addition, the WTO Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement, The World Bank Group (WBG) and various UN forums are currently discussing issues of TK. The International Forums are intended to set standards for Indigenous rights. International standards represent inclusive processes, which Indigenous people voice and vision has been heard rather than denied (Henderson-2001). These international bodies and the nature of their TK programs of work will be briefly outlined below.

Key Principles

Some key principles and concepts that have emerged in the International Framework discussions are: 1) Customary Law, 2) *Sui Generis* legislation, and 3) free, prior and informed consent (FPIC). Customary Law” is regarded as the “traditional laws” and/or “cultural protocols” that have regulated the use of TK within Indigenous nations for centuries. In some forums there is a recognition that Customary Laws are evolving and have a key role to play in the development of international standards on the regulation of TK. *Sui Generis* legislation is discussed in a number of forums as new forms of legislation that be developed for TK, that are not based on forms of existing legislation.

“Free, prior and informed consent” (sometimes called “prior informed consent” or PIC) is discussed in the WIPO, CBD and various UN forums, as a principle that there should be a process of acquiring the consent of Indigenous peoples before any access to their TK and/or natural resources is granted. Indigenous peoples have consistently demanded that WBG policies on Indigenous peoples recognize and require Indigenous peoples’ free, prior and informed consent. This was also recommended to the WBG by the World Commission on Dams and, in 2004, by the Extractive Industries Review. The WBG has rejected recognition of and respect for FPIC. Instead, the WBG approved, in its decision on the response to the Extractive Industries Review in August/September 2004, that the standard to be adopted and applied will be “free, prior and informed consultation resulting in broad community support” (FPICon), a “new” concept which is less restrictive on corporations backed by the WBG to develop on or extract resources from Indigenous lands. The concept of FPICon remains exclusive to the WBG and has been used in the latest version of draft Operational Policy 4.10 on Indigenous Peoples (December-2004) and issues in relation to its

interpretation and application as part of the overall process of developing and approving World Bank projects (McKay-2005).

The Working Group on Indigenous Populations

The Working Group on Indigenous Populations (WGIP) was established in 1982 as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights and meets annually in Geneva, usually during the last week of July. (Trask-2002) The WGIP is mandated to “(1) review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples; and (2) to give attention to the evolution of international standards concerning indigenous rights.”

The Working Group is open to all representatives of Indigenous peoples and their communities and organizations. The openness of the Working Groups’ sessions, which also includes the participation of representatives of Governments, NGOs and United Nations agencies, has strengthened its position as a focal point of international action on indigenous issues. The United Nations Voluntary Fund for Indigenous Populations was established in 1985, with the purpose of assisting representatives of indigenous communities and organizations to participate in the deliberations of the Working Group.

(WGIP Draft) Declaration on the Rights of Indigenous Peoples

In 1985 the WGIP began preparing a Draft Declaration on the Rights of Indigenous Peoples, taking into account the comments and suggestions of participants in its sessions, particularly representatives of Indigenous peoples and Governments. At its eleventh session, in July 1993, the Working Group agreed on a final text for the draft United Nations

Declaration on the Rights of Indigenous Peoples and submitted it to the Sub-Commission.⁴

The WGIP has since been meeting annually in Geneva to discuss issues pertaining to Indigenous rights and the Draft Declaration, but has been reluctant to make any changes to the text in the 1993 draft. The Draft Declaration has since been under review by an ad hoc working group of the UN Commission on Human Rights. The Declaration was recently under review by the new UN Human Rights Council (established in 2006) and passed on June 29, 2006 at the new Commission initial meeting— despite being voted against by Canada and Russia.

Indigenous peoples organizations and their supporting NGOs and member states at the Human Rights Council “expressed their deep frustration and disappointment with the Canadian government’s effort to stall this much needed and long overdue human rights instrument... but in the end Canada was one of only two nations to vote against the Declaration” (Joint press release “Draft Declaration on the Rights of Indigenous Peoples Moves Forward Despite Canadian Government Interference-June 29, 2006). The proposed Declaration will now move forward to consideration for adoption by the UN General Assembly.

Provisions of the Draft Declaration which pertain most directly to TK are:

Article 12: Indigenous peoples have the right to practice their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historic sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

⁴ Posey, Darrell & Dutfield, Graham, (1996). Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities (pp. 29). Ottawa, Ontario: International Development Research Centre.

Article 29: Indigenous peoples are entitled to recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of properties of their fauna and flora, oral traditions, literatures, designs and visual and performing arts.

If adopted by the General Assembly, the new Declaration will be an imperative tool for applying the UN human rights conventions to the Indigenous peoples of the earth (Battiste and Henderson-2003) and Indigenous peoples will have Articles 12, 29, and other articles making reference to TK rights, to hold states and the international community to these obligations in the ongoing discourse and discussions.

The UN Permanent Forum on Indigenous Issues

The proposal to create a permanent forum focused on Indigenous issues under the auspices of the UN Commission on Human Rights was officially introduced at the Vienna World Conference on Human Rights in 1993. Its establishment then became one of the central objectives of the program of work for the International Decade of Indigenous Peoples (1995-2004). UN workshops were held to discuss the possibility of a permanent forum in Copenhagen, Denmark in 1995 and in Santiago de Chile in 1997. In February 1999, an ad hoc working group of the Commission on Human Rights met in Geneva to elaborate proposals for the forum. A second ad hoc working group met the following year, in February 2000, to finalize a proposal for the Commission on Human Rights. At its fifty-sixth session, the Commission on Human Rights decided to recommend to the Economic and Social Council that it set up a permanent forum on Indigenous issues. On 28 July 2000, the Economic and Social Council adopted resolution establishing the Permanent Forum on Indigenous Issues.

The mandate of the Permanent Forum is to:

- (a) Provide expert advice and recommendations on indigenous issues to the Council, as well as to programs, funds and agencies of the UN through the Council;
- (b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the UN system; and
- (c) Prepare and disseminate information on indigenous issues.

The Forum meets once a year for ten working days and submits an annual report to the Council on its activities, including any recommendations for approval. The report is also distributed to relevant UN organizations, funds, programs and agencies as a way of furthering the dialogue on Indigenous issues within the UN system. The Forum is comprised of sixteen independent experts, eight of whom are nominated by governments and eight of whom are appointed by the President of the Council, following formal consultations with governments on the basis of consultations with indigenous organizations.

The Forum has frequently dealt with various aspects of TK and was mandated in 2004 to hold a workshop on free, prior and informed consent in New York January 17-19, 2005. The workshop produced a set of strong recommendations and guidelines on FPIC which was approved by members and participants at the 6th meeting of the Forum in May 2005.

The Forum also held a Technical Workshop on Indigenous Traditional Knowledge in Panama City, 21-23 September 2005, that was convened following a recommendation of the Permanent Forum at its fourth session in 2003. The Forum called for the convening of such a workshop, in collaboration with UN agencies dealing with TK issues and with the participation of Indigenous experts, to promote a collaborative, complementary and holistic approach to TK in order to enhance better understanding of Indigenous concerns and possible

solutions (Report of the Technical Workshop on Indigenous Traditional Knowledge-2006).

The Workshop made over twenty recommendations including:

- Relevant international human rights treaty bodies should strengthen the monitoring of the implementation by States parties of provisions relevant to indigenous traditional knowledge.
- The UNPFII should provide human rights-related information and advice to intergovernmental organizations with respect to traditional knowledge to promote the development by these organizations of a better understanding for human rights related to indigenous traditional knowledge.
- The UNPFII should commission a study or studies on customary laws pertaining to indigenous traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge. The study should include an analysis of indigenous customary laws as a potential sui generis system for protecting indigenous traditional knowledge. Relevant UN system organizations should collaborate to promote the respect for and recognition of indigenous peoples' customary legal systems pertaining to indigenous traditional knowledge in national legislation and policies and regarding their application.

The Permanent Forum's program of work incorporates TK as one of its priority issues and also includes starting work on coordinating and networking with all the various organization in the UN system working on TK.

Various Other UN Forums

Aside from WIPO, CBD, WGIP and the Permanent Forum, Other UN Forums dealing with TK issues include: United Nations International Children's Emergency Foundation (UNICEF), The Food and Agricultural Organization (FOA), The World Health Organization (WHO) and The International Foundation for Agricultural Development (IFAD). The United Nations Commission for Trade and Development (UNCTAD) forum has had numerous discussions on TK with regard to trade and published a book entitled *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* in 2005. United Nations University has also been highly involved

with TK issues at a research level. United Nations Economic, Social and Cultural Organization (UNESCO) has also dealt with issues of TK its convents including: *The Convention for the Safeguarding of Intangible Cultural Heritage* (2003) and *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).

The 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* was UNESCO's first Convention intended to protect significant heritage and environment sites. The second 2003 Convention, *The Convention for the Safeguarding of Intangible Cultural Heritage*, is designed to bind its State Parties to take necessary measures to ensure the safeguarding of their cultural heritage and to promote cooperation and solidarity at regional and international levels in this field. The Convention is also intended to encourage the exchange of information, experiences and joint initiatives. In Article 1 the stated "purposes of the Convention" are:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.

Article 2 defines "intangible cultural heritage" as:

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity...

The “intangible cultural heritage”, as defined in Article 2 above, is manifested inter alia in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship. (The Convention for the Safeguarding of Intangible Cultural Heritage-2003)

The Convention for the Safeguarding of Intangible Cultural Heritage adopted by UNESCO in 2003 potentially protects a significant amount of TK (Wenland-2006) although TK is not specifically mentioned in the Convention. UNESCO's third convention, *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), is intended to be the last in UNESCO's trilogy of Conventions to protect the world's culture. TK is not specifically mentioned in the Articles in the Convention, although it is in the part of the preamble text that reads:

Recognizing the importance of traditional knowledge as a source of intangible and material wealth, in particular the knowledge systems of indigenous peoples, and its positive contributions to sustainable development, as well as the need for its adequate protection and promotion.

However, the Articles of the Convention do not place any authority in Indigenous peoples to control expressions of TK, but rather place authority in states in Article 1 of the Convention that reads:

(h) to reaffirm the sovereign rights of states to maintain, adopt and implement policies and measure that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory. (The Convention on the Protection and Promotion of the Diversity of Cultural Expressions-2005)

UNESCO has recently focused its attention on the importance of “local and indigenous knowledge” as a resource for promoting cultural diversity, combating impoverishment and elaborating a more equitable knowledge society. The project “Local and Indigenous Knowledge Systems in a Global Society” (LINKS) is included in UNESCO’s Medium-term Strategy for 2002-2007 which prioritizes:

- Revitalizing traditional knowledge transmission within local communities by strengthening ties between elders and youth and evaluating the opportunities and constraints of existing educational frameworks.
- Identifying customary rules and processes that govern knowledge access and control, in order to inform efforts to develop appropriate normative instruments for protecting traditional knowledge.

Most of these forums within the UN family have not forged formal working relationships on TK issues, such as between WIPO and The CBD. Consequently, there was an initiative to propose a meeting between the ten UN agencies dealing with TK at the May 2005 fifth UN Permanent Forum on Indigenous Issues.

The UN Special Rapporteur Reports

The UN COMMISSION ON HUMAN RIGHTS Sub-Commission on the Promotion and Protection of Human Rights mandated Chairperson-Rapporteur Mrs. Erica Daes to conduct three studies on: 1) Indigenous peoples relationship to land, 2) Indigenous peoples heritage, and 3) Indigenous peoples Permanent Sovereignty over Natural Resources. In the second of these HUMAN RIGHTS OF INDIGENOUS PEOPLES Reports the draft principles and guidelines for the protection of the heritage of indigenous people (Geneva, 28 February - 1 March 2000) were proposed including the following provisions:

9. The prior, free and informed consent of the owners should be an essential precondition of any agreements which may be made for the recording, study, display, access, and use, in any form whatsoever, of indigenous peoples’ heritage.

12. The heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage.

13. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immovable cultural property such as sacred sites of cultural, natural and historical significance and burials.

23. National laws for the protection of indigenous peoples' heritage should:

- (a) be adopted following consultations with the peoples concerned, in particular the traditional owners and teachers of religious, sacred and spiritual knowledge, and, wherever possible, should have the informed consent of the peoples concerned;
- (b) deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits; ...
- (d) ensure the labeling, correct attribution and legal protection of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale.

Although the Daes reports are yet to be ratified by the UN General Assembly the conclusions for the time being hold the weight of report mandated by Commission of Human Rights (Trask-2002).

WTO and TRIPS

The escalating value of Intellectual Property and its increasing economic importance to the pharmaceutical industry and agriculture and cultural goods prompted the United States to spearhead a move for a multilateral agreement protecting economic rights in Intellectual Property. The efforts to secure such an agreement were begun in the late 1980s with the General Agreement on Trade and Tariffs (GATT) negotiation. These negotiations culminated in 1994 with the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement. TRIPs came into effect January 1, 1995 and is the primary instrument that set up and governs the WTO, and set up a TRIPs Council to monitor the situation world wide and to report on the non-compliance of Members.⁵ The agreement applies to all members of the WTO and is backed by the same dispute settlement rules that govern other WTO agreements. The breach of these rules can result in retaliatory measures including sanctions.

The TRIPs Agreement is described as one of the three “pillars” of WTO, the other two being GATT and the General Agreement on Trade in Services (GATS). According to the WTO, the TRIPs attempts to narrow the differences in the way IPRs are protected and enforced around the world.

Article 27.3 (b) and Article 39.3 of TRIPs

The TRIPs Agreement requires a review of Article 27.3(b) that deals with patentability or non-patentability of plant and animal inventions, and the protection of plant varieties. The TRIPs Agreement. Article 27.3 (b) has emerged in discussions as the primary provisions affecting TK. Article 27.3 (b) says the following:

...(in dealing with) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other

⁵ Crean, Susan, Taylor, Caldwell & Young-Ing, Greg, (2003). In Handbook on Creator's Rights (pp 6). Toronto, Ontario: Creators' Rights Alliance.

than non-biological and microbiological processes. However, Members shall provide for protection of plant varieties either by patents or an effective sui generis system by a combination thereof. The provisions of this subparagraph shall be reviewed four years after the entry into force of the WTO Agreement.

Article 39.3 of the TRIPs also requires governments to protect certain data against unfair commercial use. Article 39.3 holds out the possibility that certain information can be protected against unfair commercial use even when that information has been disclosed to the public. The Andean Community countries (Bolivia, Colombia, Ecuador, Peru, and Venezuela) and Brazil have come up with a defensive protection plan for TK within the TRIPs agreement which calls for an amendment (Taylor-2004). The Brazil/Andean Community proposal seeks to bring the TRIPs in line with the main objectives of the CBD and will require patent applicants to do the following:

- Identify the TK used in their invention;
- Disclose the source of the TK;
- Provide proof of prior informed consent (PIC); and
- Provide evidence of benefit -sharing with the owners of the TK used in the invention.

The Brazil/Andean Community proposal is not the only one calling for defensive protection for TK by means of an amendment to the TRIPs. A proposal calling for a modification of Article 29 of the TRIPs has been submitted by India. The Indian proposal calls on the WTO Council for the TRIPs to examine the relationship between the CBD and the TRIPs. However, this call for the examination of the CBD-TRIPs interface is being frustrated by the actions of the United States and Japan (Dutfield-2003). The India proposal is in line with Paragraph 19 of the 2001 Doha Declaration that says the TRIPs Council should also look at the relationship between the TRIPs Agreement and the CBD, regarding the protection of traditional knowledge and folklore. It adds that the TRIPs Council's work on

these topics is to be guided by the TRIPS Agreement's objectives (Article 7) and principles (Article 8), and must take development issues fully into account.

Summary

TK started as an unspoken element of Indigenous peoples right to self-determination and Permanent Sovereignty Over Natural Resources in the emerging Human Rights regime. Since the UN Human Rights convenes in 1946, TK has evolved as a key issue throughout the evolution of a vast number UN forums and the WTO. It has, indeed, arguably become the most salient Indigenous issue in the UN system. The various UN and other international bodies discussed issues of TK illustrates that TK has is now regarded as an issue of immense international importance, especially over the last decade. Most of the forums discussed in this chapter are at the initial stages of incorporating TK into their mandates or beginning the process of setting parameters for dealing with TK. A process is underway to engage TK and Indigenous peoples on a global scale and begin standard setting that will spread across the UN and into its many member states and into Indigenous and local communities.

CHAPTER NINE:

DEFINING AND REGULATING TK IN THE INTERNATIONAL FRAMEWORK

Throughout this multi-faceted international framework no forum is yet to enact (an) international regime(s) or otherwise create any other international law on TK. This chapter will discuss the discourse on TK as it has evolved in the two international forums who have dealt with TK most extensively one of which will likely be the first forum to take concrete actions on TK, WIPO and the CBD. These two UN forums have taken leading roles on international TK standard setting far beyond the progress made in the forums discussed in the previous chapter. The primary TK discourses in WIPO and the CBD has been taking place within mandated committees of the two forums. In WIPO the TK role has been assigned to the *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (IGC), and in the CBD the TK discussions have taken place in: 1) The Ad Hoc Open Ended Working Group on Article 8(j) and Other Related Provisions of the Convention (8(j) Working Group), and, 2) the Ad Hoc Open Ended Working Group on Access and Benefit Sharing (ABS Working Group). WIPO and the CBD have also been following the TK discourse in both forums and have both had discussions and passed resolutions around working co-operatively and in a complementary manner on TK issues.

The Convention on Biological Diversity

The CBD is a UN Convention established in 1992 with the objective of “conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”¹ The Handbook of

¹ The Convention on Biological Diversity (2005). The Handbook of The Convention on Biological Diversity (3rd ed.) (pp. 12). Montreal, Quebec.

The Convention on Biological Diversity (3rd Edition-2005) states that the long term purpose of the CBD is to establish International Law to regulate the use of biological and genetic resources and the associated TK. Nation states are members of the CBD as “Parties” to the Convention and pass resolutions dealing with the Convention at the Conference of the Parties (COP) every two years.

The Convention on Biological Diversity and Traditional Knowledge

There are two key Working Groups established under the CBD in which Indigenous knowledge and Indigenous advocates may play an important role: 1) The 8(j) Working Group and, 2) The ABS Working Group.

The special interest of Indigenous peoples TK is recognized primarily in Article 8(j) of the CBD that reads:

Each Contracting Party shall, as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovation 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 the benefits arising from the utilization of such knowledge, innovations and practices.²

The Parties to the Convention and Indigenous representatives meet each year at the 8(j) Working Group to discuss issues around the implementation of Article 8(j) and make decisions to be ratified at the next COP. The CBD other main working group is the ABS Working Group which also convenes the Parties and Indigenous representatives each year.

The 8(j) Working Group

At the Seventh Conference of the Parties (COP7), the Parties clarified previous decisions and held that the most appropriate means of protecting Indigenous knowledge is

² Ibid., 139

“based on a combination of appropriate approaches... including the use of existing intellectual property mechanisms, *sui generis* systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice” (CBD COP Decision VI/10A, para. 33.) More particularly, the 8(j) Working Group has a working draft of potential components of a *Sui Generis* system for the protection of Indigenous knowledge which include (among other items):

2. Clarity with regard to ownership of traditional knowledge associated with biological and genetic resources.
4. Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (i) customary rights in indigenous/traditional/local knowledge; (ii) customary rights regarding biological resources; and (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.
5. A process and set of requirements governing prior informed consent, mutually agreed terms and equitable sharing of benefits with respect to traditional knowledge, innovations and practices associated with genetic resources and relevant for the conservation and sustainable use of biological diversity.
10. Provisions regarding enforcement and remedies.
11. Relationship to other laws, including international law.
12. Extra-territorial protections.

The potential components mark a critical advancement in the work of the 8(j) Working Group, particularly its concrete inclusion of the role of Indigenous Customary Law in protecting Indigenous knowledge. With regard to *Sui Generis* protection of TK, the 8(j) Working Group has been mandated to: 1) consider non-intellectual-property-based *Sui Generis* forms of protection of Indigenous knowledge; 2) further develop, as a priority issue, elements for *sui generis* systems for Indigenous knowledge protection, 3) review and make

recommendations regarding the international regime on access and benefit-sharing with a view to including *sui generis* systems and measures for the protection of Indigenous knowledge; and 4) explore, taking into account the work of the IGC, the potential of and conditions under which the use of existing as well as new forms of intellectual property.

The International Indigenous Forum on Bio-Diversity (IIFB) is an organization of Indigenous representatives from around the world that have been participating in CBD process. The IIFB has a network to discuss issues between meetings and holds separate two day meetings prior to CBD meetings to formulate Indigenous strategies and positions. The IIFB also sits at the CBD as an “Indigenous” block with a status separate from Parties (Nations states) and NGOs. The IIFB also holds in camera meetings during CBD meetings to formulate positions and statements during the ongoing discussions.

The ABS Working Group

Without going extensively into the background of the ABS Working Group, a brief introduction regarding Indigenous knowledge protection follows. Between the Sixth and Seventh Session of the Conference of the Parties (2002-2004), there has been a substantive and, generally, successful movement to commence discussion and negotiation of an international regime on Access and Benefit Sharing on Genetic Resources and Associated Traditional Knowledge. This was a remarkable and unprecedented move from voluntary Guidelines (i.e., the Bonn Guidelines-discussed next) to an international treaty discussion in a two-year period at the international level. The ABS Working Group developed *The Bonn Guidelines* that were enacted by COP in 2002 to regulate parties’ treatment biological resources and TK. The voluntary guidelines make several references to Indigenous peoples and TK including:

I General Provision 16: Contracting Parties... in accordance to the Convention should (a) (vi) Establish mechanisms to ensure that their decisions are made available to relevant indigenous and local communities and relevant stakeholders, particularly Indigenous and local communities. (b) (ii) Respect customs, traditions, values and customary practices of indigenous and local communities. (iii) Respond to requests for information from indigenous and local communities.

IV Steps in the ABS Process: Competent authority(ies) granting prior and informed consent (31) Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with genetic resources is being accessed, the prior and informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices...³

The Bonn Guidelines are voluntary (i.e. non-binding) but have been agreed to by COP and adopted as guiding principles for Parties in the interpretation of the CBD until such time as International Laws are established. Specifically, at COP7 (2004), the Parties provided the ABS Working Group with a mandate to commence negotiations of an international regime (Alexander-2005).

The Bonn Guidelines

The Bonn Guidelines were developed and negotiated with minimal involvement of Indigenous peoples. At the ABS Working Group, Bonn 2001, IIFB determined that it did not have the capacity to meaningfully negotiate legal text and decided to not participate in the discussions. As a result of the IIFB's decision, Indigenous peoples did not engage in negotiations until the contact session at COP6 (2002). Unfortunately, very few of the IIFB's suggested textual amendments and additions were amenable to the Parties.

³ Secretariat of the Convention on Biological Diversity (2002). Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (pp.1) Montreal, Quebec.

As the Guidelines are viewed as “evolutionary” in nature, the COP6 also decided to reconvene the ABS Working Group to advise the COP on:

- (a) Use of terms, definitions and/or glossary, as appropriate;
- (b) Other approaches as set out in decision VI/24 B;
- (c) Measures, including consideration of their feasibility, practicality and costs, to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted in Contracting Parties with users of genetic resources under their jurisdiction;
- (d) Its consideration of any available reports or progress reports arising from the present decision; and
- (e) Needs for capacity-building identified by countries to implement the Guidelines.

Internationally Binding Regime

From the onset of discussions, there has been a vigorous debate between developed and developing countries on the nature of the ABS regime, whether it should be a binding or voluntary. The Guidelines are clearly voluntary in nature, but this has not ended the debate. The debate is currently active in two forums, the WIPO IGC and the World Summit on Sustainable Development.

The issue of an international regime on ABS was addressed as a distinct agenda item by the Inter-Sessional Meeting held in March 2003 on the Multi-Year Programme of Work of the Conference of the Parties up to 2010. The Inter-Sessional Meeting invited “Parties to provide information to the Executive Secretary on experience gained in the use of the Bonn Guidelines, taking into consideration information provided by Parties pursuant to decision VI/24.” It also invited “Parties, Governments and relevant organizations to submit to the Executive Secretary their views on the process, nature, scope, elements and modalities of an

international regime on access to genetic resources and benefit-sharing prior to the second meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing.” With respect to next steps in addressing this issue, the Inter-Sessional Meeting recommended that “the Ad Hoc Open-ended Working Group on Access and Benefit-sharing should, in its consideration of other approaches, in accordance with its mandate as specified in decision VI/24 A, consider the process, nature, scope, elements and modalities of an international regime and provide advice to the Conference of the Parties at its seventh meeting on how it may wish to address this issue.”

Indigenous Engagement on the Guidelines

The above background, particularly the information regarding the further development of the Guidelines and an internationally binding regime, raises the pertinence of future engagement by Indigenous peoples in these international discussions. This background demonstrates the hurried rate of development in the ABS forum. Indigenous peoples must engage and affirm their sovereignty over Indigenous knowledge to counter any misguided assumptions. Therefore, Indigenous peoples must bring clarity to the Guidelines with respect to their applicable customary laws, requirements for prior informed consent and key capacity-building measures, among other issues.

Principles

Underlying the Guidelines are basic principles that may be inconsistent with Indigenous peoples’ perspectives, these include:

- (a) Contract law is the most suitable legal framework for dealing with ABS;
- (b) Nation-States will be the primary “Contracting Parties” in ABS arrangements;

- (c) Indigenous peoples are “stakeholders”;
- (d) Commercialization of Indigenous Knowledge and monetary benefits thereof are incentives for Indigenous peoples to enter into ABS arrangements;
- (e) Prior informed consent is a one time event that occurs at beginning of an ABS arrangement;
- (f) Prior informed consent of Indigenous peoples may be determined by a national/competent authority; and
- (g) National governments will act in the best interests of Indigenous peoples within their countries. Under paragraph 9, under the Heading “Scope” of the Guidelines states that:

All genetic resources and associated traditional knowledge, innovations and practices covered by the Convention on Biological Diversity and benefits arising from the commercial and other utilization of such resources should be covered by the Guidelines, with the exclusion of human genetic resources.⁴

Indigenous Peoples as Knowledge Holders

While Indigenous Knowledge generally appears within the scope, the Guidelines are silent on the issue of sovereignty over Indigenous knowledge. If Indigenous peoples are committed to engaging the Guidelines, it is imperative that they spell out in clear and unequivocal terms that Indigenous peoples are custodians of their Indigenous knowledge and have the exclusive right to control, manage and, in particular circumstances, own their knowledge. In practical terms, Indigenous knowledge holders will not communicate or share their knowledge without this fundamental affirmation. The Guidelines must be thoroughly examined and enriched to reflect this fact.

⁴ Ibid., 2

Customary Law

For many Indigenous peoples, their custodial relationship with their knowledge has Customary Law as its basis. The basic presumption that contract law, domestic law and other international instruments will adequately address ABS with respect to Indigenous knowledge is therefore flawed. Put simply, the Guidelines fail to take into consideration a substantive body of law, Customary Law, which is particularly applicable in the context of accessing Indigenous knowledge. Parties must also recognize that for many Indigenous peoples the commercializing of their sacred knowledge will not be an option. It may be contrary to Indigenous Customary Law to commercialize their knowledge. That is, in some Indigenous societies, there exists a categorization of Indigenous knowledge and some information such as medicinal plants, sacred sites or particular spiritual practices, customs and traditions, which cannot be shared for monetary benefits. This may be closely tied to the issue of prior informed consent.⁵

Prior Informed Consent

The term “prior informed consent” is articulated in the Convention, and increasingly it is set out as a fundamental requirement for access to Indigenous knowledge in Indigenous peoples’ declarations and statements. Broadly, in the CBD, it means the consent of a party to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved and the full implications that can realistically be seen. Article 15 of the Convention on access to genetic resources requires that “Access to genetic resources shall be the subject to the prior informed consent of the Contracting Party providing such resource, unless otherwise determined by

⁵ Alexander, Merle, (2003). In Customary Law: Applying Sharing within Communities to International Instruments (pp. 22). Paper presented at the meeting of the Creator’s Rights Alliance National Conference on Traditional Knowledge. Montreal, Quebec.

that Party.” In Article 8 of the CBD, on *in situ* conservation the “approval and involvement” of Indigenous peoples is required for the application of their knowledge to conservation problems. Sub-paragraph 26.d. of the Guidelines partially appears to address our concerns as follows:

26. The basic principles of a prior informed consent system should include:
 - d. Consent of the relevant competent national authority(ies) in the provider country. The consent of relevant stakeholders, such as indigenous and local communities, as appropriate to the circumstances and subject to domestic law, should also be obtained.⁶

It is a more fundamental consideration for Indigenous peoples, whether there is a need for separate guidelines that singularly address access and equitable benefit sharing with respect to Indigenous Knowledge. It is a question that speaks to the extent that the Bonn Guidelines are a workable context for protection, preservation and maintenance of our knowledge. This option may be considered if the suggested amendments and the perspectives of Indigenous peoples are not better reflected in the future regime, binding or voluntary.

Recent CBD Developments

The CBD Third Meeting of the ABS Working Group was February 11-18, 2005, in Bangkok. Throughout the ABS Working Group meeting Indigenous delegates participated in the discussions and formulation of all IIFB interventions including those on such topics as Certificate of Origin/Legal Providence, Measures to Ensure Compliance with Prior and Informed Consent, Future Evaluation of Progress, a Proposal for Enhanced Indigenous Participation in the ABS Working Group and the Opening and Closing Statements. Most of

⁶ Secretariat of the Convention on Biological Diversity (2002). Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (pp.3).Montreal, Quebec.

the IIFB interventions were met with approval by most of the Parties and will potentially have a positive impact on Indigenous peoples' aspirations within the ABS Working Group. After a carefully planned solicitation of support from The European Union, Brazil, Ethiopia, India and New Zealand, the Increased Indigenous Participation Proposal was in the end blocked by Canada and Australia.

The CBD forth 8(J) Working Group was held January 23-27, 2006, in Granada, Spain. Approximately 370 participants attended the meeting, representing 95 governments, as well as Indigenous and local community groups, UN agencies, intergovernmental and NGOs, academia and industry. Delegates at the fourth meeting of the Working Group considered and adopted nine recommendations for COP-8 on: progress in the implementation of the programme of work; collaboration with the Working Group on Access and Benefit-Sharing on the negotiations for an international regime on access to genetic resources and benefit-sharing ; participatory mechanisms; elements of an ethical code of conduct for the respect of the cultural and intellectual heritage of indigenous and local communities; indicators of progress towards the 2010 biodiversity target linked to Article 8(j); elements for *Sui Generis* systems of TK protection; potential socioeconomic impacts of genetic use restriction technologies (GURTs); recommendations to the UNPFII; and a composite report on status and trends of TK.

The venue of the fourth meeting of the Working Group on Article 8(j) – Granada, Spain – offered a historic backdrop for deliberations on Indigenous issues. It was at the city's Alhambra castle in 1492 that Columbus was given the mandate to set out on his epic voyage that led him to what later became known as the Americas, giving rise to many indigenous issues debated to date, including in the context of the CBD. More than five hundred years later, some 370 Indigenous and government representatives traveled to Granada to work

together towards the protection of TK and biological diversity. Discussions focused on how Indigenous representatives should be involved in the work of other CBD bodies, most notably the ABS Working Group. Agenda items and outcomes of the fourth meeting of the Working Group on Article 8(j) focused on the establishment of a voluntary funding mechanism for Indigenous participation, the outset of a consultation process on the elements of an ethical code of conduct, and the collaboration with the Working Group on ABS.

Looking at the accomplishments of the meeting, the establishment of a voluntary funding mechanism to facilitate Indigenous and local community participation in the CBD's work was hailed by governments and Indigenous representatives alike as a concrete step towards greater indigenous involvement in the CBD process. Following the example of other UN bodies, the fund is to be administered in a transparent fashion with the involvement of Indigenous and local communities. The funding mechanism will be structured according to the UNPII classification of seven geo-cultural regions, rather than the conventional five UN regions used by the CBD. Discussions on regional classification and criteria to award funding evidenced that some governments and Indigenous participants are pondering over who should represent Indigenous and local communities at CBD meetings. They suggested, for example, further streamlining to ensure a balance between gender, geographical origin, and representativeness of Indigenous and local communities.

The recommendation on the development of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of Indigenous and local communities carries the promise of becoming one of the distinctive features of the work on Article 8(j). Some countries thought Indigenous communities' opinions should be reflected in the general opinions of their governments through their own internal consultation mechanisms, while others proposed that indigenous community positions should be coordinated through the

IIFB. Most agreed that, at this stage, setting up a process, including a time schedule allowing for completion of the elements of the code by COP-9, was a tangible step towards the establishment of what may become an essential instrument for the protection of TK.

The extent to which Indigenous voices are heard during the fourth meeting of the ABS Working Group is, thus, yet to be determined. However, the fact that the two Working Groups are held back-to-back is definitely an advantage for Indigenous participants, as many of them will stay and follow the ABS discussions, and delegates who advocated for their enhanced participation, will have the chance to reiterate their positions.

The fourth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing of the CBD was January 30 to February 3, 2006 in Granada. More than 450 participants attended the meeting. The Working Group considered: other approaches to complement the Bonn Guidelines on ABS, including an international certificate of origin/source/legal provenance; and measures to support compliance with PIC of the party providing genetic resources and mutually agreed terms (MAT) on which access was granted. The Working Group postponed consideration of agenda items on the use of terms and indicators for ABS Working Group in the context of evaluation of progress in the implementation of the Convention's Strategic Plan.

The meeting made some progress on the international regime, agreeing on a recommendation to the COP and a draft to serve as the basis for future negotiations. This draft, although bracketed almost in its entirety (i.e., not yet accepted by consensus), contains a structure and core issues that may allow for a more formalized negotiation process to take place at COP-8 and beyond. However, deep divisions remain among the key players on issues such as: the need for a new instrument and whether it should contain legally binding elements; the inclusion of derivatives and products of genetic resources; disclosure

requirements in applications for IPRs; and the participation of indigenous and local communities in the ABS negotiations.

This desire for a strong regime met a powerful, yet polyphonic opposition from developed countries. Some, like Australia, Japan and Canada, made it clear that they were not convinced of the need for a new international instrument at this stage, and in any case, favored one with a narrow scope without any reference to derivatives. Others, such as the EU, Norway and Switzerland, preferred leaving options open. In the case of the EU, this was interpreted by many as a signal that a common position is not yet developed, since its members diverge in their views about the potential benefits/impacts of a binding ABS regime. Some, like Spain, publicly declared their preference for a binding regime, while others expressed their caution about any moves in this regard, and as a result, the EU was unable to present alternative proposals and maintained a “defensive” position.

Discussions on the mechanisms to make any international regime “workable” focused on the creation of a certificate of origin, source or legal provenance and the establishment of disclosure requirements in IPR applications. These issues inherently relate to the relationship of the future regime with existing international agreements and processes, like the International Treaty on Plant Genetic for Food and Agriculture, the TRIPS Agreement and WIPO.

The CBD is at a critical point of progress in both the 8(j) and ABS Working Groups, and it is evident that Indigenous peoples may have a substantial role to play in the development of CBD-based international instruments. At this point, it is unclear whether there will be a stand-alone *Sui Generis* system advocated by the 8(j) Working Group that will parallel the international regime being negotiated by the ABS Working Group.

The fact that the CBD is widely endorsed by nation states is significant in that it recognizes (1) the importance of Indigenous knowledge (in “traditional ecological knowledge” language) to the conservation and sustainable use of biological diversity; (2) it acknowledges the contributions of Indigenous knowledge as innovative approaches to environmental studies, and recognizes the validity of Indigenous science; and (3) it recognizes the need to link relevant information concerning Indigenous knowledge, innovations, and practices to scientific knowledge, conservation studies, and sustainable development. This Convention requires the exchange of information and results of technical, scientific and socio-economic research, as well as information on training and educational programs. In addition, the Convention encourages the repatriation of information to the proper Indigenous peoples (Henderson-2000).

The World Intellectual Property Organization

WIPO is a specialized agency of the United Nations that co-ordinates the work of several constituent “unions” including the Paris union on industrial property and the Berne union for the protection of literary and artistic work. The Convention establishing WIPO was signed in Stockholm, Sweden in 1967 and was amended in 1979. WIPO’s mandate is “to promote the protection of intellectual property.” WIPO is based in Geneva, Switzerland. The objectives of WIPO are:

- 1) To promote the protection of intellectual property through co-operation among states and, where appropriate, in collaboration with any other international bodies;
- 2) To ensure administrative co-operation among Unions.

To become a member of WIPO, a Nation States must deposit an instrument of ratification or accession with the Director-General in Geneva. There were 178 States as members of WIPO in 2002.⁷

WIPO and Traditional Knowledge

As the specialized United Nations agency responsible for the promotion of Intellectual Property (IP) worldwide, WIPO has worked in the field of traditional cultural expressions (folklore) for over thirty years, often in collaboration with UNESCO and has, more recently, considered specific IP issues related to Indigenous knowledge and genetic resources.

In the last decade, the WIPO has faced significant questions regarding the relationship of the IP system with Indigenous knowledge. Concerns have been raised relating to the misappropriation of Indigenous knowledge by third parties, such as the unauthorized use of traditional designs, songs and dances by the entertainment and fashion industries to create works that are then protected by Intellectual Property. Furthermore, holders of Indigenous knowledge have expressed a need to be better informed of the Intellectual Property implications of making their Indigenous knowledge available to a wider audience; for instance, of using certain distinctive elements of their Indigenous knowledge as IP assets that may lead to economic growth.

Prior to 1995 WIPO's position was that the organization had no mandate to deal with issues of Indigenous peoples. In the mid-1900s this position quickly shifted as the organization was confronted with the issues of the problems with the application of Intellectual Property to Indigenous knowledge. In particular, in 1998-1999 WIPO consulted

⁷Crean, Susan, Taylor, Caldwell & Young-Ing, Greg, (2003). In Handbook on Creator's Rights (pp. 8). Toronto, Ontario: Creator's Rights Alliance.

with a wide range of stakeholders such as Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives to determine the IP needs and expectations of holders of Indigenous knowledge. In 1998-1999 WIPO conducted a *Fact Finding Mission* to consult with Indigenous peoples around the world and collect information. The Canadian segment of the *Fact Finding Mission* visited Vancouver, Saskatoon, Calgary, Ottawa, Montreal and Iqaluit in 1998.

WIPO developed the following definition of “traditional knowledge” for the purposes of a 1998-1999 fact-finding mission (that has come to be regarded somewhat as a standard definition):

Traditional knowledge refer [s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition –based” refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; traditional cultural expressions (“expressions of folklore”) in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of language, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of “heritage” in the broad sense.

With respect to Indigenous knowledge protection, the Committee at its Sixth Session agreed to examine a comprehensive approach to Indigenous knowledge protection including:

- using existing IP systems (including an array of IP rights and the law of unfair competition),

- adapted IP systems with Sui Generis elements, and
- new, stand alone Sui Generis systems, as well as non IP options, such as trade practices and labelling laws, liability rules, use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources, and remedies based on such torts as unjust enrichment, rights of publicity, and blasphemy.

These options discussed at this Sixth Session were either already in use in national or regional systems or have been discussed in Committee sessions or other WIPO activities. In particular, a study on the role of Indigenous customary law within the IP system was approved by the IGC at its Third Session in accordance with document WIPO/GRTKF/IC/3/11.

Based upon the Sixth Session developments, it is clear that there is upcoming opportunity for Indigenous peoples' organizations to make substantial contributions to the work of the IGC. A key opportunity that may be open will be the informal consultative sessions of the ad-hoc Indigenous caucus that will now meet prior to each IGC session. If key Indigenous peoples' organizations were to take a lead role in drafting text for a principled approach forward on issues such as Indigenous customary law, this would likely have great influence. The primary impediment is that the voluntary funding initiatives have not contributed to the voluntary fund.

In last decade, the WIPO has faced significant questions regarding the relationship of the IP system with Indigenous knowledge. Concerns have been raised relating to the misappropriation of Indigenous knowledge by third parties, such as the unauthorized use of traditional designs, songs and dances by the entertainment and fashion industries to create works which are then protected by Intellectual Property. Furthermore, holders of Indigenous knowledge have expressed a need to be better informed of the IP implications of making their Indigenous knowledge available to a wider audience; for instance, of using certain

distinctive elements of their Indigenous knowledge as IP assets that may lead to economic growth.

The World Intellectual Property Inter-Governmental Committee

As a result of the conclusions of the Fact Finding Mission the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between Intellectual Property and TK, genetic resources and traditional cultural expressions (folklore). At this time the IGC was given a three-year mandate to meet twice a year with Member States and Non-Governmental Organizations (including Indigenous representatives) to study and gather information on the relationship between Intellectual Property and TK, genetic resources and folklore.

At the September 2003 WIPO General Assembly the IGC's program of work was extended for an additional two-year term and given the additional mandate to:

...elaborate the draft text of core principles and substantive elements of international instruments on intellectual property and genetic resources, traditional knowledge and folklore, as basis for further consideration of the issues...

Recent WIPO IGC Developments

At the Sixth Session of the IGC in March 2004 a proposal for an International Instrument and a proposal for the IGC to work collaboratively with the Parties to the CBD emerged as the key issues. After long debates over the CBD proposal the Chair concluded that no consensus could be reached, therefore the matter was referred back to the WIPO General Assembly. A proposal document was also submitted by the African Group containing principles and objectives for the drafting of a binding International Instrumental

for the protection of Traditional Knowledge, Folklore and Genetic Resources. Some debate over particular elements of the document ensued, but the member states generally agreed that the document provided a good basis to move forward on the issue.

The member states also generally agreed that national frameworks for *Sui Generis* legislation for Traditional Knowledge, Folklore and Genetic Resources should continue, complimentary to the work the IGC should undertake to accelerate the process of drafting a binding International Instrument(s). The secretariat has also initiated research on the application of Indigenous Customary Law in the International Instrument(s). A statement of principles to be incorporated into an International Instrument(s) was also presented by a group of Indigenous NGOs who had held caucuses throughout the session.

The seventh session of the WIPO IGC in November 2004 considered the issue of increased Indigenous participation following an intervention made by Indigenous NGOs at a meeting and a supportive proposal that followed from the New Zealand delegation. In the end, the IGC agreed to allow for more speaking time to Indigenous NGOs and to hold a half day of Indigenous NGO panel presentations chaired by an Indigenous representative prior to each future session.

The Committee's work on what it had called "Expressions of Folklore" had now become focused on documents on what had become the more frequently used term "Traditional Cultural Expressions" (TCEs). At this point in the IGCs progression TCEs and TK had come to be regarded as two separate items in the Committee's mandate. Member States at IGC Seven also considered principles set out the two separate developing documents on TCEs and directed the IGC secretariat to further develop these principles. Two documents on international standards on the regulation of Traditional Knowledge were also discussed and met wide spread approval pending an opportunity for Member States and

NGOs to do a more detailed review and submission by the end of February. Another document on principles regarding Genetic Resources was also discussed and with no general consensus being reached, the IGC secretariat was instructed to further develop the document for consideration at IGC Eight in June, 2005.

In the WIPO discourse Traditional Cultural Expressions (also referred to as “expressions of folklore”) are seen to form part of cultural heritage and identity, and their protection and preservation are linked to the promotion of cultural diversity and human creativity. The relationship between IP and TCEs raises some specific cultural and legal policy issues. Accordingly, although, in practice, such expressions may overlap with the field of TK, this area has been given a distinct focus in WIPO’s work. Over the past several decades, WIPO has undertaken extensive work on the protection of TCEs. In 1982, WIPO worked with UNESCO, to develop a sui generis model for the IP-type protection of traditional cultural expressions: the UNESCO-WIPO Model Provisions (1982).

IGC Eight, June 6-10, 2005, was the first IGC that the Enhanced Indigenous Participation that Indigenous peoples had lobbied for (to a satisfactory degree of success under the circumstances) at IGC Seven were to be implemented. Committee Meeting began in the morning of June 6 with presentations from Indigenous NGOs from the United States, Canada, Sweden, Africa and Indonesia, which were generally well received by the delegates. The official IGC Eight session began in the afternoon with the opening statements and welcoming protocols for the new Chair and Co-Chair, including the Informal Indigenous Consultative Forum Opening Statement which thanked the Chair and member states for supporting the Increased Indigenous Participation and the morning panel presentations, supporting the establishment of the Voluntary Fund, supported TCE and TK documents and

asking the Committee to prioritize its work on Customary Law as a means to protect and preserve TK and TCEs.

Although IGC Eight turned out to be one of the more uneventful of the recent IGCs, there were high hopes among Indigenous groups and developing countries at the beginning of the meeting that progress could be made on the new single document WIPO/GRTKF/IC/8/4 on TCEs and the new single document WIPO/GRTKF/IC/8/5 on TK. The Informal Indigenous Consultative Forum saw IGC Eight as a potential opportunity to have the progressive TCE and TK documents accepted leading to the establishment of international standards and perhaps a legal regime. However, the initial proceedings of IGC ended up being dominated by nation states non-consensus over the TK and TCE documents and their contents and, even more so the, Genetic Resources documents (WIPO/GGRTKF/IC/7/9) and (WIPO/GGRTKF/IC/7/10). These discussions degenerated into debates over the mandate of the IGC on whether it should continue to include Genetic Resources, and some nation states and member states questioning whether the Committee should continue its mandate. Indeed a great deal of floor time was spent on these debates and other drawn out discussions on the Voluntary Fund. This breakdown in progress led to long periods Agenda "In Session" not occurring while the Chair allowed backroom meetings to take place.

Towards the end of IGC Eight a wide consensus emerged in support of the TCE and TK documents as Indigenous groups, developing countries and many developed countries all spoke widely in favor of the documents; however, it was openly blocked by Canada and United States, the only two members who spoke out against the documents on the floor. In the end, IGC 8 once again tabled the Voluntary Fund and deferred the mandate issues to the WIPO General Assembly.

At the WIPO General Assembly in September 2005 the IGC mandate was extended for two additional years. IGC Nine, April 20-24, 2006, was the first meeting of the renewed mandate. At IGC Eight many member states had expressed that the Committee's progress on genetic resources would be long term, and there was wide agreement that progress on TK and TCEs should be the focus of the Committee's short term work. As the WIPO Secretariat believed there was widespread support for at IGC Eight for WIPO/GRTKF/IC/8/4 on TCEs WIPO/GRTKF/IC/8/5 on TK, the documents were presented to IGC nine unchanged as WIPO/GRTKF/IC/9/4 on TCEs WIPO/GRTKF/IC/9/5 on TK.

Aside from the re-presentation of the two documents, IGC Nine was marked by two other important events: The Norway Proposal and the establishment of the Voluntary Fund. The Norway Proposal is a proposal for charting the IGCs way forward that was modeled on the progression of The Paris Convention. The basic tenements of the Proposal are that it appears there needs to be a great deal more discussion on the binding or non-binding international instrument(s) on TK and TCEs under consideration at the IGC, and, therefore, the Committee should begin with a Political Declaration on TK and TCEs as the start of the "roadmap" of its future work. The Voluntary Fund for increased Indigenous participation at IGC meetings that had been under discussion for four years was finally established at IGC Nine. The WIPO Secretariat announced the establishment of the Fund at the beginning of the meeting and that SwedBio, a division of The Swedish Government's Sweden Development Agency, had contributed an initial \$65,000 U.S. to the fund. The Fund's establishment received wide support and France announced an additional contribution of 20,000. A special committee of Indigenous NGOs was struck and met during IGC Nine to decide on which applications would be funded to attend IGC Ten.

During the course of the IGC 9 discussions there was wide spread support for the Norway Proposal as a way forward and the TK and TCE documents. Of the very few member states who spoke against elements of the documents, Canada spoke against the non Intellectual Property proposals in the documents and Australia spoke strongly against the proposal that Customary Law should prevail over Intellectual Property Law. Lead by Brasil, Peru, The African Union, Norway, India, many other member states, and Indigenous people, there was wide agreement that the IGC should consider the Norway Proposal and set a short term goal of establishing a Political Declaration on TK and TCEs based on the principles set out in the two documents. A significant portion of IGC Nine was spent on members states making comments on specific elements of the text the TCE and TK documents. In the end, the Committee decide that IGC Ten in December 2006 should be extended one or two days to allow for more time for comments on specific elements of the text of the documents. The slow but encouraging progress of the IGC will continue at the tenth meeting in December 2006.

Summary

The work of the CBD and the WIPO IGC is ongoing and it progresses slowly from meeting to meeting; however, these two important forums remain at the forefront of defining TK rights at the international level. The ongoing discussions will continue to play out as a conflict between Indigenous peoples continuing and consistent call for Human Rights and certain National States attempts to prioritize economic interests. Indeed the final outcomes will depend on the persistence tenacity, negotiations and lobbying that transpire between the representatives of the rights of peoples and representatives of the rights of states in the UN system.

There have been significant developments in the international framework leading to mechanisms to “reconcile” Indigenous legal perspectives with Western counterparts as it applies to TK in recent years. Indigenous peoples have become increasingly involved in these discussions and have aggressively moved themselves to the forefront with limited resources. Indigenous peoples have gained considerable credibility in part because of their advocates’ ability to integrate moral suasion with informed succinct analysis. This advocacy effort is still at an early stage; but has produced concrete opportunities and good reason for cautious optimism.

Developments in many international forums has increased demands upon limited human and financial resources available to Indigenous NGOs while discussions have advanced beyond principles towards negotiation of an international regime. Yet Indigenous peoples still find themselves with few resources in a highly sophisticated, often legal, debate. The challenge that Indigenous peoples now face is turning the procedural equality that they have fought for into substantial progress. One of the solutions that has been identified by Nation–States to facilitate more substantive contributions by Indigenous peoples’ organizations, in the CBD and the WIPO IGC. As a Voluntary Fund for Indigenous participation has recently been established at the IGC, this could signal the beginning of a new era of increased Indigenous participation which may eventually influence the CBD process and other forums beyond WIPO.

CHAPTER TEN:
EMERGING MODELS AND STRATEGIES

This concluding chapter will: 1) outline and establish principles in the use of TK in cultural practice, artworks and other tangible and intangible cultural expressions and commercial products; 2) establish some theoretical frameworks on Indigenous peoples transformation of TK through their cultural practice; 3) discuss useful principles and concepts to regulate the use of TK in the contemporary context, and 4) summarize the potential for the establishment of effective TK protection and regulation in Canada and at the international level.

Related concepts and principles developed through Common Law in Canada and Australia will also be discussed with regard to their relevance to the establishment of TK regulation, and the legal recognition of concepts such as: Moral Rights, Authors' Rights, and Collective Copyright. An analysis of the practices and works of one particular Indigenous artist, Bill Reid, will also be analyzed to illustrate how concepts from Indigenous and European Laws can be fused in concepts regulating the use and transformation of TK through contemporary practice.

It should be noted that other protective mechanisms for Intellectual Property besides copyright, patents and trademarks, have been explored with regard to their potential to protect TK, including: trade secrets, industrial designs, plant breeders rights, and geographic indicators. However, it is not within the scope of this dissertation to go into those discussions and issues.

The Legacy of Bill Reid

An examination of the legacy of the late Haida Artist, Bill Reid, reveals some useful insights and concepts for TK regulation within the context of the arts. Reid was the grandson of Haida artist Charles Edenshaw and nephew of the Haida artist Charles Gladstone, who had begun to push Haida artistic boundaries. Gladstone and Edenshaw were among the first Haida artists to access new mediums and technologies introduced by Europeans such as various metals and industrialized carving tools. In their traditional artistic practices they were both totem pole carvers and made copper bracelets and hair pendants adorned with traditional Haida designs. With the introduction of European culture and new materials and tools, they also began making objects such as brooches and napkin rings using gold and silver. Edenshaw knew, as every great Native artist before him, how to push the limits of design while adhering to the traditional vocabulary of Native art.¹

Reid sometimes claimed that his grandfather, Charles Gladstone, had instructed him in the lore, history and tradition of the Haida people when he was in his early teens.² Charles Edenshaw trained directly under his uncle Charles Gladstone and started to develop his skills as a young carver and jewelry maker after a long visit with his uncle in 1897. As he was making the career transition from radio broadcaster to artist in the 1950s, Bill Reid visited his uncle Charles Edenshaw to train under him on several occasions. The Haida artistic lineage, therefore, was passed from Gladstone to Edenshaw to Reid in accordance with Haida Customary Law. From the beginning of his artistic career, Reid set out to continue along the path of Gladstone and Edenshaw in transforming the Haida artistic tradition. After completing a two year jewelry making course at Ryerson Institute of Technology in the early 1950s, Reid told a reporter, Rhodi Lake, that “he wanted to apply the principles of

¹ Tippett, Maria, (2004). In Bill Reid: The Making of an Indian, (pp. 74). Toronto, Ontario: Random House

² Ibid.

contemporary jewelry making to Haida art... in order to cultivate a twentieth-century audience for his work.”³

Another important aspect of Reid’s legacy is that he set out to move Indigenous art out the commonly held perception of unevolving folkloric work to be viewed in museums, to the status of high art to be viewed in galleries. In this effort Reid had a part in organizing an exhibit of Indigenous art called “The Arts and Handicrafts Show” at the Vancouver Art Gallery in 1954, and also exhibited jewelry in the show. In the mid 1950s Reid also undertook many visits to Haida Gwaii to salvage many of the ancient totem poles, study them, and carve new poles, masks and sculptures based on his interpretation of the Haida tradition. Reid believed that traditional Haida aesthetics could be improved upon. For example, he stated that he did not like the shapes of some of the faces and noses on the ancient poles, so he was going to shape them differently. In spring of 1959, Reid resigned from his job at the CBC (8) to work full time on a project recreating a Haida village at the Museum of Anthropology (MOA) at the University of British Columbia (UBC) with the assistance of Nimkish carver Doug Cranmer. Reid and Cranmer’s work on the project received some attention at the time because of the tools they were using. Reid often spoke with passion about his tools, most of which he made up himself (based on adaptations of traditional tools)... At the same time he appreciated the speed of power tools.⁴ The MOA UBC project was the first time Indigenous carvers publicly used chain saws to do the bucking and roughing out work on totem poles.

Throughout his career as an artist Reid associated and worked with many Haida and other Indigenous artists who informed his work. Throughout the 1960s through to the 1990s he continued his innovations of Haida symbols in jewelry, mask, and totem pole making.

³ Ibid., 117

⁴ Ibid., 121

Through repousee, casting, soldering and silver overlay, Reid extended Northwest coast jewelry into three dimensions (whereas) past technology only allowed shallow engraving of designs on metal surfaces. He also made large wood carvings the size of which had not been seen before in the Haida tradition (ie. *Bear Sculpture* 1962 and *Raven and the First Man* 1980) and bronze casted even larger monumental sculptures (ie. *Killer Whale* 1985 and *The Spirit of Haida Gwaii* 1989) which represented the first time that medium had been applied to Haida art.

Indigenous National Artistic License

At the end of his career Reid had become an Icon in the Canadian artworld and was regarded an ambassador and hero of the Haida Nation. Reid's transformation of Haida art - based on use of new technologies, the development of new forms, and the use of new mediums - gradually earned him the status of master artist, which in turn allowed him to train younger Haida artists such as Robert Davidson. His status as master artist was granted because he did pay homage to the Haida traditions and began his work in accordance with Haida Customary Law - which he also paid homage to throughout his career, while at the same time breaking new ground. These aspects of Reid's work afforded him a type of "license" from the Haida Nation to transform their artistic traditions in a respectful manner.

This concept of "license" is a type of "permission to innovate TK" which characterizes part of the relationship between the Indigenous artist and the Indigenous Nation to which they belong, and could be termed "Indigenous National Artistic License." The concept of Indigenous National Artistic License represents an example the evolutionary nature of Customary Law's ability to adapt to contemporary contexts.

This type of "license" to transform TK being possessed by Indigenous peoples to use responsibly can be applied to all aspects of TK use based on the following: 1) the Indigenous

user is a stakeholder with a custodial relationship to the TK; and 2) the Indigenous user also has a relationship and responsibility to the community the TK derives from and the Customary Laws associated with it. With these relationships intact an ethical use of TK is able to result. This does not mean that Indigenous peoples are the exclusive users of TK. A non-Indigenous user is also able to enter into a relationship with an Indigenous community and access TK for a certain use through a process of FPIC and MAT.

Principles to Guide the Way Forward

Based on the discussion of the issues outlined, new regimes of protection and regulation for TK could combine aspects of Customary Law and European-based Law and should incorporate the following principles:

1. A) Indigenous Nations have a collective ownership over their TK, which could be expressed as a form of “Collective Copyright.”

 B) In the development of a “Collective Copyright” system, a “Collective Royalty” system could also be considered. Another consideration could be that royalty payments for the use of TK could go into established Indigenous Nations Collection Agencies and/or scholarships and/or an established National Indigenous Arts Fund and/or scholarship.
2. An Indigenous Nations’ TK has a natural form of Moral Rights, which could be expressed as “Collective Moral Rights.”
3. New regimes of protection for TK should be based on and/or incorporate Customary Law.
4. In cases of conflict between legal systems over TK, Customary Law should prevail over Eurocentric Law.

5. Certain aspects of TK should not enter the public domain (as deemed under Customary Law) and should remain protected as such into perpetuity, which could be expressed as a form of “Indigenous private domain.”
6. Indigenous artists have “Indigenous National Artistic License” that grants them permission to adapt their particular Indigenous Nations’ TK in their work.
7. Non-Indigenous people and Indigenous peoples from other Indigenous nations do not have Indigenous National Artistic License that grants them permission to adapt their particular Indigenous Nations’ TK in their work.
8. Non-Indigenous people and Indigenous peoples from other Indigenous nations should attain Prior Informed Consent in use of a particular Indigenous Nations TK in art (and other tangible commercial objects).
9. A) Enforcement of infringements of TK regulation should incorporate the concept of “Cultural Harm” and damages should reflect the severity of the harm.
B) Reimbursement payments for profits made from unauthorized use of TK could also be considered. These payments could be made to the same established funds suggested in 1) B).

The Economic Factor

Generally, there are Indigenous peoples and NGOs who come to the TK negotiations with Indigenous and Human Rights concerns and/or environmental and cultural concerns, and then there are there are nation states and NGOs that come with political and economic concerns. There are many nation states whose Gross National Product benefits significantly from the exploitation of TK. Many of the developed countries know that TK regulation is coming, and would like the economic exploitation of TK to continue for as long as possible. Indeed, many of the powerful nation states who hold control within the WTO would rather

the issue of TK not have been raised and advanced by developing nations in the TRIPS Agreement. It is developing countries who tend to have a wealth of TK within their borders and would rather have to make deals with Indigenous peoples than compete with multinational corporations over TK. The WBG would also rather not have had TK issues enter into regulations for their clients who the Bank often provide financing to for projects involving the extracting of Indigenous resources and knowledge. Without going into great detail and analysis, these are some of the real factors behind the rhetoric on the integrity of the IPR system and concerns over conflicts of legal regimes that are often used as stalling tactics in the WTO and UN forums.

TK has now become a resource to be exploited economically just as Indigenous peoples land and natural resources have been the subject of exploitation. On the other hand, Indigenous peoples and developing nations stand to gain economically and could form mutually beneficial and valuable partnerships through TK regulation. TK has the potential to play a significant part in offsetting the global economic imbalance. New TK regulation models should also incorporate royalty mechanisms to distribute capital back into Indigenous communities, such as the Indigenous Funds operating in the Peruvian Law and those proposed in the above Principles. It would also be possible to set up royalty sharing schemes between Indigenous peoples, innovators and corporations where TK is transformed for new uses.

The Case for TK Regulation in Canada

It is clear that there are pressing issues in the regulation and protection of TK. It is also clear that there are problems to which the IPR system other Eurocentric concepts do not offer a solution. Such discrepancies between TK and the IPR systems have led certain academics and Indigenous peoples to reject the current system in its entirety. Some have

argued that the protection of TK requires the establishment of an entirely new system. In the developing literature and discourse, this proposed new system is usually referred to as *Sui Generis*. An “intellectual property-like” system could be adopted to suit TK needs. The TK/IPR interface forces us to re-evaluate Intellectual Property fundamentals. The central question in this debate is, can Intellectual Property be a truly universal system recognizing various forms of traditional creations and innovations and grant some protection to collective rights holders?

A perceived need to legislate a *Sui Generis* system to match identified needs of TK holders clearly does exist. Others would argue that resorting to a *Sui Generis* system should be a solution of last resort, because it could mean that instead of finding out why the system does not work, a “tailored” system is legislatively put in place without necessarily thinking about its impact on the existing system. In order to avoid stretching the current Intellectual Property canvass beyond what is reasonable, a *Sui Generis* regime could be established and extended through a new international instrument (Gervais-2002) that would likely be developed first in the WIPO IGC and perhaps later in the CBD. This could happen once countries most advanced in dealing with TK issues have adopted and tested certain forms of protection of TK and shown that these new forms of protection actually work in meeting the needs and expectations of TK holders.

While international efforts continue to discuss and develop regulations for TK protection, complementary efforts must be made on domestic fronts at the same time. Countries with wide-spread abuse of TK in the arts and other areas, like Canada and Australia, must move quickly to bring about domestic regimes of protection that will be in line with developing international regimes. The Carpet Case and the Bulan Bulan Case in Australia have begun the process by establishing Indigenous copyright (and affording it the

same protective mechanism as European-based Intellectual Property); although the Court stopped short of recognizing Collective Copyright. In *Bulan Bulan* this was done on what could be seen as an erroneous attempt to apply the concept of Indigenous collective ownership to the concept of “joint authorship.” More such test cases on TK are now required in Australia since a new Moral Rights regime has been established after *Bulan Bulan*.

In Canada the contradictory judgments of the *Snow* and *Théberge* cases leave all creative works relation to Moral Rights in question, let alone TK, and further test cases are required on Moral Rights to clarify the contradiction. Meanwhile, the SCC has yet to consider the existence of a collective Aboriginal Right to ownership and control of Aboriginal cultural property.⁵ Again, test cases on TK are required in Canada to begin the process in Common Law that is underway in Australia. Meanwhile Canada and Australia and many other countries need to begin the process of working with Indigenous groups on the development of new regimes of protection or face problems of conflicting national and international regimes when international standards are set. The time frame to do so seems to be getting shorter as the WIPO IGC appears to be heading towards an incremental approach starting with short-term soft law and long-term entrenched law. In the IGC work plan it appears that this will begin soon with a political declaration on TK rights leading to instruments such as a binding or non-binding treaty (or treaties). It is certainly the hope of many Indigenous peoples, and their lobbyists and supporters, that the IGC’s current program of work on Customary Law will lead to a binding treaty (or treaties) that also recognize and incorporate Customary Law. It has, in fact, emerged in Indigenous and other perspectives on the discourse that any consideration of *Sui Generis* mechanisms must incorporate Customary Law.

⁵ Bell, Catherine & Paterson, Robert (2003). *Aboriginal Rights and Repatriation of Cultural Property*. In Box of Treasures or Empty Box: 20 Years of Section 35, (pp. 121). Penticton, British Columbia: Theytus Books.

Indigenous Customary Law is intended to protect Indigenous knowledge; therefore, any of the problems with TK in relation to Eurocentric law, should be seen as an issue of conflict of parallel legal regimes. Customary Law regarding TK should prevail over Eurocentric patent, trademark or copyright law: but, in the present situation, it clearly does not. It is possible, however, to imagine that a fusion of concepts from Customary Law and IPR Law could be developed to regulate the use of TK in contemporary contexts. In Canada, Indigenous jurisprudence, knowledge and heritage is uniquely constitutionally protected as an Aboriginal and/or treaty right in Section 35 of the *Constitution Act, 1982* and Section 25 in the *Charter of Rights*. The *Charter* also recognizes the constitutional and legal rights to Aboriginal heritage, (s. 27) languages (s. 22) and education (s. 29).⁶ The governments of Canada (federal, provincial or territorial) have not clearly claimed jurisdiction or ownership over Indigenous knowledge in any public statement, policy or legislation. Therefore, there appears to be an implied recognition that Indigenous peoples have control and management of their Indigenous knowledge, but a concise legal affirmation that Indigenous knowledge is an Aboriginal right under section 35(1) of the *Constitution Act, 1982* is required. Canada has approached Indigenous knowledge from both a self-government and conventional means perspective, willing to negotiate Indigenous knowledge as an implicit subject matter of self-government negotiations (Alexander-2005).

Canada also advocates protection and management of Indigenous knowledge by conventional contracts, other co-management agreements or existing legislation. The situation in Canada is that legal interpretation of TK rights is required by the introduction of test cases. This could work in conjunction with or separate from any legislative initiatives may be taken by Canada to protect and/or regulate TK. It could also work in conjunction

⁶ Bell, Catherine & Paterson, Robert (2003). *Aboriginal Rights and Repatriation of Cultural Property*. In Box of Treasures or Empty Box: 20 Years of Section 35, (pp. 121). Penticton, British Columbia: Theytus Books.

with or separate from any further legal interpretation of Moral Rights in Canada. Canada has been apathetic with regard to taking any significant TK initiatives and, although there may be some recent potential for movement, it appears that test cases would be necessary to accelerate any progress – as has been done in Australia.

The Indigenous humanities and visual arts are integral to the renewal, revitalization of Indigenous knowledge (Henderson-2002) yet they are exploited unabated by appropriators who often can use the IPR system to protect themselves. Intellectual Property was conceived and developed independently of the TK system and later imposed upon the TK system through the colonization process. The IPR system never took into account Indigenous cultural protocols, or the intrinsic value of TK, yet it's economic institutions now exploit TK while Indigenous peoples remain the most economically deprived population in the world. National and international *Sui Generis* regimes of protection for TK based on Customary Law and current global economic realities are required to resolve the situation and must be created with the participation of Indigenous peoples.

In the meantime ongoing discussions at the Indigenous community, national and international level will continue to lead the way forward to solutions that satisfy Indigenous peoples and others interested in TK. The National Gatherings on Indigenous Knowledge may be part of a beginning to address these issues in Canada. Previous national initiatives in countries such as Australia, New Zealand, Nigeria, India, Brazil, China, Costa Rica, Peru, Philippines, Portugal, Thailand, South Africa and the US that have been addressing TK issues for several years may one day be able to add the Canadian experience to the list of advanced national initiatives that can inform the international initiatives taking place in WIPO and CBD, and other forums of the UN, and lead to the development of viable

solutions. Hopefully these solutions will be designed to strike a balance between protecting TK and allowing it to be shared for the benefit of all.

The CBD states that Traditional Knowledge provides “valuable information to the global community and a useful model for biodiversity policies ... as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use” (The Handbook of the Convention on Biological Diversity-2005). As a signatory to the Convention, Canada is obligated to do its part in protecting and preserving Indigenous knowledge. It is time for Canada to recognize, value and protect Indigenous knowledge in all its richness and complexity. There are two key points to be made in the Canadian legal context. First, Indigenous knowledge is an incidental right of each constitutionally protected Aboriginal and treaty right, and second, Aboriginal rights, and corresponding Aboriginal traditional knowledge-based rights, are collective not individual in nature. Canadian Aboriginal groups need to use their constitutional and legal leverage to take a rights-based approach to their ownership, management, control and continuation of their knowledge systems.

The Supreme Court of Canada has affirmed this as follows: “to ensure the continuity of Aboriginal practices, customs and traditions, a substantive Aboriginal right will include an incidental right to teach such a practice, custom and tradition to a younger generation” (*Cote vs. The Queen*-1998). The SCC has also affirmed the Aboriginal legal perspective that Aboriginal rights, by their very nature, are collective rights held by members of the particular Aboriginal nation as follows: “Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts... Rather, they are the right of Aboriginal people in common with other Aboriginal people to participate in certain practices

traditionally engaged in by particular Aboriginal nations in particular territories”(Cote vs. The Queen-1998).

Indigenous peoples use the Oral Tradition to chronicle important information, which is stored and shared through a literacy that treasures memory and the spoken word.

The oral transmission allows for a constant re-creation of Indigenous systems of laws.

The reinterpretation of tradition to meet contemporary needs is a strength of this methodology. Customary Law, like other sources of law, is dynamic by its very nature (Alexander-2003). Indigenous peoples had rights of self-government and self-regulation at the time of sovereignty. Those rights rest on the customs, traditions and practices of those peoples and formed an integral part of their distinctive cultures. The SCC has recognized that the assertion of Crown sovereignty does not prohibit a continuing co-existence with Aboriginal Customary Law. Courts have also held that Customary Law is neither abrogated nor derogated by provincial, territorial or federal law unless there is “clear and plain” intention of the sovereign power by act of Parliament or legislature.

Indigenous peoples in Canada must begin to take actions to increase public awareness on TK issues and initiate court actions to push the TK agenda. The fact that misappropriations of TK continue in Canada shows that the status quo is far out of line with the legal reality. Canada is also far behind the many countries mentioned previously who have taken steps to regulate and protect TK. Thus far, Canada has not expressed any policy on TK and has only made the following disjointed responses to the problem: a) the introduction of the Igloo Mark in the 1960s that has now fallen out of usage; b) certain government agencies and departments funding certain research projects related to TK; c) the National Gatherings on Indigenous Knowledge conducted in 2004-2005 (the Report of which

is thus far unpublished and awaiting approval at the Prime Minister's Office); d) the establishment of an inter-departmental committee including Department of Canadian Heritage, Industry Canada, Indian and Northern Affairs Canada Department of Foreign Affairs and International Trade, Environment Canada and Department of Justice.

These ineffective or otherwise inactive measures are not sufficient to address the complex, salient issues and problems that that have been addressed in this dissertation. To make matters worse, Canada has consistently been among a few countries who block and oppose the advancement of TK protection, Indigenous participation, and Indigenous rights in general in the CBD, the WIPO IGC, and other international forums. It was the Canadian delegation who first spoke against the proposal for increased Indigenous participation in the third ABS Working Group (2005) and continued to oppose it in the fourth ABS Working Group (2006). Canada has also been one of the few nations who openly oppose consideration of Customary Law and *Sui Generis* regimes and do not support the proactive TK and TCE documents in the WIPO IGC. More recently, Canada was also a leading delegation initially opposed to the passage of the UN Declaration of the Rights of Indigenous Peoples first meeting of the new UN Human Rights Council in June 2006.

The recent passage of UN Declaration of the Rights of Indigenous Peoples by the new United Nations Human Rights Council represents the first step in a landmark for the recognition of Indigenous peoples rights on an international level that should also be reflected domestically within the borders of UN member states. If the Declaration is approved by the UN General Assembly it will become an all encompassing Indigenous rights "soft law" and set high international standards for UN member states to abide by.

Even though Canada was one of only two member states to vote against the Declaration in the UN Human Rights Council, it will still be required to uphold the standards

set out in the Declaration as a UN member state. As TK has emerged as a key Indigenous issue over the past decade, Indigenous peoples now have a complete set of standards to advance Indigenous rights in various forums in addition to their human rights. The beginning of the process to adopt the Declaration comes at a time when TK issues are forefront internationally in many nation states that characterize themselves as progressive and humanitarian in nature. Canada likes to include itself among such nations and must, therefore, move within a short timeframe to bring itself in-line with the emerging international and other national standards that have been considered and discussed herein.

It has now been almost one hundred years since Deskaheh went to Ottawa in 1914, and then to the League of Nations in 1922, to advocate for Indigenous rights in Canada. In the years since Deskaheh's interventions, slow but steady progress has been made internationally on Indigenous peoples rights to their lands, resources, heritage and knowledge. It would seem, however, that the first UN member state to be confronted in an international forum over its treatment of Indigenous peoples continues to resist the inevitable international standards.

DEFINING MOMENT AT THE END OF WRITING: The week of June 25-30, 2006, was spent working hard at completing the final draft of my dissertation; knowing that, as I worked in Vancouver, the first meeting of the new UN Human Rights Council was meeting in Geneva considering the passing of the UN Draft Declaration on the Rights of Indigenous Peoples. I had asked my friend Sonia, who works at the UN Permanent Forum on Indigenous Peoples, to keep me informed on the Declaration's progress because it was an important aspect of my dissertation. Early in the week she informed me, "It seems that almost all member states are supportive, but Canada is trying to block it." On the evening of June 29th, after a long day at the computer, I checked my voice mail to hear Sonia's message saying, "just calling to let you know the Draft Dec passed." The next day I found out that Canada was one of the two countries to oppose it and made some changes to my dissertation to reflect the recent events. Canada's opposition was of no surprise to me after witnessing the Canadian delegations positions and statements on Indigenous and TK rights at several UN meetings over the past five years.

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