



INTELLECTUAL PROPERTY RIGHTS: AN ETHICAL CULTURAL POLICY FOR INDIGENOUS SOCIETIES?

**Peter Konefal, BA (Communications) Honours Thesis
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**INTELLECTUAL PROPERTY RIGHTS: AN ETHICAL CULTURAL
POLICY FOR INDIGENOUS SOCIETIES?**

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TABLE OF CONTENTS

List of Figures and Illustrations	5
Introduction: IPRs, the Global Context and the Question of Traditional Societies	6
Introductory Overview	6
Part I: Methodology.....	8
a. A note on definition and language.....	8
b. Methodological Validity and Research Question	8
Part II: Defining Indigenous and Minority, and Exploring Commonalities	10
a. Who are indigenous peoples?	10
The International and Historical Context of Indigenous Peoples: Colonization from Without or Within?	12
b. The Minority Connection	14
Part III: Commonalities in Traditional Indigenous Cultures and Customary Law.....	15
c. Cultural Production: Of Creators and Collectives.....	16
d. Orality	16
Part III: The Theory and Practice of Intellectual Property Rights in Anglo-European Legal Systems	19
a. A brief history of western patent law	19
b. The contested evolution of copyright.....	20
c. Current debates and controversies in the west	21
d. Concepts and institutions in western intellectual property rights.....	24
i. Property and incentives: “economic rights”	24
ii. Markets in intangible property: non rival, non exclusionary	26
iii. Fair use, limited terms and the public domain: societies rights	26
iv. Idea vs. expression.....	27
v. Individuality and “moral rights”	28
vi. Innovation, technology and competition.....	28
Part III: The Commercial, Political (State) and International Context of Global IPRs	29
a. Researchers and scientists	30

b. Global corporate actors..... 31

c. Institutions of global governance in intellectual property rights..... 31

 i. The Berne Convention 32

 ii. The International Labour Organization (ILO) 32

 iii. The World Intellectual Property Organization (WIPO)..... 32

 iv. The United Nations Education, Scientific and Cultural Organization (UNESCO).. 33

 v. The World Trade Organization (WTO) and the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement. 34

d. Intellectual property rights and the state 35

Part IV: Conflicts between AEIPRs and Traditional Societies 36

 Case example 1: Can Australian Copyright be used by Australian Indigenes to Protect against Infringements?..... 37

 Bulun and Milpurrurru v. R & T Textiles Pty. Ltd..... 37

 Case example 2: Protecting Cultural Memory with Patents? 39

 Estate of Tasunke Witko (Crazy Horse) vs. G. Heileman and Hornell Brewing companies and Ferolito 39

 Case example 3: Blending Constitutional rights with Customary Intellectual Property Rights..... 41

 Implications for the Kwakwak'wakw people of the Delgamuukw v. British Columbia decision and Section 35(1) of the Constitution Act, 1982..... 41

 Case example 4: Is State Ownership the Answer?..... 43

 a. Ghanaian fabric producers (kente cloth) 43

 Case Study 5: Maori Art and Commercial and Artistic Appropriations..... 46

Part VI: Summary of Policy Discrepancies between Indigenes and AEIPRs..... 51

Part VII: Summary of Alternatives and Recommendations to Mitigate Discrepancies 58

 Local Strategies 58

 a. Contracts? 59

 National Strategies..... 60

 a. State Ownership: Out of the Pan and into the Fire..... 60

 b. Using Sui Generis Principles to Reinforce Customary Rights..... 60

 i. Common Law 61

 ii. Statutory 61

CHANGE TO 6 B

iii. Constitutional	64
International Strategies	65
a. Rights Beyond Sale? The Question of Author’s Moral Rights.....	66
b. Geographical Indicators under TRIPS: Rights for Creative Tradition?.....	67
c. Mattaatua Declaration and the Draft Declaration on the Rights of Indigenous Peoples: Do they Matter?	69
Part VIII: Conclusion.....	70
Questions to Guide Further Research	70
a. Is Cultural “Protection” a Euphemism for Cultural Isolationism?	70
b. Finding Allies Among the Anti-Proprietarians	71
c. Problems with Cultural Hybridity and Capital “C” Culture	72
d. What of “Non-Tribal” or “Urban” Aboriginals? Caught between Tribal and National Cultural Policy?.....	72
Summary	73
Part VIII: Bibliography	75
Part VII: Notes.....	80

List of Figures and Illustrations

Fig 1.1 Characteristics of Oral (Indigenous) Cultures	17
Fig 1.2 Adapted Diagram of “Forces” Affecting Indigenous Cultural Policy	29
Fig 1.3 Obaakofu Mmu Man Kente Cloth	43
Fig 1.4 Kyeretwie Kente Cloth	43
Fig 1.5 Ceplok Batik	44
Fig 1.6 Modern Batik	44
Fig 1.7 Excerpt of Indonesian Copyright Act Specifying State Ownership of Indigenous Cultural Traditions	45
Fig 1.8 Indigenous Maori Ta Moko and Related Designs In Culturally Dislocated Contexts	47
Fig 1.9 Moontide Swimwear Promotional Brochure 1999/2000	47
Figure 1.10 Criteria for Determining Authenticity of Indian Persons and Goods within New Mexico Indian Arts and Crafts Protection Law	49
Fig 1.11 Jemez Pueblo Storyteller	50
Fig 1.12 Navajo Storyteller	50
Fig 1.13 The Three Designations of the Toi Iho (Maori Made) Trademarking System	63

Introduction: IPRs, the Global Context and the Question of Traditional Societies

Indigenous people worldwide face a variety of serious threats to their continued cultural distinctiveness and sustainability. Physical privations, dispossessions of land and the appropriation of cultural and ecological heritage continue to define national policies towards indigenous or traditional societies in many parts of the world (e.g. Vietnam, China, Tibet, Malaysia, Sri Lanka). In recent decades, indigenous groups have begun calling attention to and resisting a convergence of state-level, commercial and international legal frameworks which have facilitated a wide scale “piracy” of indigenous cultural and biodiversity resources. Where these policies were recognized and purposefully perpetrated during the age of colonialism, allegations that these same policies continue through the more codified and “fair” system of modern states, international bodies and intellectual property rights is worthy cause for investigation. A small but growing number of analyses have focused on this contentious normative context, questioning the role of commercial, state and international governmental actors in securing the rights of world indigenous peoples to ‘cultural survival’ (Boateng, 2001; Posey & Dutfield, 1996; Shiva, 1999). Although the literature on the question of biopiracy and the associated questions it poses towards the normative operations of global trade and commercial actors is still in need of greater scholarly attention, investigations into the relationship between indigenous cultural needs and the theory and practice of western cultural law (Anglo European Intellectual Property Rights, or AEIPRs) are especially lacking.

Introductory Overview

Part I, Methodology, introduces the research question and details the empirical basis for the investigation: an analysis of a series of related case studies. The working hypothesis of the methodology section is that 1) if a significant number of indigenous cultures throughout the world (seven examined here) have similar concerns with global IPR regimes, then 2) arguably global IP regimes deserve reform in a generalized fashion that would alleviate *common complaints* advanced by indigenous cultures. Attention is given in the methodology and in the study to the question of issues outside of this rigid framework, including a) enforcement of some existing but immobilized legislation (e.g. the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992), b) some advantages of the existing IPR regime, and c) contradictions and circumstances specific to some indigenous groups but not others.

Part II, Defining Indigenous and Minority, briefly introduces and discusses varying definitions of ‘what’ indigenous peoples are. The goal of this section is to problematize the definition ‘indigenous,’ and discuss the politics of labeling, representing and defining peoples, especially when ‘labelling’ power is distributed unevenly over ethnic and socio-economic divides. This section also

introduces some historical issues (e.g. colonialism) which are particularly relevant for many traditional societies.

Part III, *Commonalities in Traditional Indigenous Cultures and Customary Law*, posits several unique characteristics of indigenous cultures spiritual, religious, social and legal-customary systems. Without over-generalizing across regional distinctions, this section will attempt to highlight the way some characteristics of indigenous cultures are likely to be reflected in their customary legal systems, and moreover, how these characteristics differ radically from the philosophical and material bases of western economic development, property and the notion of cultural commodities.

Part IV, *The Theory and Practice of Anglo European Intellectual Property Rights*, provides an assessment of intellectual property rights within the societal context for which they were originally intended. One can consider the analysis in this section as a 'best case scenario' with which to compare the relative functioning of AEIPRs for indigenous peoples. If AEIPRs have unique functions with respect to intrinsic aspects of the history and evolution of Anglo European societies, what are these unique functions and aspects and how are they reflected in AEIPR regimes?

Part V, *The Commercial, Political (State) and International Context of Global AEIPRs*, takes the "practice" component of Part II a step further. Law is often thought of as a "regulator" of behaviour. Thus it is important to take this into account when examining whether it regulates the behaviour of individuals, corporate actors and states in a way that is meaningful and satisfying with respect to the needs of indigenous peoples. However, it is *not* the only regulator. Therefore, it is important to examine the most important institutions in addition to 'law' that affect the regulation of indigenous cultural resources. The most vital of these institutions are corporate actors, political actors such as states, and international global governance structure such as the United Nations, the World Intellectual Property Association (WIPO) and the World Trade Organization (especially its Trade Related Aspects of Intellectual Property and Services or TRIPS agreement).

Part VI, *Conflicts Between AEIPRs and Traditional Societies*, presents seven different example which illustrate the manner in which indigenous cultural policy needs were negotiated by actors acting in accordance with AEIPRs. This section will constitute the evidentiary portion of this study and the interpretation of the seven examples will be used to help draw conclusions and form recommendations for the last section. This section moreover, is designed to highlight how the differences between the west and many indigenous cultures is reflected by the formers institutions, such as exclusivist¹⁶ property, market commerce and individual authorship, to name a few.

Part VII, *Summary of Policy Discrepancies between Indigenes and AEIPRs*, will draw from the analysis of the successes and failures involved in the interaction between intellectual property rights and indigenous cultures examined in order to formulate a coherent set of policy recommendations on how AEIPRs could (and should) be reformed.

Part I: Methodology

a. A note on definition and language

Before proceeding however, it is worthwhile to note that this discussion itself implies a relation to indigenous cultures that requires mention. This discussion will no doubt reflect many epistemological and linguistic categories particular to the west, which translate poorly or not at all for aboriginal peoples. As an example of why this is an important consideration for the analysis here, consider this studies focus on issues of indigenous *culture*. As previous scholars have pointed out, separating issues of land, ecological resources and spiritual concerns from that which is considered of cultural value is an artificial exercise from the perspective of many indigenous groups. It might be preferable to engage issues of land and ecological resource preservation and sustainability insofar as those elements become engaged in the same relation to AEIPRs as do more conventionally western cultural artifacts as folklore traditions, textile patterns, dance choreographies and the like. Unfortunately, that preference exceeds the analytical scope proposed here, although other studies might benefit from a combination of indigenous cultural and ecological concerns.

b. Methodological Validity and Research Question

Given the diverse and overwhelming number of indigenous groups, this study aims at a compromise between a case study of a particular culture and a general study of almost all indigenous cultures. The advantages of a case study (depth and rigour of analysis) are compromised by the lack of validity involved in inferring that the characteristics of that one group are found among all or almost all indigenous groups. In other terms, case studies tend to produce results that are un-generalizable, and in this case, might therefore provide weak evidence of an overall failure of western AEIPRs to satisfactorily meet the needs of indigenous cultures.

Another issue involves the power disparity within indigenous peoples themselves, some are more public and have more resources than others, which will no doubt be reflected in this study. The Pueblo, Maori, and various Australian Indigenous groups (Ganalbingu) are much more broadly known than more anonymous indigenous clans and groups. Thus, the study here will attempt to find as many illustrative examples of cultural producers from areas that may not receive as much international attention (British Columbia, Indonesia, etc).

In terms of the second variable in this analysis, that of Anglo European intellectual copyrights, one might question whether it is valid to conceive of such a complex and varied set of doctrines as a singularity. Are there not regional disparities and differences in regulation and

enforcement from the Dutch influenced copyright laws of Indonesia to the more progressive copyright doctrines of Australia? Certainly this is true to a degree.

Although attention will be given to particularly evident regional distinctions in copyright and other related IP laws, there are also pressures and logics that impel a considerable degree of uniformity in the broad structure of modern IP regimes. Internationally ratified agreements such as the Paris, Berne and more recently, TRIPS agreement suggest that limits exist as to how liberally nations can interpret and alter their IP laws. Presently, over 148 nations are signatories in the WTO TRIPS agreement, and the five-year deadline for developing nations to ratify their laws accordingly has long since expired, in 2000 (Matthews, 2002). In addition, such international accords overlap in principle, with the TRIPS agreement *in principle* affirming previous agreements such as the *Berne Convention for the Protection of Literary and Artistic Works* (Rajan, 2001, p. 90).

Methodologically speaking then, if modern intellectual property regimes can be conceived as a broadly similar set of doctrines throughout the world, they can be considered for the purposes of this study to be an independent variable. The dependent variables in this study, therefore, are the indigenous groups which are subject to this “relatively constant” stimulus (if one can call it that).

If, as this study will show, commonalities exist across many different indigenous cultures in terms of their relationship to AEIPRs, then a set of common issues and grievances can form generalizations of some validity concerning the relationship between all (or most) AEIPRs and indigenous peoples. Obviously, the more dependent variables one documents, the more generalizeable validity the study will have. At least six indigenous cultures (dependent variables) will be examined qualitatively in this study. It is a fortunate circumstance that many of the cultures examined in this study are geographically diverse. If it can be shown that peoples as diverse geographically as the Kwakwak'wakw tribe in British Columbia Canada, the Pueblo Indians of the New Mexico USA, the Batik producers of Singapore and the Aborigines of Australia (and many more) have all been frustrated by similar failures in the way that AEIPRs regulate their cultural property, then the claim that AEIPR policy is in need of change has substantially more validity. Moreover, many striking similarities in the cultural worldviews of geographically diverse indigenous peoples suggest that the prospects for normative policy change could begin by accommodating some of these similarities. For example, the inextricable link between land, “art” and the sacred (spiritual concerns) is common to many different indigenous cultures, and makes for many conflicts between AEIPRs, which emphasizes exclusionary rights over communal ownership and economic over spiritual concerns.

A last note to mention within methodology is that, for reasons of necessity many factors aside from indigenous culture(s) and AEIPRs are examined. These include corporate actors, political actors such as states and international governmental bodies which perform (or fail to) roles exceeding

the passing and enforcement of legislation. This study will no doubt produce many critiques of these institutions, which would drastically affect the function of the aforementioned legislation. It is no doubt unfair to criticize intellectual property rights as a distinct legal doctrine and hold that doctrine entirely responsible for the plight of indigenous peoples cultural sustainability. A change in the policies of international corporate actors and states might make legislative changes less or even entirely unnecessary. A study of intellectual property rights is nevertheless a worthwhile investigation. Reform of laws and how they are enforced and their capacity to improve conditions on the ground for indigenous peoples is a working assumption of this investigation and one reinforced and supported by other scholars in the field (Bengwayan, 2002).

Part II: Defining Indigenous and Minority, and Exploring Commonalities

a. Who are indigenous peoples?

Before critiquing the ways in which intellectual property issues affect indigenous groups, it is important to define our subject in greater detail. Just who are indigenous peoples? A dictionary definition of indigenous usually contains the criteria of originating or occurring 'naturally' within an area or environment, or being 'intrinsic.'

Indigenous peoples therefore, literally refers to peoples originating from within a distinct geographic region. Unfortunately, this definition seems to raise more questions than it answers. One of the central problems emerging from this definition has to do with the fact that, if we consider geography and history broadly, we can truthfully say that all human beings are indigenous to the earth in its totality: *there are no non-indigenous people on earth.*¹ However, given that humanity is usually dissected according to linguistic and ethno-cultural divisions, the need for the term indigenous to apply to peoples who share especially strong cultural and historical connections to particular geographic areas remains. The above term 'especially,' is not a quantitative term, and hints at the vagueness and problematic distinctions that inevitably creep into definitions of indigenous and non-indigenous peoples.

Nonetheless, If I may propose my own (less?) problematic distinction it might be the following. If we were to define indigenous peoples by arbitrarily considering peoples as those who inhabited a more or less specific geographic region in the year 1400 A.D, as being genuinely indigenous to that region, our definition would likely be very acceptable to virtually everyone. It could be argued that this is merely a meticulously worded clarification of the term "since time immemorial" which is usually used to indicate the long-term geographic residencies associated with indigenous peoples (Robbins, 1999). This definition would categorize the people of Hawai'i as being "indigenous" to that land, despite the fact that at a certain point in time, the Hawai'ian islands didn't

exist, and furthermore were unoccupied by any descendents of Polynesian island tribes who would later occupy the island and develop a distinctively Hawai'ian ethnic and cultural identity. North American majority populations of European descent could not claim that the term "indigenous" as applying to non-Europeans existing in North and South America prior is misplaced, since those peoples were "immigrants" from Asia thousands of years ago. The migration of any ethno-cultural homo sapient variant from their incubation in Africa, any corresponding environmental speciation, the mixing and interbreeding of different ethno-cultural groups due to conquest as well as category-defying implications of nomadic migrations and trans-oceanic traipses prior to 1400 A.D. would not be reason to discard the historical relativity of this definition of indigenous status.

For some, this definition would nonetheless be unacceptable. Some critics of aboriginal rights claims such as Tom Flanagan (2000) argue that "special treatment" and recognition of aboriginal groups as historically persecuted informs a set of misguided policies and thinking. Many have claimed that Flanagan's indisputable claim that North American aboriginals are immigrants is made ideologically, or duplicitously. While this may be true, it does nothing to diminish the comparatively long time that aboriginal persons have resided in North America as compared to European "immigrants,"² nor does it address the historically located and continuing social and economic disparities between individuals of European and aboriginal descent. This brings us to contemplate how power and ideology affects this debate. It is well and good that there are non-aboriginal discussants in this debate, but where are the aboriginal discussants and why do they not receive the same prominent place in the debate as do participants from the controversial Calgary school (of which Flanagan is a member)?³ This problem is indicated by Michael Brown's recognition of the conspicuous absence of aboriginal participants in other policy spheres: "it [is] discomfiting to witness Aboriginal attitudes towards land, religion, and law under discussion in... formal setting[s] and in the absence of any Aboriginal people themselves" (Brown, 2003, p. 50). I would argue that it's fair to transfer Brown's reservations to *any* dialogue conducted almost exclusively by non-aboriginals on "behalf" of aboriginals and their issues. As observers and participants in this discussion of identities to which many of us don't belong, it is incumbent on us to recognize the limits circumscribed on us by our own lack of experience, and to point out the need for more aboriginal participants in discussions of representation and identity politics.

An enormous motivation behind defining particular peoples as indigenous is to note their special differences from and increasing rarity compared to the urban, globalized modernity that exists outside the threatened geographic oases in which these people find themselves. For proponents of assimilationist policies, it is argued that such policies of recognizing difference and according special priorities for these people in recognition of incalculable historical wrongs and present social, economic and political disparities between mainstream populations are unhelpful, misguided and

even counter to the best interests of these peoples (See Flanagan, Tom, 2000; Conklin, Kenneth, 2004).

The International and Historical Context of Indigenous Peoples: Colonization from Without or Within?

Many contemporary nation-states contain large ethnic majorities that although indigenous to the region, are often not considered to be 'indigenous peoples,' as in geographically isolated, linguistically and culturally distinct, non-mainstream societies. Frequently, this definition of indigenous peoples has been avoided through the drawing of national boundary lines over indigenous territories. Consider the example of the Kurdish peoples in Iraq, Turkey and Iran who have suffered enormous repression as a result of colonial national-boundaries that failed to take their sovereignty into account. Indigenous peoples are often described as under threat due to their status as distinct communities under assimilationist pressures from a larger mainstream society. These threats may take the form of economic pressure to conform to demands that they export commodities, or depart traditional lands in order to allow resource extraction companies (mining, forestry) to conduct their affairs unimpeded.

Many indigenous peoples such as those in Canada, the USA, Australia and New Zealand are often described as colonial indigenous peoples, as they were historically subject against their will to the sovereignty and sovereignty of nations which superimposed their authority over such people as subjects and as custodians of their traditional lands. Although in most cases, traditional forms of colonialism have ended during the mid 20th century, with various forms of repatriation and compensation measures having taken place to acknowledge past inequities and assimilationist policies. Nevertheless, the 'stamp' of colonialism is often very much apparent with such peoples, who often suffer significant disparities in health, crime, income and other indicators of socio-economic welfare.

Other indigenous peoples may technically reside within the current boundaries of nation states, but be free from precisely the same colonial onslaught that befell North American and Australian indigenous peoples. In Africa, unlike in North America, with the exception of South Africa, large European populations do not live alongside historically persecuted indigenous groups. Although the debate over colonialism is as alive as are the disparities in health, welfare and income between the historically persecuted and those who persecuted them, current controversies centre along neo-colonialist or have integrated with the broader critiques of political economy. In South America and Asia, many indigenous ethnic groups have not fared particularly well in relation to the nation state. Such groups might have less experience with overt Anglo-European colonialism, than with the comparatively recent developmental demands made by the rapidly expanding economies of

many South American and Asian states. Such developmental demands have often taken place alongside state policies directed towards the extermination, geographic displacement or forced integration of indigenous peoples into the general population (Bengwayan, 2002).

The discussion thus far has introduced some historical factors which produce a generalized imperfect stratification between those introduced first, indigenous peoples within a Anglo-European post-colonial context, and those indigenous peoples under threat from the government assisted developmental policies. One might ask of this description, are there any indigenous peoples not under immediate threat? A short answer might be, not really. Although the circumstances of some indigenous peoples are dramatically better than others, most remain under threat if from no more insidious a trend than the desire of younger descendents of traditional societies to spurn older ways of life. Canada's Inuit peoples have achieved a remarkable degree of political and geographic autonomy, as compared to other post-colonial nations. In the Philippines, a series of progressive measures and laws have been enacted in favour of indigenous rights and special protections, belying the established trend of most rapidly developing Asian states (Bengwayan, 2002).

What is the value in noting some general differences between indigenous peoples who have been historically persecuted and subjugated within post-colonial states and those that are more recently under threat from local governments? In essence, it highlights the care we must take in assessing definitions of "indigenous" peoples. Some controversial scholars have argued out that in many cases, once 'un-contaminated' indigenous peoples (in Hawai'i and British Columbia for example) have since become 'hybridized' with the mainstream, taking part in many mainstream cultural, artistic and employment activities. Such peoples, these scholars maintain, are no longer *really* indigenous. Notwithstanding such critics, there are significant differences between indigenous peoples (say Brazilian rainforest peoples) who have only recently been exposed to the culturally incompatible pressures of westernized modernity.

c. Anglo-European Power Relations and Representations of the "Other"

In a landmark cultural-studies text, *The Imaginary Indian: the Image of the Indian in Canadian Culture*, Francis Daniel exposes the hidden assumptions and logic behind those who would invent identities and criteria for indigenous peoples to fulfill in order to be deemed sufficiently "authentic." In short, we can garner from her text and the objections of many aboriginal scholars that it is not a task for society at large, and especially non-aboriginal scholars, to establish the criteria by which people can legitimately describe themselves as being part of indigenous heritage. Whether European bones are buried in the land (making European's "indigenous Hawai'ians" so the argument goes) or European genes have mixed with those of aborigines is irrelevant (Conklin, 2004). Paradoxically, it is a violation of both the individual rights of those who would reconnect holistically with their heritage

and of the boundaries of that heritage itself, for outside arbitrators to decide who can belong. Instead, it must be sufficient for an individual to make the decision to reconnect with their traditional culture, beliefs and forms of self-government, and be accepted by that community, for outside powers to consider them as such.

To return then, to the objective described at the beginning of this section, we shall attempt to document some key characteristics of many indigenous peoples and their worldviews in order to gain a better understanding of these peoples and how these characteristics stand in contrast to the systems implied and inherent in Anglo-European intellectual property rights.

There are some clear reasons why being identified as part of an indigenous people, that is to say, as being part of a specific group identity or collectivity, might be desirable. Such a designation can allow and make possible international or national petitions for a redress of grievances as a collective, as opposed to a series of individuals with common complaints. In international law the status of the rights of collectivities is an emerging category, challenging the previous status quo inherited from western liberalism, that of only entertaining the grievances of individuals.

Meanwhile the very notion of identity is being challenged in the interdisciplinary quarters of what may be loosely summarized as cultural studies. Representation of the Other – often as the darker side, the binary opposite of oneself – is revealed as being a mere tool for self-identification and consolidation of power relations, rather than a source of objective information. Identity – be it racial, ethnic, cultural or other – is exposed as being a social construct... arising through contingent alliances and oppositions...rather than an absolute, innate phenomenon. (from book review of Makkonen, (2000) by Brolmann, Catherine).

Having introduced the divergent, but often usefully combined terms of indigenous and minority, why not inquire further into the politics of “labeling.” People of all kinds are and should be suspicious of externally created definitions that declare unilaterally “what it is” that the people are, “who can belong” and “who can’t.”

b. The Minority Connection

Another problematic issue involved in the term indigenous, has to do with its general association with minority status. Minority status as well as indigenous status has a general and frequently supported parallel with diminished political, economic and social status relative to majority ethno-cultural groups in many nations. At the level of international law, concern over the rights of national minorities is often sought with the intention of also benefiting the many indigenous groups that are ethnic and linguistic minorities in many nations. Nevertheless, the two often don’t correspond. Thus, it is important to recognize that although there frequently is overlap between these two categories, however loosely they might be defined, their usefulness has limits. For example, the indigenous Han Chinese of China, constitute the overwhelming ethno-cultural majority of that country, a fact not perhaps evident if one assumes that indigene corresponds to minority status. In

British Columbia however, peoples such as the Kwakwak'wakw peoples are both indigenous to the region prior to 1400 and a current minority ethno-cultural group. Although there are certainly many national contexts in which mainstream populations are technically indigenous (Brazil, China, Vietnam etc), our use of the term indigenous will be in reference to groups that are both indigenous to a national geography, and also of minority status (in both linguistic and demographic representation).

Part III: Commonalities in Traditional Indigenous Cultures and Customary Law

The goal of this section is to “identify the minimum common ground on which to base constructive understanding, [motivate] discussion, and [impel] concerted action in diverse locations around the globe” (Indigenous Traditions and Ecology. Ed. Grim, John, p. xxiii). The dark side of the exercise of seeking commonalities, or indiscriminately generalizing about many different ethnic and cultural communities is well surmised by Anja Portin:

We are in danger of using colonizing discourse if we talk about indigenous peoples as entities without taking the differences between cultures, and between individuals within these cultures in consideration (International Journal on Minority and Group Rights 8: 397-401, 2001. Anja Portin, University of Turku, Finland).

With this injunction to not perpetuate a colonizing discourse typified by the suppression of regional distinctions and particularities, the objective of identifying some frequently occurring characteristics of indigenous peoples will focus as much as possible on specific examples and on avoiding universalizing statements.

b. Indigenous “Lifeways”? Investigating the concept of Interbeing of Cosmology and Ecology

The difficulties of apprehending, much less understanding indigenous culture are underscored by the terms we inherit from the English language. The terms we use are discrete, analytical, descriptive and usually segregate worldly and human phenomena into categories. These tendencies serve to obstruct rather than assist an organic understanding of many indigenous cultures. Thus, the terms “lifeways” and “interbeing” are developed to help non-aboriginal readers to think broadly and grasp cultures which don't distinguish between religion, culture, spirituality and “art.”

In other terms, many indigenous cultures have a holistic worldview which doesn't easily translate into other linguistic or cultural contexts. However, perhaps the French term *l'histoire des mentalités*, which loosely translates into the history of cosmologies, or worldviews may be helpful. The grounded assertion of *l'histoire des mentalités* is to understand “the way ordinary people make sense of the world...how they organized reality in their minds and expressed it in their behaviour...Instead of deriving logical propositions, they think with things, or with anything else that their culture makes available to them, such as stories and ceremonies” (Darnton, 1985, p. 3). In contrast to Anglo-

European cultures which tend to view themselves as distinct from and apart from “nature,” many indigenous cultures are said to view themselves as part of a cosmological continuum which includes some recurring categorizations that include the people, the land and its creatures, and the spiritual other-world. Often, depending on the unique aspects of the culture in question, these worlds intermingle (Cole, 1982). People can become inhabited by spiritual beings for a time, reverting in-between worlds with or without ceremonial aid, birds and natural creatures can represent or carry the will of the supernatural (Achebe, 1959; Grim (Ed), 2001; Cole, 1982). For many aboriginal and tribal societies, dreaming is often conceived of as an entry-point into the spiritual world, and often death is viewed as part of a natural linear process of renewal and reincarnation. The land, in contrast to secular European sensibilities, is not an alienable object of property rights, but rather conceived of as a site of spiritual reverence and debt, to be used according to custom and sacred obligations.⁴

c. Cultural Production: Of Creators and Collectives

Given the holistic and collectivist nature of most indigenous societies, wherein ecology, spirituality and people’s activities are deeply connected, cultural producers frequently view themselves not as individual “authors,” but rather as agents of spiritual powers. Other reasons for creating material or non-material forms of culture may have to do with kinship obligations (gift cultures) (Coast Salish peoples) or ceremonial purposes marking important village events. When individuals such as members of the mbari Igbo (ee-bo) of Nigeria are involved in creating a communal cultural work, for example *mbari*, they conceive of themselves not as individual artists, but rather a part of an engaged collectivity working towards similar goals (Cole, 1982, p. 77).

d. Orality

Another key feature of many indigenous peoples has to do with the predominantly oral nature of their languages, and the unique ways in which this characteristic influences their cultures. Considering that only 100 of approximately 3,000 human languages have developed a literature, this is by no means an exceptional phenomenon (Ong, 1982). Previous studies, such as those by Walter Ong in *Orality and Literacy* that have usefully theorized how the “technology” of writing gradually exerts its influence on how members of such societies ‘think’ and conceive of their world, provide useful insight into the nature of many indigenous cultures. His well known tabulation of some key tendencies in oral cultures include:

Expression that is additive, rather than subordinative and repetitive
As an oral statement cannot be retracted or reviewed repeatedly once it has been uttered, oral cultures tend to produce statements that contain more terms than are necessary to convey the information. In addition to using more terms to express a concept, repetition is also used to ensure the audience can miss a few details and still understand the message. In contrast, written cultures produce expression that tends to be perspicuous (fewer redundancies).
Aggregation rather than analysis
Concepts and ideas tend to be clustered together in ways that aid memory retention, as opposed to what makes sense analytically.
Conservative or Traditionalist
In oral societies, the preservation and transmission of old knowledge is of paramount importance. As repositories and data-banks of knowledge, older individuals in an oral society are treated with great respect and value. According to Ong, print cultures make the role of living knowledge repositories redundant, leading to a degradation in their in print traditions (Ong, 1982, p. 41).
Thought is close to Human Lifeworld; Situational Rather than Abstract; Participatory rather than Objectively Distanced
<ul style="list-style-type: none"> • Oral societies tend to emphasize knowledge that is directly relevant to their present situation. Oral traditions make use of combinations, formulas and other methods to make it easier for a person to recall what is important for the audience/purpose at hand, but not what characteristics of a concept are common according to a detailed analysis (e.g. among an Axe; Hatchet; Saw; and Log, members of an oral society would be unlikely to identify the 'Log' as the odd-one-out, since it is not a 'cutting implement.' Non-literates would say these objects are the same since without the log, the other objects would be useless. • While knowledge of obscure dates and facts can remain within written societies indefinitely due to the ease with which recorded information can be retrieved, the necessity of remembering only that which is important (so that everything else can be forgotten) leads to what has been called "selective amnesia" in many oral societies: The Tiv people of Nigeria used complex genealogies to assist them in recalling family status and kinship relationships. These relationships were recorded by the British, and compared to the Tiv people's own accounts of the relationships over a decade. The Tiv people later claimed that the recorded genealogies were <u>inaccurate</u>. According to anthropologist Jack Goody, the Tiv people had modified their genealogy to accommodate population increases, intra-group migration and territorial conquest. Only those parts of the genealogy that "still made sense" were retained, while the rest was forgotten in a process Goody describes as "selective amnesia" (Goody, 1987).

Fig 1.1 Characteristics of Oral Cultures

In Chinua Achebe's novel *Things Fall Apart*, the various characters and townspeople of Umuofia⁵ frequently make use of "sayings" to assess a troublesome domestic situation, pass judgment on a person, or reflect on the relationship between the favour of the god's and one's prosperity. Such

sayings contain a tremendous amount of information, social norms, cultural codes and ideas about the world that is directly relevant to daily experience. For example, the saying “when the moon is shining, the cripple becomes hungry for a walk” eloquently refers to the desirability of a lighted path at night and the dangers of the dark (Achebe, 1959). Correspondingly, as Postman notes of oral societies, “intelligence is often associated with aphoristic ingenuity, that is, the power to invent compact sayings of wide applicability.”

In many indigenous or oral cultures (such as that of the pre-colonial Igbo people), customary laws and practices often reflect the importance of *common sense* and sayings in managing the complexities of village social affairs. The tremendous epistemological and legal validity associated with oral testimony, aphorisms or proverbs is in radical contrast to the complete distrust and occasionally contempt associated with the same in written Anglo-European cultures. While talk may be cheap and judged legally unsuitable in most cases, the reverse is true in many oral societies. As Postman describes of the cultural-epistemological importance of orality in Western Africa:

When a dispute arises, the complainants come before the chief of the tribe and state their grievances. With no written law to guide him, the task of the chief is to search through his vast repertoire of proverbs and sayings to find one that suits the situation and is equally satisfying to both complainants. That accomplished, all parties are agreed that justice has been done, that the truth has been served (Postman, 1985, p. 18).

As Postman notes of Anglo-European legal cultures on the other hand,

...there is a much stronger belief in the authenticity of writing, and in particular, printing. This second belief has little tolerance for poetry, proverbs, sayings, parables or any other expressions of oral wisdom...in [this] culture, lawyers do not have to be wise; they need to be well briefed (Postman, 1985, p. 19-20)

Without examining in detail the particular spiritual, cultural and legal aspects of many different indigenous cultures, a task that would be too vast to accomplish here, the frequently occurring characteristics of holistic worldviews involving an intimate interconnection between people, land, gods, an tendency to be ecologically sustainable and many of the cultural-societal characteristics observed by Walter Ong and others, can nonetheless provide a useful overview. This overview serves to illuminate how some key aspects of indigenous cultures and their schemes and understandings of cultural production contrast significantly from the respective assumptions of Anglo-European cultures.

Part III: The Theory and Practice of Intellectual Property Rights in Anglo-European Legal Systems

a. A brief history of western patent law

Intellectual property rights in the west have a lengthy history, both in terms of their theoretical conceptualization and the lived conditions of their practice (legal, commercial, religious) within particular time periods. Some legal scholars use an especially extended timeline in tracing the historical development of AEIPRs (arguably, to an extent that stretches the boundaries of ‘western’ civilization), especially those concerning regulations approximate to conventional trademark and patent laws. Certainly, if one takes a broad view of the general idea behind patents, many civilizations and dominant world cultural areas have used something approximate to modern AEIPRs for thousands of years. As an example, some scholars argue that the marks placed by Egyptian potters on clay pots in 3200 BC are evidence of early trademark protection (Grandstrand, 1999, p. 28). Others point out that in 100 BC, the Roman Empire made extensive use of trademarks to certify and regulate everyday products such as textiles, lamps, glassworks, cheese and medicines (Grandstrand, p. 28). Within the middle ages, the city of Venice issued a formal patent code in 1474 that permitted inventors a 20-year monopoly on the use and reproduction of their creations. The 1474 Venetian patent code is surprisingly modern in that it was established by a central authority, specified limits on exclusive monopoly privileges and lastly, outlined a fine for infringements (300 Venetian ducats) (Grandstrand, p. 29). England followed Venice’ example in 1623 with the passage of a similar patent law, The Statute of Monopolies, granting exclusive patent rights to new inventors for a limited term of 14 years (Grandstrand, p. 29)

These acts closely resemble the intentions of modern patent laws. Modern patent laws still attempt to reward commercial and individual innovators for their creativity and yet, not provide outright monopolies that might give possessors of patents undue commercial power. Like their predecessor laws, modern patent law also attempts to prevent industrial or individual foul play (appropriation of other firms inventions or rights to certain inventions). That said, the importance of patents within the commercial realm and the extent of phenomena regulated has greatly expanded, and that subject will be discussed in greater detail following an introduction to the other “half” of the intellectual property rights equation. This is not to imply that intellectual property rights only include copyrights and patents, there are trade secrets, contracts, and trademarks as well, but the two components are the most significant.

b. The contested evolution of copyright

Despite the resemblance between modern patent law and that of mediaeval, Roman or even Egyptian systems, many modern scholars of intellectual property law focus instead on the commercial, political and intellectual circumstances of 18th century England (and Europe at large) in search of the origins of western intellectual property rights law. Why is this? In essence, this is because before the 18th century, there was no formalized statute governing the creative output of authors. Individual inventors and corporations could secure statutory rights to protect their inventions (patents) and company-specific emblems (the basis of trademark law), but monopoly incentives and rights for literary authors (e.g. copyright laws), were essentially nonexistent before the enlightenment. In its place was a system of political, financial and religious patronage, with other kinds of authorial production taking place outside of conventional economic incentive explanations (gift culture, religious devotion). In post-revolutionary England, liberal parliamentary sentiment and the growing influence of enlightenment thought set up a conflict between the traditional system of religious patronage and crown sanctioned monopolies and that of an emerging system that privileged the individual author and the public good of literary competition.

In this case, the subject of traditional crown favour was a book publishing monopoly called the Stationers Guild (Conger). To understand the full development of the ensuing conflict, we must examine some key aspects of the book-publishing status quo in pre-revolutionary England from the 15th to 17th centuries as exemplified in its late stages by the Licensing Act of 1662. With this act, the government granted exclusive publishing rights to the Conger in return for the Guild's assistance in censoring tracts deemed seditious, heretical or "political" (Blagden, 1960). In this manner, the crown and parliament was assured a staunch ally in limiting the spread of unfriendly and dangerous ideas while the Guild reaped the economic benefits of its status as the sole legitimate source of new (and old) books, plays and poems (Drahos, 1996, p. 22-3). Unfortunately for the book publishing monopoly, the Licensing Act expired in 1695, leaving the question of their continued monopoly rights in question. Refusing to acknowledge any ambiguity over their rights, the Conger found itself fighting a growing number of smaller (often underground) booksellers who argued that the Guild's reign of monopoly had expired with the Licensing Act. Although the Conger claimed to have a continued monopoly because of a long established common-law tradition of "perpetual rights," they nevertheless appealed to the crown to grant another statutory law in order to firm up state legitimacy in their battle against the underground "pirates" and competitors (Lessig, 2004, p. 86-7). However, many parliamentarians recalled the injurious history of crown-granted monopolies before and during the English civil war, and now wished to restrict any exclusive rights they might grant (Lessig, 2004, p. 88). Thus, to the horror of the Stationers guild, the next statutory law regulating publishers

exclusive rights “to copy,” the Statute of Anne of 1710, contained the provision that new publishing rights be limited to fourteen years (renewable once if the author was alive) and specified that already existing rights be limited to a single term of twenty-one years. The act made a compromise between the enlightenment view that ideas should enjoy unrestricted distribution throughout society so as to ensure a rational and free-thinking public, and the market-liberal view that property rights ought to be respected.

As an historical aside, the Statute of Anne, didn’t itself end the Stationers monopoly. The Stationers challenged the new law by arguing that the previous common law tradition allowed for perpetual monopolies despite the limitation written into the new statutory law. In a famous and very public trial, *Donaldson vs. Beckett*, lawyers on behalf of the “infringing” Scottish bookseller (Donaldson) and a member of the Stationers guild (Beckett) argued their cases before members of the House of Lords (a Supreme Court equivalent for that era) (Lessig, 2004, p. 92-3). Ultimately, the case was won in favour of Donaldson by a large majority, and in 1742, the first public domain in literary works was created *for the first time* in western history. This historical segue way might seem extended, but it is an important introduction to the many contested concepts of western copyright law.

c. Current debates and controversies in the west

Within western government policy-making circles and especially within legal and economic scholarship, there is still vehement disagreement on the subject of how “limited” the temporary monopoly of the author should be in order to effectively encourage new authors to create while not burdening future “follow-on” innovators. At one extreme there are lobbyists on behalf of major commercial entertainment interests such as Jack Valenti, who argue that the terms should be “forever minus one day,” while others argue for a return to more traditional copyright terms. Traditionalist legal scholars argue that creativity and innovation, whether scientific, technological or artistic, is a collective activity, requiring a balance between the short-term interests of authors and the long-term interests of creative communities (Benkler, 1999; Boyle, 2001; Lessig, 2001, 2004). If creative communities are starved of access to the creative contributions of their fellow members because their contributions are withheld from a creative community for dramatically extended lengths of time, then the vitality and rate of innovation is jeopardized. Lessig, Boyle, Benkler and many economists⁶ stress that dramatic increases in the length of monopoly terms (from 14 years in 1710 with the passing of the English Statute of Anne, to the life of the author plus 90 years in 2004 with the passage of the US Sunny-Bono Copyright Term Extension Act) is an important premise of this argument.

Before a list of key conceptual components of western intellectual property law is examined in detail, it is worth noting that our notion of intellectual property as a unified concept has emerged

after its constituent components (copyright, patents, trademark laws) were already in place. Instead of society developing a holistic branch of IP law beforehand, doctrines such as copyright and patents emerged separately and over time became branched together because of what were seen to be their similarities. This means that specific laws such as the Statute of Anne developed not as a solution to the question of legal rights in “intangible property,” but rather to resolve a very particular problem: how to regulate who had the right to make copies of books and other literary works (Boateng, 1996; Ketley, 2001). Patents initially served the purpose of registering and protecting particular individuals’ industrial inventions so that the state could ensure fair compensation to the individual and punish any unscrupulous appropriations before the term expired. The objects of regulation during the first two centuries of copyright law were chiefly books and written literature. During the same period, patents generally regulated industrial machinery, electrical devices, film and sound recording devices and light-industrial goods (bicycles, gasoline engine designs, etc).

However, in the late 19th century and 20th century, western intellectual property laws and the objects and phenomena they regulate, began to expand in scope. When the phonograph became popular, the question emerged of whether copyright law governed the recording of performances in which copyrights existed on paper music. Although the way courts dealt with this issue is worthy of detailed examination, the point I wish to make is that this new invention not only raised questions of whether ‘copying’ was allowed if no “paper copy” was used to make the reproduction, but that the end result of this and other technological formats for content is that copyright law eventually expanded its jurisdiction to include this new format. The long 20th century tradition of consecutive consumer technologies that permit the copying and redistribution of creative content that was protected on a previous technological format (phonographs, tape recordings, Betamax, VCR, DVD, the Internet and p2p technologies) has resulted in a parallel expansion of copyright law jurisdiction. Western copyright laws now regulate a massive amount of previously unregulated information.

The law now regulates almost all newly created information and virtually all new culture that is produced, whether that culture is a scribble on a piece of paper, a sound recording, a motion picture, a theatrical script, a computer program, database or website. Its rights don’t just apply to the authors of works, but any party to whom an author sells their rights. The requirement of “creativity” and “originality” in determining whether a creation is novel enough for its creator to be granted a monopoly right has gradually become watered down to the extent that astoundingly uncreative works are now summarily awarded full protection from the respective canons of (by default) copyright and patent registration offices (especially the US patent office). See example of telephone databases, National Hockey League statistics, etc. The focus has changed from “creativity” and “originality” to whether the creator expended any effort at all in the creation of a given work. Similarly, in the realm of patents, the question of just what *can* be patented has evolved into the converse: what can’t be

patented? Human cell lines, genetic code, entire living organisms (often altered to a trivial extent) such as plants, animals and insects have all become subject to patent claims in recent years.

Given that controversy exists in the west with regard to what kinds of phenomena copyright and patents should regulate (e.g. disagreement exists over whether copyright should regulate everything by default, and also, whether the patenting of life-forms is ethical) This debate is certainly a central issue in the context of western property rights, and it also bears many similarities to the concern of many legal scholars about whether copyright terms are too lengthy. One position argues that there are some things that property rights should not be extended to include (life forms etc), while the other argues that property rights should not be extended in length and to an extent both positions can be connected to issues of concern for global indigenous peoples. Extending copyright and patent terms, and expanding the range of phenomena regulated are both means of increasing propertization. Many indigenous groups struggle against the tendency of westerners to subsume greater parts of the world and its cultures within the context of property rights, and thus have an interest in opposing propertization in general. This point leads us back to this sections' history of intellectual property rights and borders on fundamental philosophical and economic characteristics of western societies. Recalling the previous historical view of both patents and copyright, a number of concepts come to mind that deserve specific analysis in order to understand how these concepts fundamentally differ from most indigenous cultures. We've briefly examined the concept of property, surely a fundamental part of intellectual property rights. That, however, is just the beginning. The above discussion of copyright invoked the concept of a public domain? Just what is that? The value in conducting this exercise is to highlight how, despite the AEIPR problems in the developed world, the law in question corresponds to the general industrial, philosophical, and cultural contexts of these societies. Here are a list of highly contentious and historical western assumptions, conceptual frameworks and institutions (capitalist markets, legislatures) that anchor and make possible the functioning of western concepts of intellectual property within western societies. Every one of these concepts, including the most bedrock institutions: the assumptions of an individual's rational self interest and the social good of private property are in dispute, however foundational the concepts remain. With this in mind, the following intellectual property institutions are presented as pointedly historical and ongoing contests for legitimacy, rather than as neutral facts from within a western consensus.

d. Concepts and institutions in western intellectual property rights

i. Property and incentives: “economic rights”

Capitalist market economics is premised on the notion of individual property rights. Both property rights and capitalism have their beginning in the same time period and nationality that produced copyright law: 18th century England. Property rights and capitalism did not supersede the previous system of common land ownership and feudalism without a bitter struggle between two opposing forces. Since the arguments in favour of property are broadly similar whether that property is intellectual or not, detailing the original struggle and justifications for property as a social good is instructive in understanding the justifications behind property in general, but will also come in handy when the important differences between material and intellectual property are dissected.

Property as a distinct concept was proposed by a series of intellectuals in the 18th century, British state, a large group of powerful and entrepreneurial landowners and an influential group of intellectuals represented the first agents of capitalism and property ownership. Intellectuals such as John Locke and Adam Smith proposed that land held in common was economically wasteful and that a system of private ownership would encourage greater investment into the upkeep and potential economic productivity of the land (Boyle, 2003, p. 33). The British State was in an expansionary, imperialistic struggle for colonial power, and was in the midst of protracted wars with France, Spain and the American colonies. The demands which empire and war placed on the agricultural productivity of England’s geographically small area were immense. The English state was thus highly susceptible to the economic restructuring, however harsh, so long as it promised the prospect of greater economic productivity in aid of the war effort. Lastly, the group of landowners saw in the ideas of Locke and Smith the prospect of expanding the ownership of their lands by subsuming lands previously held in common while securing the goodwill of the state (and a handsome profit) by increasing land productivity (especially in wool, mutton, grains and other goods).

So who was the opposing the “privatization” of the common public lands? The opposition were all the common people of England who had lived and worked on common lands for centuries, earning their living off the land directly by producing enough agriculture and livestock to feed themselves in addition to providing surpluses for the state and landowners (nobility, usually).

Then as now, property is a contentious concept. The enclosure of the common lands was promoted as a social good, “saving lives” through the greater efficiency gained through private ownership. In his article “The Second Enclosure Movement and the Construction of the Public Domain,” David Boyle examines this first enclosure of the English common lands as holding valuable lessons not only for the “double edged” sword of property rights, but additionally for the

“enclosure of the intangible commons of the mind,” or intellectual property rights (Boyle, 2003: 31-2). What does Boyle mean here? How is property more efficient than that which is held in common?

The rationale is as follows: land held in common suffers from economic phenomena called “freeloading.” Individuals, acting according to the maximization of their own self interest, will attempt to extract as much (grain, livestock etc) out of the common lands while putting in the least amount of effort and time to procure those goods. If possible, they will “free-load” off the effort of others by extracting more good than they have themselves put in to the common lands. Others will have disincentives to manage and maintain the common lands when others can appropriate the product of their hard work. Thus, the land suffers from mismanagement and under investment, with each peasant doing only that which is necessary to eke out their own living and produce only the surplus necessary for their lord’s tithes and the state’s taxes. The association between land held in common and the under investment and underutilization of the land’s resources has been called “the tragedy of the commons.”

Accordingly, the intellectuals and property owners argued that property reversed this situation of under investment and low utility. When an individual owned land, they suddenly had a personal self interest in investing in that land’s productive potential. They also had a greatly reduced risk of misappropriation of investment. The state could prevent misappropriation and free-loading by protecting the owners property rights – jailing or imprisoning those who would steal or misappropriate that which was not owned by them. Assured of recouping the benefits, or profit from their original investment of time and capital into the productive capacity of their lands, the property owners had not only an incentive to invest in their lands, but to invest in the production of those commodities that which would bring them the greatest profit. Since, as intellectuals like Adam Smith theorized, a free market of perfectly equalized supply and demand in commodities would “naturally” assign high prices to those commodities in the greatest demand, the property owners would in turn equalize the distribution of commodities by recognizing profit opportunities and producing accordingly. This system promised to rectify the ancient system of feudal production wherein the planting of particular crops and the raising of livestock was a more arbitrary and ad hoc process, leading to underproduction of in-demand goods and overproduction of surpluses (with the consequences being periods of starvation and wasteful gluts, with starvation being particular prevalent in the 16th century English countryside).

Is the logic irrefutable as outlined here? No. Without getting overly technical, Boyle points out that “recent empirical work has indicated that it had few, if any, effects in increasing agricultural production. The tragedies predicted in articles such as Hardin’s *Tragedy of the Commons* did not occur. In fact, the commons frequently may have been well-run, though the restraints on its depletion and the incentives for investment in it may have been “softer” than the hard-edged norms of private

property” (Boyle, 2003, p. 36). Nonetheless, the above rationale for property (and market capitalism) is invoked to justify expansions in the jurisdiction and term length of intellectual property rights despite significant differences between rights to agrarian property and those of intangible property.

ii. Markets in intangible property: non rival, non exclusionary

Unlike material forms of property, property of intangible form can be consumed without ‘depleting’ the original resource. It is therefore non-rival: my use of a mathematical formula or book does not lessen anyone’s knowledge of that same knowledge or book. It also follows that one of the major causes of tragedy in the commons, the depletion and non-renewal of resources held in common, is avoided with intangible goods. Additionally, and similar in characteristic to being non-rival, intellectual property is non-exclusionary: merely owning it doesn’t prevent others from also owning it. Material property has the convenient characteristic of being both rival and self-exclusionary. One person’s ownership and use of a field to grow corn makes it impossible, or at least very difficult, for another to raise a herd of sheep on that same field. With intellectual property this isn’t the case, and at first this doesn’t seem to present a problem; doesn’t everyone benefit equally? Consider the problems it poses for those who might wish to sell their intellectual property to others. Why would a buyer purchase that which might be easily appropriated at zero cost? The ability to exclude access to a good to all those who don’t purchase the right of access (with physical goods, this occurs at the same time as physical transfer, making transferability and exclusivity easy to preserve) is necessary in order for a market to exist in those goods. Without the limited monopoly of intellectual property protection and the markets they make possible, so the argument goes, the creators and innovators of intellectual property have no incentive to create in the first place.

iii. Fair use, limited terms and the public domain: societies rights

Another important concept and raging debate within intellectual property law concerns the overall purpose of, and limits to the sanctity of the temporary monopolies granted in intangible goods. The doctrine of “fair use,” generally concerns copyright law and creative works, and specifies that some uses of others intellectual property is permitted insofar as those uses are “transformative,” use only a portion of the work involved, and don’t harm the owners economic interests. Transformative uses include certain kinds of parody, satire and criticism necessary to enable the well-functioning of another legal doctrine: free speech. Within the specification of economic damage, fair use is designed to allow “free speech,” without permitting unfair appropriations that might permit another person to appropriate the economic benefits of ownership of the work in question. The injunction to not cause economic harm by tampering with the owners possible market remains key, although economic harm

caused by criticisms that steer future customers away, is and considered non-appropriative and thus legitimate.

Fair use is contentious in that there ownership and protectionism advocates who argue that fair use was a compromise necessary in an age of imperfect enforcement of property rights, a relic leftover from a time when it would have been impossible to discover and prosecute instances where individuals copied a greater portion of say, a book, than they would legitimately be permitted to. Correspondingly, they argue that in the age of digital intellectual property rights and perfect enforcement mechanisms, fair use should be tossed aside and property rights should be enforced down to the microscopic level: charging for even very small uses of another's property with few if any exceptions. Paul Goldstein and his controversial paper, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, helped popularize a view which runs counter to what many argue is the real purpose of fair use: to assure that that society benefits. Defenders of fair use point argue that the entire historical and present purpose behind intellectual property was not to enrich private power through the protection of individual rights that were previously held in common, but rather to 'suffer the ignominy' of temporary monopolies in order that society might benefit from the greater productivity enabled. Accordingly, they view fair use as not only a prerequisite for free speech, but a valuable measure to ensure that society receives a fair, but not appropriative benefit from new works before the temporary monopoly expires.

The public domain has been a subject of much recent scholarly attention. Some of this scholarly attention (Lessig, Boyle) has focused on how a vibrant public domain filled with works that pass in and out of copyright and patent protection relatively quickly, more viably acts as a catalyst for invention and creativity. The Free Culture movement emphasizes that protection and control functions to clamp down in the innovative capacity of a well-functioning public domain. So what is the public domain? In short, it is the label applied to works that have either never been formally protected or have expired from their copyright or patent term. Although the Free Culture movement could surely find allies in many indigenous communities when it comes to resisting the patentability, or patent terms of certain life forms and seed varieties, their call for a vibrant public domain is often an unwelcome one from an indigenous point of view. The Anglo-European assumption that everything traditional or old is undeserved of protection because it's

iv. Idea vs. expression

Another important principle behind intellectual property rights has to do with its protection of ideas as expressed in some form, rather than the ideas themselves. Allowing ideas themselves to become property would undoubtedly become impracticable and unenforceable, and would clearly render free speech impossible. Thus, freely expressed ideas, however valuable are assumed to be in the public

domain, free for anyone to appropriate, modify (transformatively) and potentially express as their own property. This doctrine has a contentious side, in that public performances and predominantly oral culture become vulnerable to appropriation, since it is often not practiced or recorded as a concrete expression.

v. Individuality and “moral rights”

Within copyright in particular, certain “moral rights” have been granted within the international Berne convention of 1886 to authors of plays, directors of films and other creators of cultural forms thought to deserve special respect. Such authors have the moral right to have their works attributed to them personally and no one else, and to be protected from false allegations about the author and the work created. Moral rights are also specified as inalienable: the authors unique ‘moral’ right remains despite whether the work is sold or otherwise transferred from the authors possession. Moral rights are a rarely used component of the Berne Convention and its later international ratifications, but nevertheless constitute an integral component of Anglo European cultural and intellectual property protection schemes. The concept of moral rights are controversial among many critics, who dispute the idea of an individual being wholly responsible for his creations, arguing instead that “no man is an island,” creating independently of peers and previous creators. Another aspect of this debate and underlying the entire concept of creative intellectual property is individuality.

If one accepts the view that most creativity and innovation, whether technological, scientific, literary or otherwise, is a social process, as opposed to a process entirely divisible into individual acts of genius, then not only are concepts of moral rights problematic, but so are broader notions of exclusive individual rights in property which can only be described as the result of collaboration – an individual combining his or her ideas with the ideas and knowledge of others.

vi. Innovation, technology and competition

As mentioned above indirectly, innovation has been argued to be the most vital purpose behind

Yet, this logic has an interesting and problematic historical dimension that Boyle successfully elucidates:

...There seems to be an assumption that the strength of intellectual property rights must vary inversely with the cost of copying. To deal with the monk-copyist, we need no intellectual property right because physical control of the manuscript is enough. To deal with the Gutenberg press, we need the Statute of Anne. To deal with the Internet, we need the Digital Millennium Copyright Act, the No Electronic Theft Act, the Sonny Bono Term Extension Act, and perhaps even the Collections of Information Antipiracy Act. As copying costs approach zero asymptotically, intellectual property rights must approach perfect control (Boyle, 2003, p. 42).

Criticizing the one-sided logic that technologies that permit a greater ease in copying always and unilaterally impact the interests of intellectual property right holders for the worse, Boyle notes that technologies such as the Internet expand the size of markets, the ease with which consumers can find products (search engines) and reduce the distribution costs involved in transferring products to legitimate consumers (Boyle, 2003: 42-3). Raising the issue that the benefits and harms might easily outweigh one another, or even tend to benefit rights holders, Boyle adds (like Lessig, in *Free Culture*), that before demanding further protections through legislation, rights holders must “demonstrate the harm” (not incidentally a difficult thing to do given the complexity and number of factors involved) (Boyle, 2003, p. 43; Lessig, 2004, p. 67-70).

Part III: The Commercial, Political and International Context of Global AEIPRs

The reader will note that Part IV of this paper describes a Commercial, Political and International Context to Intellectual Property Rights. This has been done with two propositions in mind. Firstly, it is this paper's assumption that the relationship between traditional societies and intellectual property rights cannot be understood without understanding the institutions that leverage the policies which traditional peoples are generally subject to. These institutions, broadly speaking are, commercial actors (often global), states (legislatures for example), and supranational regulatory bodies such as WIPO and the WTO. The validity of introducing these other institutions when discussing the initial relationship is to foreground that both understanding and any possible solutions and alternatives must take these institutions and the manner in which they affect traditional societies into account.

Similarly, in discussing the relationship between 'free culture' and 'society,' Lessig makes use of a diagram of forces that each have an affect on the 'dot' - a person or unit of property that has their behaviour or uses of property constrained by these regulators. Lessig argues that these forces affect the dot “all at once,” injecting a sense of interrelatedness and dynamism into what can become an abstract discussion of supposedly static variables.

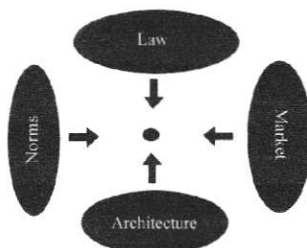


Fig 1.2 Adapted Diagram of “Forces” Affecting Indigenous Cultural Policy (From L. Lessig)

The diagram and the inferences it allows fit very organically with the thesis I have developed in Part IV. Essentially, the aboriginal society in question can take the place of the dot at the centre of the diagram. Law corresponds to 'intellectual property law'; the market corresponds to commercial actors; while architecture can be likened to the governmental and regulatory institutions at both state and international levels. Norms may be assumed to be social expectations of what indigenous cultures are, what uses should be made of their culture and so forth. Within many traditional communities, inter-generational methods for constructive crafts, art and folkloric media are often handed down through families and regulated by the community as a whole. For the Zuni craftsmen of the Pueblo first nations people, certain designs are understood to belong to certain families and no other. Pinel and Evans (1994) describe these community specific norms as important conventions informing the production of Pueblo cultural forms from within that community (Pinel and Evans, 1994, p. 47). There are of course other norms and conventions that exist within the more broadly conceived mainstream society (commercial norms, incentives etc) and often these two sets of norms do not correspond with indigenous norms or "cultural copyrights," as Pinel and Evans use the term.

a. Researchers and scientists

In their book *Beyond Intellectual Property*, Darrell Posey and Graham Dutfield's first chapter is entitled "who visits [indigenous] communities and what are they seeking" (Posey and Dutfield, 1996, p. 5). The question and the chapter are an apt way to frame a discussion of the international context of global intellectual property and the situation of indigenous peoples within it. Indigenous peoples invariably play the role of "host," willing or not, to visitors from the outside world, and it is with this fact in mind that Part III proceeds; listing the most likely, and most potentially damaging interjectors into local indigenous communities first and moving to address the global structures which frame and theoretically control their actions after.

Among the visitors to indigenous communities, both in the present day and historically, are missionaries and religious welfare organizations. Some of these organizations and individuals provide valuable health and educational services to indigenous communities, while others seek primarily to impose religious doctrine without regard to its capacity to cause long-term social disruption (Posey and Dutfield, 1996, p. 7).

Researchers and scientists from within the varied fields of anthropology, biology, archeology and many others, visit local communities for a variety of reasons. Some visit for personal or individual research purposes, intent on collecting information and little else, while others come at the behest of companies, governments, NGOs, academic institutions and other related institutions (Posey and Dutfield, p. 12). The goals served by these researchers frequently reflects their individual

or institutional contexts. Researchers from companies may seek out indigenous locales in order to bioprospect for commercially valuable “raw materials” such as plants, insects and other biological organisms. Researchers from other institutions, universities, government ministries or conservation NGOs for instance, may simply attempt to gather empirical data on indigenous peoples themselves or catalog information on aspects of the local ecology (species, pollution levels, etc). The purposes and intents of researchers vary. Researchers may arrive with good intentions for traditional communities but be motivated by other concerns, and are frequently unaware of how their activities impact local indigenous peoples (Posey and Dutfield, p. 12-13)

Scientists and researchers may fail to ask permission in conducting their research, or recognize any link between indigenous culture and ecology. As a result of these failures, they may attempt to appropriate, disturb or otherwise interfere with a complex network of social and spiritual ties important to indigenous peoples (Posey et al, p. 12).

Many researchers are motivated by organizations that share many goals and interests with indigenous peoples including environmental and cultural preservation. Many indigenous peoples are keen to take advantage of the opportunities presented by outside researchers and the institutions they represent, whether they are non-profit, educational or even commercial in nature. Depending on the context and the people in question, researchers and other facilitators may act as approved ‘go-betweens’ for the community and the outside world.

b. Global corporate actors

Global corporate actors are often at the heart of ‘bio-piracy’ struggles, with mostly large pharmaceutical, medical and biotechnology firms focusing their attention on the plant varieties, in many cases cultivated by indigenous peoples, as a resource ‘material’ freely available for their alteration and commercial use. Other commercial actors, such as those involved in music recoding or textile production may wish to use indigenous fabric patterns and musical traditions in the production of products imbued with an “exotic” appeal. The concern with these types of motives is generally twofold. One, that these actors may appropriate such materials and ideas without asking permission, and secondly, that their activities will fail to benefit the people providing the “source material” in any way.

c. Institutions of global governance in intellectual property rights

There are many international global governance structures that exist to regulate a variety of phenomena including the problematic interaction between member states, indigenous peoples and actors from developed countries (whether corporate, non profit institutes or individual researchers).

These institutions frequently have unclear jurisdictional claim as regulators, and even less ability to issue binding judgments or sanctions upon violators of international cultural regulation. Moreover, there exists a striking disparity between those international governance structures with relatively significant clout (the WTO and the TRIPS agreement provisions) and that of UNESCO for example, which can at best issue non-binding regulations and recommendations within the politically impotent General Assembly of the United Nations.

i. The Berne Convention

The Berne Convention for the Protection of Artistic and Literary Works (1886) was the first internationally binding piece of legislation which mandated that member states would be required to respect other member's copyrights and intellectual property rights. The legislation also stated that copyrights would be 'created automatically' by authors of new works, ending the need for the registration and filing of individual copyrights over material works. The *Berne Convention* also specifies an article *6bis* that specifies an authors moral right to have his or her work spared "distortions" and "derogatory actions." Many states such as Russia and India have interpreted articles in the Berne convention in innovative ways so as to further progressive cultural policy objectives favourable to traditional societies (Rajan, 2001). Many states and critics in the developing world have developed a distaste for moral rights, as it provides authors with rights beyond sale and poses problems for the rights of subsequent authors and innovators to freely create transformative and derivative works.

ii. The International Labour Organization (ILO)

The ILO is a specialized but low profile UN agency that deals with labour issues such as workers rights, standards and occupational safety issues. However, despite a labour oriented agenda, this organization has been at the forefront of many UN agencies in addressing global human rights violations, including those that concern indigenous peoples. The ILO meets yearly in June during an International Labour Conference in Geneva, which provides an opportunity for the organization to create policy recommendations, general policy, work and budget programs, which can then be adopted through majority approval. The organization has been at the forefront of many key pieces of legislation advancing indigenous human rights and related cultural and intellectual property rights. However, like the many UN committees that produce non-binding legislation, it's capacity to actually intervene in cases of human rights and labour standard violations (such as the state of Myanmar) is very limited.

iii. The World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization has for most of the duration of the United Nations been a forum in which developing countries could issue complaints and recommendations on international intellectual property policies. The organization has as its mission the “promotion and protection of intellectual property rights,” an objective potentially at odds with the unique desires of indigenous peoples to see particular intellectual property rights curtailed (the rights of corporate actors to obtain exclusive rights in ‘public domain’ materials considered by indigenous peoples to be objects of their collective stewardship)(Siochru et al, 2002, p. 85). The forum had its own difficulties, but since collectively, developing countries outnumbered developed nations, developing states could effectively leverage their combined strength to focus discussion on issues of importance to their own members. After the creation of the WTO (the successor to the General Agreement on Trades and Tarrifs, GATT which existed 1947-1995) so-called ‘Trade Related Aspects of Intellectual Property Rights’ or, regulation governing cultural products with commercial value (including news and entertainment content, newspapers, film, music recordings and many other media) fell under the jurisdiction of this more powerful trade and commerce-oriented body. Thus, a body which was more amenable to the airing of developing countries concerns saw its exclusive authority as a regulatory body for all concerns related to intellectual property become secondary to the WTO TRIPS agreement. Arguably the concerns of developing nations and their resistance to many problematic free trade policies is unlikely to assure them the same leverage in a body specifically designed to liberalize trade, an agenda supported by most developed nations.

iv. The United Nations Education, Scientific and Cultural Organization (UNESCO)

The United Nations Education Scientific and Cultural Organization (UNESCO) has been a global governance structure defined by a very broad and impracticable humanist mandate, seeking to

...contribute to peace and security in the world by promoting collaboration among nations through education, science, culture and communication in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms that are affirmed for the peoples of the world, without distinction...(Girard, Bruce; Mahan, Amy; Siochru, Sean, 2002, p. 72).

The UNESCOs laudable objectives stand in marked contrast to a longstanding status quo of global governance, the thesis that rich and powerful nation states engage in a struggle for self-interest political and economic power prior.⁷

Within the forum of UNESCO, there was a brief but unprecedented global discussion on the subject of whether the existing market-based “free-flow” doctrine was a preferable state of affairs (e.g. wherein media flows predominantly produced by developed countries and were consumed by developing world). Developing nations argued for a more balanced, diverse media environment and the right of nations to have the sovereign freedom to have their own voices heard in the global communications arena. In the late 1970s and early 1980s, the rhetorical battle lines were drawn

between rich, industrialized western nations choosing the free flow doctrine and developing nations proposing a system of balanced and fair trade in media-flows (Girard et al, 2002, p. 78-9). Unfortunately for the developing world, the developed world leveraged its financial advantage, with both the US and UK leaving UNESCO, crippling the organization with the loss of their funding. The NWICO debate fell of the table in the late 1980s with the removal of the NWICO-supportive UNESCO Director-General, Amadou Mahtar M'Bow was replaced by a new leader, Frederico Mayor, who was more complicit with the free-flow doctrine (Girard et al, p. 77-8). Since the controversial and polarizing NWICO debate, the UNESCO has declined in importance as a forum which can reliably voice the concerns of developing states. It has made some important proposals and recommendations on issues of importance to the developing world, including supporting cultural diversity, increasing media capacity in undeveloped regions and states and tackling the need for 'democratic discourse' and alternative voices in the global media arena (Girard et al, p. 80-1). Unfortunately for developing countries and the frequently consonant concerns of many indigenous groups, the post-NWICO UNESCO has consistently avoided any significant criticism of the structural problems associated with the free-flow doctrine and market-regulated global media structures including increased private media concentration and declining organizational competition as well as the declining status of most public service media (Girard et al, p. 81).

Although UNESCO's capacity to create policy that directly affects indigenous people is limited, the institution has a significant role in sketching out the 'normative' outlines of what a responsible policy framework would entail. Its draft declarations and other non-binding recommendations frequently address the issue of indigenous peoples cultural rights and in so doing, provides an important source of policy direction and lobbying for decision-makers in more effective organizations.

v. The World Trade Organization (WTO) and the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement.

The world trade organizations history and purpose expressly relate to the goal of liberalizing global trade and removing barriers to the free-operation of international market-based commerce. The organization's normative role is in dispute with proponents arguing that international trade would be worse off without the "fairness" made possible by the WTO trade rules, while critics accuse the organization of being indirectly supplicant to the demands of multinational corporate actors as opposed to those of citizens within the nations represented.

Within the international trade rules of the World Trade Organization exist a set of agreements pertaining specifically to "trade related" aspects of intellectual property rights. Just what are 'trade related' intellectual property rights? Trade related intellectual property rights are those

cultural productions, technical inventions and trademarks that have saleable, commercial value in a market in 'intangible' commodities. Virtually all intellectual property rights that has potential value in a market and that is created and or distributed in a WTO signatory is subject to this set of liberalizing regulations. In a very real sense, "trade related" is a way of saying, intellectual property rights have a commercial and trade function, and therefore will now (as of 1995 that is) be regulated by the WTO over and above other bodies (be those other bodies states or WIPO). TRIPS was developed as a vital section of WTO trade rules because of a variety of factors, not least of which included a coordinated campaign by multinational corporate actors with interests in intellectual property within and between the governments of the European Union, Japan and the United States (Matthews, 2002, p. 4-6). According to the WTO and even its critics, this purpose of TRIPS is undeniably to reduce the differences in intellectual property rights regulation between all WTO signatories, and as a result ease the trade tensions that resulted because of these regulation gaps. As beneficial as this objective might be, it is also undeniable that TRIPS entailed a movement from *less protection of intellectual property rights* as had been the case in many developing countries to *more protection* as was more standard practice in more industrialized nations with significant intellectual property rights industries. Proponents of TRIPS and secure intellectual property markets stress that the benefits of protection flow "both ways," to both developed and developing countries, although they often de-emphasize the possible effects upon indigenous peoples within these nations.

Thus, it remains to be asked, how does TRIPS affect indigenous peoples and their claims for cultural protection and sovereignty? According to many critics, it doesn't. TRIPS harmonizes what are essentially Anglo European intellectual property rights regimes across the geographic board, resulting in a situation in which pharmaceutical companies and other agents in search of "raw material" in the public domain can find that raw material in the land, biological and cultural resources used by indigenous peoples and "appropriate it" for commercial purposes (Shiva, Vandana, 1996, p. 154). Others argue that TRIPS protects the indigenous rights to exploit their own culture for commercial gain as much as it does those of multinational corporate actors. Instead of a system where infringements of indigenous culture might go unpunished if they were rightfully "owned" by peoples of that culture, TRIPS allows a system of fair treatment and harmonized national laws allowing fair and consistent prosecutions of infringements wherever they may occur.

d. Intellectual property rights and the state

Proceeding from supranational bodies to individual state methods of regulating intellectual property rights we see that 'more local' does not necessarily entail 'better representation.' Indigenous groups and sympathetic academics have raised questions as to the capacity of state actors to use what limited

jurisdictional power they might have to cooperatively secure the best interests of indigenous cultural producers and their traditions.

Often these questions centre around the decisions of some governments, in Indonesia and Ghana for example, to amend copyright legislation in such a way that nationally distinct cultural forms that stand to gain little protection from traditional copyright laws are explicitly placed under the frequently permanent ownership and guardianship of the state. This method, while admirable in the sense that it aims to correct the failures of traditional copyright law in protecting vulnerable cultural forms such as folklore and traditional medicinal practices, it also suffers from a tendency to remove legitimate creative license from the very peoples it aims to protect. In many cases, such legislation can define indigenous cultural production as “infringing” on state copyrights. Furthermore, state ownership clauses carry the risk of unfairly centralizing the process of revenue collections from cultural exploitation, thus removing the possibility of local creative communities receiving any direct financial benefit.

As might be expected, the status of indigenous peoples in poor, authoritarian states is dramatically worse, in almost every respect. Indigenous peoples in Tibet, Sri Lanka, Bangladesh and Vietnam in particular suffer from severe forms of state repression including systematic discrimination, assimilation measures, land deprivations and other gross human rights violations (Bengwayan, 2002, p. 8). In these and many other economically depressed states, governments are desperate to remain receptive to foreign direct investment and comply with the avaricious resource demands of mining, agribusiness, biotechnology and oil companies (Bengwayan, p. 7). With little incentive to extend constitutional rights to peoples whose livelihoods is an unfortunate externality of such forms of development, indigenous peoples and their concerns are frequently suppressed and denied: “many governments in Asia insist on viewing the indigenous issue as a ‘Western’ concept that does not apply to the region” (Bengwayan, p. 2). Indeed, the west, viewed as a monolith, does have a duplicitous role to play in indigenous subjugation at the behest of developing countries. While some westerners demand that such states extend western style constitutional protections for the individual, additional and frequently competing imperatives from (western style) multilateral development agencies and banks to achieve economic development objectives have a role to play in the decisions of states to shortchange minority rights for short term economic gain (Bengwayan, p. 7).

Part IV: Conflicts between AEIPRs and Traditional Societies

To converts of the view that AEIPRs fail to address the needs of the traditional societies, this study will produce such intuitive results as to be an almost meaningless exercise: is it such a surprise that AEIPRs only meet the needs of the west? They were designed by and for the needs of western

cultural producers and distributors! To lawyers schooled in western legal traditions, the question will seem inappropriate and inapplicable: AEIPRs were never designed with indigenous needs in mind, rendering a litmus test of their appropriateness for developing countries a pointless exercise. As Tom Greaves summarizes the possible objections of IPR lawyers, “to propose allowing indigenous societies to patent and copyright their knowledge appears on its face to be nonsense. There is no identifiable inventor, all traditional culture is already in the public domain, and the monopoly benefits would, at best, be only for a finite number of years. The present purpose of patents and copyrights is to encourage change, not to maintain the traditional” (Greaves, 1994, p. 9). The objection is a reasonable one, but as Greaves adds, “these objections merely define the problem” (Greaves, 1994).

In essence, it is absurd to expect western laws, especially in a field as esoteric as AEIPRs to apply to non-western cultures. However, this expectation appears to be a kind of status quo in AEIPR policy towards the developing world. For some, it is unreasonable to expect other cultures to use Anglo European legal traditions to defend indigenous cultural traditions and values, while for others; this expectation is perhaps part of an expectation that traditional cultures need to ‘adapt to the world’ and “earn money” just like anyone. As a facilitator for community level economic gains, western AEIPRs are just what indigenous cultures need (see Cultural Survival NGO and Posey & Dutfield, 1996). The implicit implication of economic globalization in and international “harmonization” efforts, is precisely that the developed world model of legality, economics and culture will be emulated by the developing world (*as the terms developed and undeveloped imply*). As will be discussed in later sections, problems associated with the nation state as representative of the interests and people of that state, combined with the particular logics of trade liberalization substantiate and problematize the relationship between AEIPRs and the indigenous societies.

Case example 1: Can Australian Copyright be used by Australian Indigenes to Protect against Infringements?

Bulun and Milpurrurru v. R & T Textiles Pty. Ltd

Another well-known Australian case concerns a particularly far-reaching lawsuit concerning the commercial infringement and appropriation of aboriginal artwork as well as an unprecedented argument about connection between traditional cultural production and rights to land. In the case, the plaintiff’s (Johnny Bulun Bulun) case was advanced by two highly skilled lawyers, who argued Bulun Bulun’s view that “[he] is authorized or permitted by the traditional [clan] owners to depict the matters contained in the artistic work, and he does so for the benefit of those traditional owners and under their overall direction.” Conceived of in this way, Bulun Bulun’s artistic production is connected to clan rights and knowledge, and is intimately connected to land-specific rituals and

stories. Michael Brown provides that a specific part of the trial argument and analysis was devoted to developing a connection between the land and Bulun Bulun's traditional painting: "The heart of the case, after all, was the claim by the second plaintiff, George Milpururru, that the Ganalbingu people as a whole had rights in traditional designs that were inextricably tied to rights in land" (Brown, Michael, 2004, p. 48). The case thus forwarded three issues: one, assessing the guilt of R & T Textiles Ltd. in its copyright infringement of Bulun Bulun's *Maggie Geese and Waterlilies at the Waterhole* and any damages forthcoming, and secondly, determining whether upholding traditional aboriginal cultural title also implied a right to land title. Thirdly, the issue of the collective nature of aboriginal art was investigated by asking the court whether Mr. Milpururru, the clan leader, possessed an equal interest in Bulun Bulun's painting. Interestingly, and as a result of the political fallout from the Mabo decision, the consideration by the court of the issue of title in indigenous art and land led to the "curious fact that the defence was mounted by the Minister for Aboriginal and Torres Strait Islander Affairs, the agency ostensibly responsible for protecting the interests of the plaintiffs" (Brown, p. 48). In other terms, the local government wanted to ensure that the political-territorial ramifications of the Mabo decision weren't extended further.

The first of the issues was decided out of the courts, with R & T reaching a financial compensation arrangement with the plaintiffs and filing for bankruptcy. With this issue decided, the question of whether rights to produce indigenous artwork implied a right in land were refused consideration on the grounds because it was held that the procedures having to do with assessing land title were independent of those associated with copyright law. Lastly, Justice von Doussa held that clan chief Milpururru did not hold an equitable interest in the creation of *Maggie Geese and Waterlilies at the Waterhole*, citing numerous instances in which aboriginal artwork was created and exploited individually (Brown, p. 64). However, despite what appears to be a failure of the plaintiffs to secure their initial demands, the judge's careful and thoughtfully reasoned a rationale by which indigenous communities could assert a greater sense of control over their cultural heritage.

Justice von Doussa concluded his ruling by stating that although artists and the local community have an equal responsibility in upholding the integrity of Ganalbingu culture. Specifically, the community may hold the expectation that the individual artist will prosecute any violations of the integrity of Ganalbingu culture where such actions are required, and when that artist is unable to do so, the community may act on his or her behalf in securing the cultural and artistic integrity of the community as a whole (Brown, p. 64). Milpururru's claim of equal interest in the painting was thus unnecessary, since Bulun Bulun had already pursued the "vigorous defence" of his copyright in this case (Brown, p. 65).

Essentially, this ruling provided the community with a real sense of agency in defending and securing a previously nonexistent sense of control over the way spiritually and culturally valuable

images and artwork could be used outside the bounds of the community. The ruling also expresses a compromise between the collective and individual nature of indigenous cultural production and the traditionally individualist perspective of copyright law. In avoiding a ruling that forced aboriginal norms of cultural production to conform to the requirements of AEIPRs, Justice von Doussa struck a compromise that met with approval of many aboriginal community organizations and advocacy groups. This ruling, in addition to the Mabo decision, has eked out a significant legal domain in which aboriginal groups can pursue their legitimate claims to land rights and obtain a certain degree of confidence in how their spiritually embedded cultural property can be used outside the community. Arguably, these new common law rights belonging to communities indicate a reinforcement of tribal customary laws and traditions that had heretofore been threatened by the extensive economic rights of culturally infringing third parties.

Case example 2: Protecting Cultural Memory with Patents?

Estate of Tasunke Witko (Crazy Horse) vs. G. Heileman and Hornell Brewing companies and Ferolito

The following case study is one I hesitatingly added to the evidentiary section of this study. I considered leaving it out because the US laws at issue in the case centred on publicity laws, a dimension of intellectual property law mostly associated with regulating the imagery of US celebrities. Nevertheless, as I am sure Coombe herself surmised, this is even greater reason to assess its relevancy from an indigenous point of view.

At issue is the familiar issue of tribal societies attempting to safeguard important aspects of their traditional culture and prosecute misuses. In fulfilling that criterion, this example is undoubtedly appropriate. In fact, it would be difficult to imagine a more offensive use of traditional Lakota culture than for two white entrepreneurs to appropriate the name and image of a revered Sioux statesman, and assign his 'mark' to their newly developed brand of malt liquor. The appropriation immediately raises obvious and egregious stereotypes of the Indian drunk and the use of a sacred figure in association with it should have been un-contemplatable on that ground alone.

Legally, the case involves more than the difficulty of enforcing a modicum of respect and civility towards indigenous victims of genocide. As with *Bulun Bulun*, the confrontation between indigenous traditions and the mainstream post-colonial system, and historical oppressor, would take place within the latter systems tribunal. As the plaintiffs in the trial discovered, this immediately precluded the plaintiffs from using a law appropriate for the circumstance, since no such laws exist. Thus, instead of claiming to the court that “the Sioux are spiritually injured by the use of an ancestral name to market a substance which continues to poison the lives of many Native communities,” they

instead had to take into account the biases of the tribunal in question and attempt to subvert an inappropriate legal doctrine (publicity rights) to the unique demands of their claim. The defendants in the case fought a vigorous battle to ensure that their right to take the name and image of a Sioux patriot, “from the public domain,” and apply it to any good, regardless of how culturally unacceptable such an application might be. Before the case even proceeded to trial, the two Italian American plaintiffs, Ferolito, Vultaggio & Sons, succeeded in using the US free speech rights to quash congressional proposals banning the illegitimate use of the Crazyhorse name.

Ferolito Vultaggio & Sons also disputed the significance of the defendants claim, suggesting that it was unimportant, immaterial and that their use of the Crazy horse figure was un-related to the historical crazy horse (despite earlier asserting in the marketing of their product that it paid homage to the same “great American hero”) (Coombe, 1998, p. 201)

Later, they attempted to circumvent the entire court process entirely, by separately creating a fictional Crazy Horse persona that they could then claim as their exclusive property right. This tactic failed, however as the US patent office, in a rare case of *refusing* a patent application, ruled that the mark in question violated a Trademark Act prohibiting “immoral...or scandalous matter; or matter which may disparage.... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute” (Coombe, 1998, 202). Given widespread belief that this ruling was unstable and could be overturned at a later time, the descendents of Tasunke Witko decided to remove that possibility by themselves claiming a property right in Crazyhorse’s name.

This decision was not made without due introspection and debate among the plaintiffs, as there had been an established tradition of silence (believed to have been initiated by Crazyhorse himself) regarding the family’s relationship to the long deceased spiritual and military leader (Coombe, 1998). The placing of a property right, even if somehow owned by the family as a whole (e.g. forming a corporation) involved the prospect of “[privatizing] an ancestral name of significance to a wider network of extended kin than those likely to be legally recognized as legal beneficiaries of the estate” (Coombe, 1998). Despite the recognition of these problematic tendencies, the plaintiffs and their lawyers realized that this case could serve as a valuable public relations campaign over the need for recognition of aboriginal customary rights.

In their public relations effort to impel the court and the defendants to recognize the gravity of their offense and the humility owed, the plaintiffs requested as compensation “a braid of tobacco, a racehorse, and a fou-point Pendleton blanket, for each state and month in which the malt liquor was sold” (Coombe, 1998). Although the case was unlikely to transpire under aboriginal customary law, the least the defendants attempted to impress on the court the cultural differences between the two parties, and highlight the colonial expectation that Anglo European laws be used to exact traditional customary compensation.

In his ruling which broadly overturned a previous trial court ruling in favour of the defendants, Chief Justice Greaves noted the cynicism and duplicitous behaviour Ferolito and Vultaggio displayed by first arguing that their product was an honourable homage to “great American hero,” which they then retracted, denying that their product was ever intended to evoke the Sioux leader at all. He also noted that the defendants marketing practices clearly revealed the dishonesty of their claims:

Defendants exalt and target the forum where it taps a likely vein of customers, but studiously avoid marketing and sale in the forum itself because their conduct is potentially offensive and tortuous there. It seems wholly unlikely that the due process clause can be made to countenance such distortion and manipulation and this Court holds that it does not. ⁸

Although this case has set a useful common law precedent against a particularly egregious cultural appropriation, the difficulty of obtaining such a ruling is highlighted by the lack of jurisprudential tools available for even culturally attuned judges to rule in favour of aboriginal customary laws. In his ruling, Greaves dismissed the potentially relevant *Indian Arts and Crafts Law* because the plaintiffs had failed to demonstrate “whether an individual Indian has standing to initiate a lawsuit under the statute.”⁹ In other words, collectives and tribal groups need not apply. Similarly, customary law was afforded a very small place in the ruling, indicating that without statutory basis in publicity, advertising and privacy laws, the case would have been dismissed.

Case example 3: Blending Constitutional rights with Customary Intellectual Property Rights Implications for the Kwakwak’wakw people of the Delgamuukw v. British Columbia decision and Section 35(1) of the Constitution Act, 1982

The Australian *Bulun Bulun* case is recognized by many legal scholars as the most prominent reversal of traditional thinking towards indigenous customary rights to date. Following the success of Australian indigenous peoples in obtaining a judgment recognizing individual obligations to ensure the respectful use of collectively held cultural heritage, international legal reform efforts began focusing more closely on the prospect of achieving similar legal recognition of collective and customary legal systems in other countries. Some legal reform advocates have questioned whether the common law precedent achieved in the *Bulun Bulun* case might later be circumvented by a statutory override declaring the nullity of indigenous communal obligations (Robbins, 1999, p. 11). Recognizing the apparent fragility of common law precedent, David Robbins has suggested that similar reforms in Canada might examine constitutional channels as a means of securing jurisdiction for indigenous customary law and the collective rights frequently enshrined in such systems (Robbins, 1999, p. 11).

The premise for this line of reasoning arises from two especially important legal developments relatively unique to Canada. The first of these is the granting of a set of constitutional protections and rights to aboriginal peoples under Section 35(1) of the *Constitution Act*, 1982. The second arises from the interpretive application of this section by Canada's supreme court in the 1990 case *Ronald Edward Sparrow v. the Queen* in which a criteria was developed to evaluate aboriginal claims for s.35(1) protections against contravening legislation. In the *Sparrow* case, the aboriginal litigant challenged the constitutional validity of a conviction of fishing with a net larger than permitted by the band license. In other terms, was the local band law invalid if it contravened the intended liberal protections outlined in s.35(1)? The supreme court thus developed a set of criteria for determining the circumstances under which inferior legislation (e.g. bylaws or band regulations) could be struck down (given that constitutional law is the *Supreme law of the land*). In cases where the aboriginal claimant could demonstrate possession of an aboriginal right un-extinguished prior to constitutional protection which had subsequently been contravened by an unjustified state interference, then the state would be obligated to justify that interference. Where the state failed in its justification on reasonable grounds (conservation etc), the legislation would be required to be altered or extinguished (R. v. Sparrow, [1990] 1 S.C.R. 1075, 1990 CanLII 104 (S.C.C.); Robbins, 1999, p. 12).

Although the criteria is redolent in conditionality i.e. the claimant must bear the burden of establishing the harm of any legislation at their own time and expense, the ruling (in combination with other rulings such as *Casimel*, 1993) does establish a domain in which aboriginal customary law, itself closely linked to un-extinguished and constitutionally upheld indigenous rights (to fish, hunt, trap, smoke tobacco, participate in community games, gambling, trading and import duty-free goods) is upheld (Robbins, 1993, p. 13).

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permitted by the band license. In other terms, the court was asked whether the local band law was invalid given the protections outlined in s.35(1). In response, the supreme court thus developed a set of criteria by which inferior legislation could be struck down in a constitutional challenge. In cases where the aboriginal claimant could demonstrate possession of an aboriginal right un-extinguished prior to constitutional protection which had subsequently been abrogated, then the court was obliged to restore that right.

The novelty in this constitutional interpretation involves the scope of aboriginal activities protected due to their practice within pre-colonial traditions. If pre-colonial aboriginal customary law involved the rights of families and tribes to have their distinct marks, emblems and culturally specific folklore protected from use by non-belonging parties, are descendants of these same tribal groups entitled to constitutional s.35(1) affirmations of traditional customary for similar present-day purposes? Although this interpretation remains untested by a case as yet, the progressive interpretations of s.35(1) made in *Sparrow* and subsequently in *Delgamuukw* indicate that a future case might empower customary legal protections with constitutional force.

Case example 4: Is State Ownership the Answer?

a. Ghanaian fabric producers (kente cloth)



Fig 1.3 Obaakofu Mmu Man Cloth¹⁰
(One man does not rule a nation)

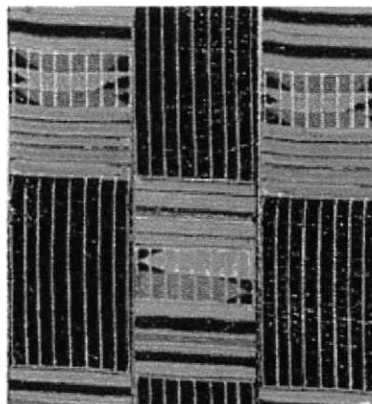


Fig 1.4 Kyeretwie
(The lion catcher)

States may attempt to overcome the conceptual biases of AEIPRs by amending their own national copyright laws to protect cultural knowledge that is assumed to be unworthy of protection. As most forms of indigenous knowledge (such as folklore) fail to satisfy the “non-obvious” and “individually created” requirements for protection privileged within AEIPRs traditions, states such as Ghana have added their own copyright clauses to compensate for these shortcomings without dispensing with the western legal structures necessary to obtain reciprocal trade relations within the WTO and other various bilateral trade agreements (Boateng, 2002, p. 574). When Ghana revised its copyright laws in 2000 to make them TRIPS-compliant, it sought to protect its domestic cultural producers by

“nationalizing” its definitions of folklore such that the state and the president became the perpetual owner of any folklore (Boateng, p. 573). Although these measure appear to be defensible as a means of protecting those cultural forms that are unprotected under conventional copyright law, the practice raises its own problems for indigenous cultural producers.

State ownership and control over folklore rights and the any royalties that might accrue from their use prevents indigenous producers from having control over and benefiting from their own culture. Communications scholar Boatema Boateng describes the practice as replicating the “owner-producer power disparities that arise from the regulation of intellectual property [which further] restricts access to a creative resource even for the Ghanaian people in whose name the state claims to protect folklore” (Boateng, p. 574). Although Boateng sees legitimacy in the declared purposes for the revised law on folklore, she argues that an alternate plan that might share royalties more directly to indigenous cultural producers themselves would be preferable to the existing arrangement. This example demonstrates how state interventions can go wrong even with (possible) good intentions and leads us to a consideration of the policies of states operating without any concern for the best interests of domestic indigenous peoples. If a compromise between caving to the demands of international legal harmonization can have such adverse impacts, what of those states that see no reason to protect their indigenous peoples?

b. Indonesian Batik Producers

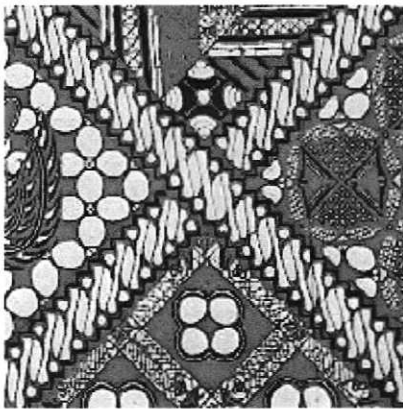


Fig 1.5 Ceplok Batik ¹¹

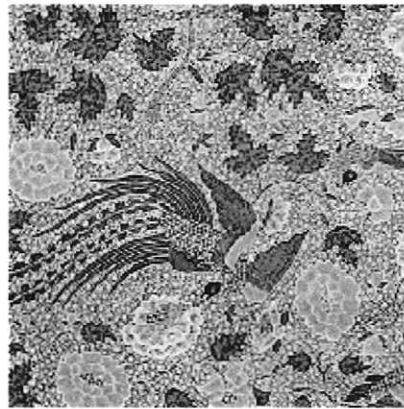


Fig 1.6 Modern Batik

As Bill Morrow notes in his paper *Aspects of Intellectual Property and Textiles*, the Anglo European fundamentals informing Indonesian copyright law have resulted in an assumption that traditional batik and textile designs are part of the public domain and are available for anyone’s use (Morrow, 2000, p. 18). It is therefore possible for a third party dyeing agent, manufacturer or fabric producer to copy a traditional batik design onto a dress or paper material without asking anyone’s permission or

paying remittance to residents of the geographic area whose ancestors originated the design in question.

Even if the design is borrowed from a set of artists who continue to work in the traditional vein of their ancestors, it is by no means assured that their creations will be deemed “original” in a tribunal informed by Anglo European copyright sensibilities. Artisans and batik designers who deliberately continue to work with traditional design elements and methods may be judged to be engaged in acts of “copying” public domain materials and thus not involved in the creation sufficiently novel to warrant copyright protection. If sufficiently novel works were created by these indigenous artisans, in the absence of alternate *sui generis* legislation, any economic rewards that might accumulate from the sale of these batik designs would accrue to the individual artist and not to the community of practitioners who collectively continue the tradition of batik fabric designing and application. This familiar example of the inability of existing international copyright and intellectual property right agreements to take into account the collective and tribal nature of much cultural production in the world at large, is made worse by government policies which move in radical directions to halt this admittedly problematic legal bias.

In its reaction to this problematic tendency of Anglo-European intellectual property rights (AEIPRs) in the absence of countervailing legislation, the Indonesian amended its copyright act with clauses similar to those made in Ghana:

Article 10 of the Indonesian Copyright Law provides that:
1. The State shall hold the Copyright to works of archaeological and historical remains and other objects of national and cultural significance.
2. a. Publicly owned works, such as stories, legends, fairy tales, folktales, epics, songs, handicrafts, classical and folk dances, choreography, calligraphy and other works of cultural and artistic significance, shall be maintained and protected by the State:
b. Copyright to article (2) a. is held by the State and is applicable outside the country.
3. State Copyright of works described in this article are further stipulated in the Government Regulation. (Morrow, 19)

Fig 1.7 Excerpt of Indonesian Copyright Act specifying State Ownership of Indigenous Cultural Traditions

Morrow notes that the copyright referred to in Article 10(1) is perpetual, thus creating the same bizarre problems as in the Ghana. Do indigenous communities that originated many of the batik patterns protected by the statute need to ask the state for permission to continue creating and copying these patterns? What does state ownership entail? Government approvals for reproduction or is ownership construed in more socialistic terms: do all citizens of Indonesia possess the right to use and reproduce these traditional patterns and cultural works?

Morrow notes that geographical indicators of the kind used by France and Scotland to label whiskey, cognac and wine bottles according to specific geographical locations of origin and prosecute fakes, might be pursued in Indonesia under the TRIPS agreement as a means of securing benefits for local batik producing communities. However, this proposition carries with it a number of problems. Modern batik involves Sikh artistic influences from India, flower and cloud motifs from China and many other cultures (Morrow, 20). Preventing external batik producers from making use of common motifs or labeling their works batik might shut down some more blatant appropriations, while also threatening to end the cultural exchange of influences and sensibilities that some identify as a positive contribution to modern batik. Morrow notes that geographical indicators protect producers only when they reside within geographic regions of protection, preventing them from carrying their traditions with them as they travel to other regions (Morrow, 20).

Despite the failings of geographical indicators as a method for protecting Indonesian indigenous batik producers, it has many advantages over the unenforceable and stunting effects of blanket state ownership. Secondly, although Indonesia batik culture is widely acknowledged to be historically syncretic, or a culture that can reconcile many different systems of belief, it will need *special forms of protection* in order to survive modernizing pressures and the destructive appropriations of indigenous cultural traditions by outsiders (Morrow, 21).

Case Study 5: Maori Art and Commercial and Artistic Appropriations

"You should be happy to have a tribute to your country and your people"

- *spokesperson for fashion designer Thierry Mugler*¹²

From pop singer Robbie Williams koru design on his left arm, to GQ magazine covers and Nike ads depicting soccer star Eric Cantona with moko (tattoo) overlaid on his head, as well as fashion designers Paco Rabanne, Thierry Mugler and Jean Paul Gaultier's collections, it is apparent that a renaissance in the popularity of Maori culture has occurred. However, these incidences have exposed a familiar schism in thinking about the use of a cultural tradition by outsiders or non-Maori – a schism that, as Peter Shand notes, does not necessarily reflect ethnic divisions. Some voices, such as Maori MP John Tamihere have described these cultural appropriations by outsiders as a “branding opportunity,” or an opportunity to highlight the distinctiveness of Maori culture as a kind of share that can only benefit from the upward trend of interest in global indigenous cultures (Ward, 2000). Others in the Maori community and outside it have identified a paternalistic and colonialist ethos in the assumption that unauthorized takings of indigenous culture are an assumed public good as far as that community is concerned, regardless of whether the community is acknowledged or compensated



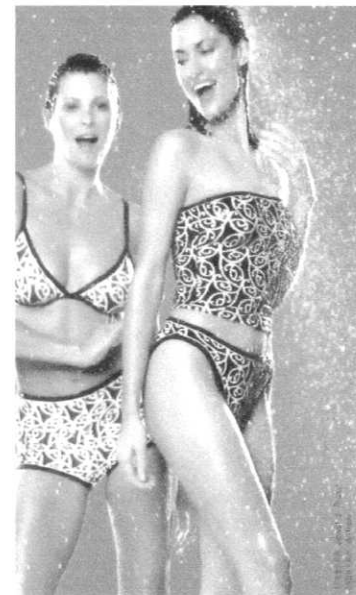
Fig 1.8 Images Reflecting Culturally Problematic Usages by Non-Maori of Indigenous Maori Ta Moko

From left to right: Robbie Williams with authentic *Ta Moko* on left arm by Maori artist Te Rangitu Netana; Paco Rabanne's Spring/Summer 1998 *Couture* collection with models sporting skimpy koru design outfits; French soccer star Eric Cantona in a Nike advertisement and in a January 1998 GQ men's magazine editorial photograph.¹³

During the same time that Rabanne and Gaultier asserted their right to borrow designs from their sacred contexts of origination and situate them in dislocated and culturally inappropriate contexts of erotic appeal and voyeuristic exoticism, a small swimwear manufacturer gathered considerable press attention through its departure from this long established *status quo* for the avaricious fashion world.

During Moontide Swimwear's debut in Sydney Fashion week featuring a number of fabrics with imprinted koru motifs, commentators and cultural critics noted that not only did the company contact local community elders and obtain permission for this borrowing, but they also ensured that part of the garment sales were returned to relevant indigenous community (the Pirirakau hapu sub-tribe of the Ngati Ranginui people) (Shand, 2002, p. 71). Shand is careful to place this example in an appropriate context.

He describes this context as firstly, a discrete arrangement between the swimwear manufacturer and Buddy Mikaere an elder from the Pirirakau hapu sub-tribe of the Ngati Ranginui people. Secondly, the example is a remarkable example of a corporation and its design team acting in a highly "un-corporate" manner. Theoretically, corporations are designed to pursue profits under the constraint of purely legal and economic factors, leaving the question of their role in promoting overall social good to the "invisible hand" of the market. Arguably, the company might have decided that their target market's social conscience might have made their effort economically as well as ethically viable. In any case, and despite this case studies status as a zenith in relations between corporations and indigenous peoples, Shand's insightful contextualization is indicative of more fundamental uncertainties.



*Fig 1.9 Moontide Swimwear Promotional Brochure 99/00*¹⁴

between corporations and indigenous peoples, Shand's insightful contextualization is indicative of more fundamental uncertainties.

Promotional Brochure 99/00 ¹⁴

The first problem involves whether voluntary measures are the best method of ensuring ethical or normative behaviour. Corporate social responsibility and indeed charity is in many cases suggestive of ills unmitigated by broader policy frameworks, and in this case, an indication of the absence of intellectual property frameworks *impelling* a certain degree of community consultation and approval to ensure the appropriate use of Maori cultural heritage. Secondly, the discrete arrangement between the two parties raises issues of representation.

With what degree of legitimacy can Buddy Mikaere bestow upon third parties the right to use cultural works that originate from a collectivity? Does he speak for Maori artisans and gatekeepers beyond the Pirirakau hapu sub-tribe? If many Maori tribespeople were outraged about Gaultier and Rabanne's use of koru motifs exclusively reserved for men in the design of risqué women's *haute couture*, didn't the use of related motifs with scanty bathing suits raise similar concerns (Shand, 76)? Buddy Mikaere and Te Rangitu Netana (the tattoo artist for Robbie Williams) are gatekeepers of Maori legitimacy for broad communities, suggesting a need for greater consensus building within communities and especially among constituents of those elders who can more properly become designated arbiters of third-party borrowings.

Case Study 6: Pueblo Arts and Crafts

One of the principle foci of traditional societies with respect to intellectual property concerns the restriction of inauthentic and unauthorized versions of traditional arts and crafts from competing in an often-crowded marketplace. In other cases, a loss of control over the sacred commonwealth of symbols and images within a traditional community can result in unsanctioned disseminations to society at large. Once permitted to reach a broad public, control over native imagery and its usages is usually lost permanently.

In the case of the Pueblo people of New Mexico, a lucrative US \$800 million trade in Indian arts and crafts is threatened by businesses and individuals that would pass off cheaper, often poor quality imitations in lieu of authentic, expensively manufactured traditional arts and crafts (Evans & Pinel, 1994, p. 47). In this case, individuals outside the Cochiti Pueblo community had used a chainsaw to quickly hollow out aspen wood components for use in making Cochiti drums without adhering to the methodical and time consuming traditional process of dying and carving the wood. Traditional Cochiti and Taois drum makers urged the state to amend existing legislation to prevent imitations from not only usurping economic benefits rightfully belonging to traditional drum makers,

but also tainting the public's "goodwill" association of high quality with Indian cultural forms (Evans et al, 47).

In the late 1980s, the US state of New Mexico examined its existing legislation and passed a series of amendments to rectify a situation that threatened both the identity of authentic Indian craftspersons, and deprived the Pueblo (and the state) of economic benefit. In essence, Pueblo activists and representative wanted the legislation to include definitions of what constitutes authentic "Indians" and "Indian art" into state law, in order to restrict fakes and prosecute imitators. The law placed the burden of determining the authenticity of an object and its maker on proprietors and vendors. Vendors were required to determine:

1. If the maker was an Indian as defined by tribal enrollment or certificate of Indian blood,
2. If the object is had made or machine made and,
3. If materials are authentic (naturalness) or semi-processed. (See Evans et al, 47)

Figure 1.10 Criteria for Determining Authenticity of Indian Persons and Goods within New Mexico Indian Arts and Crafts Protection Law

Although the act was supported by a coalition of Indian artists and distributors, and presumably by the relevant federally recognized tribes, the ultimate bill was delayed for several years due to concerns about how the act defined "Indian" authenticity, both in terms of the person or artisan involved and in terms of the labeling applied to traditional crafts (Evans et al, 48).

Although the law sought to rectify a situation wherein a lack of tribal ability to police misuses and misrepresentations of tribal identity and manufacture, many Indian artists were not represented by the law's scope. Some artists wished to create art using contemporary materials and without a strict reliance on traditional artistic guidelines. They wondered why their art should be labeled "Indian" due to their ethnic status as opposed to a label that more accurately descriptive of their work, such as "fine art."(Evans et al, 48). Indian artists outside of tribal communities also objected to having their art pass the same "authenticity" test despite the fact that they did not claim tribal status. Why should tribal governments be able to monitor individuals and their activities if they neither used traditional styles nor subscribed to specific tribal status? These artists felt that the law should strictly regulate who could create art using traditional styles, and what materials and quality that style would be required to emulate, as opposed to embedding tribally defined rights within a law impacting individuals at large (Evans et al, 48).



Fig 1.11 *Jemez Pueblo Storyteller* by Leonard Tsosie¹⁵



Fig 1.12 *Navajo Storyteller* by Phyllis Nez¹⁶

The law raised questions regarding the source of the “authenticity” in need of protection. Was the cultural tradition, or the practice something that could be authentic or not, or was it the person doing the creating?¹⁷ The law also raised the issue of whether there could be such a thing as a “generic” Indian person or product, as opposed to a specifically delineated familial or tribal identity, ostensibly one more deserving of protection. Evans and Pinel ask, “does the label “Indian-made” point to an Indian as an individual or to group identity?” They cite the example of Navajo who sell “Navajo storytellers” pottery figurines at a lesser price than Cochiti Pueblo “originals.” This case is illuminating because storytellers in the form of pottery figurines are a distinctly Puebloan cultural concept which has been copied by some Navajo artists and sold under that tribes name. This creates additional problems because in most cases the “trademark” sought for protection is an authentic “Indian” mark, not a specific Pueblo Indian mark. States have so far attempted to rid the market of obvious fakes and misrepresentations without distinguishing between different cultural traditions to prosecute generic “Indian” representations of culturally specific traditions (Evans et al, 48). Thus, Evans and Pinel suggest that tribes may need to pursue a definition and labeling system that goes beyond the binary Indian, non-Indian protection scheme.

The criticisms directed so far against the New Mexico State Commission on Indian Affairs, the various tribal groups involved and the amendments proposed for the *New Mexico Indian Arts and Crafts Protection Law* might suggest that the law isn’t a novel and valuable attempt to address indigenous cultural protection. On the contrary, the law is a valuable and novel legislative measure in place of what would surely be a legal-policy vacuum in its absence. The law addresses a basic problem facing a tribe or Indian artist when they attempt to combat infringements or misuses of their individual or collective traditions off-reservation, or against a third party (social scientist, corporation or non-aboriginal artist). If a social scientist or other third party documents distinctively

Puebloan cultural heritage, crafts methods or spiritual imagery in the creation of their own work, the by-default nature of intellectual property right law (copyright) ensures that any later publication will result in the full gamut of intellectual property right protection allotted to new creative works. After the fact (e.g. publication), there is little the tribe or individual Indian artist can do to prevent intellectual property protections from adhering to the derivative work as opposed to the cultural “raw material” used. Against any criticisms, the artists and social scientists usually lay claim to their “right” to pick and choose raw material wherever they might find it, and that their “individual creation” is worthy of protection regardless of how culturally biased such a right is: violating a tenuous and generally unrecognized set of tribal collective rights and sovereignty (Evans et al, 50; Meighan 1986, 9-12; Coombes, 1998, 214-15). Until group rights over cultural property are better safeguarded in the US and elsewhere, Pueblo artists and tribal groups appear justified in their extreme reticence to divulge any information or cultural knowledge that they stand to lose all control over *ex post facto*.

Part VI: Summary of Policy Discrepancies between Indigenes and AEIPRs

The existing intellectual property framework and its relation to the needs of indigenous and traditional cultures has been thus far examined with seven case studies. In combination, these studies provide an indication of the range and complexity of issues facing many indigenous groups. Most of the societies examined have sought to protect their cultural heritage from misuse and appropriation while still allowing certain aspects of the culture to be commercialized. For those indigenous peoples unable or unwilling to obtain complete isolation from the outside world, the economic sustainability and self-sufficiency that can be obtained through the respectful economic exploitation of traditional knowledge and culture is a worthwhile objective. In attempting to accommodate the preceding objective, many indigenous groups confront the problematic tendencies of Anglo-European intellectual property laws, the preeminent determination of what kinds of creativity are deserved of protection in the first place, who may create things worthy of protection and what objectives that protection is designed to achieve. More often than not, the tendencies of Anglo-European intellectual property laws clash vigorously with the expectations and hopes of traditional societies. Clearly, the former wasn't designed for the latter.

Nevertheless, the objective reality of the world forces us to state that these laws and their associated tribunals are relatively established. The membership of most developed and developing countries in international agreements such as the *Berne* and *Paris Conventions* and more recently, the *WTO-TRIPS Agreement* suggest that these laws will remain influential for many years to come. The challenge for governments, traditional societies and concerned NGOs will be crafting a patchwork of policies that preserves those elements of the existing legal system that are amenable to the needs of

indigenous societies, while at the same time annulling particularly disruptive legal doctrines and biases through the development of alternate (*sui generis*) legislation specifically crafted to preserve traditional knowledge. For the Pueblo of New Mexico, this has happened, with varying degrees of implementation and success.

The term ‘patchwork,’ when used in combination with ‘policy’ can invoke a sense of ineffectiveness, with numerous flaws arising from the fact that the policy in question wasn’t specifically moulded for the purpose in question. In many cases, such a supposition would be correct. In the use of publicity laws to litigate *Estate of Tasunke Witko (Crazy Horse) vs. G. Heileman and Hornell Brewing companies and Ferolito*, we have an ineffective patchwork situation, with the law being used as de-facto cultural policy, when social norms and bad public relations should have made the cultural trespass unviable in the first place. Intellectual property law is a multidimensional phenomenon, with regulation taking place at the local, national and international level. It is impossible to draft *sui generis* legislation that (by definition) has (no) bearing beyond a locality, and still less on the international stage. Moreover, the dominance of accords such as the TRIPS agreement make it incumbent on indigenous peoples to use (or subvert?) already existent doctrines to their purposes as much as possible. Some voices have already stated loudly and firmly that western intellectual property rights are inherently incompatible with indigenous peoples.

This is a strong statement and it may be broadly true. However, organizations such as WIPO and many national governments often lack the luxury of dismantling culturally inappropriate laws in their entirety. In addition, what of the customary legal systems of traditional societies? Many of these legal systems entail informal provisions mandating that specific families enjoy monopoly status over generational marks, symbols and tribal procedures. Some batik fabrics and kente cloths are reserved for specific spiritual and religious purposes (marriages, ceremonies), with infringements presumably prosecutable according to tribal law. It is a presumptuous position to assume that “non-western” societies possess no equivalent to intellectual property rights, although the notion that they necessarily involve property, or an individual rights-holder may be stretching things. Secondly, there comes the pragmatic issue of “throwing out the baby with the basket” in declaring that intellectual property rights are inherently inappropriate for indigenous societies.

Should the same agreement that holds the possibility for traditional crafts and art to be protected in the same manner as French *champagne* be dismissed because it may help enable increased patenting of indigenous medicines, seed varieties and ecologically vital life forms? This is a difficult question to answer. My hope is that such high-stakes tradeoffs will be unnecessary, and that at the very least, indigenous groups will have a greater stake in the negotiation of compromises and tradeoffs than they have previously had (e.g. *TRIPS Agreement*). Surely, the decision making process will be assisted by all parties recognition of the difference between “protecting specific persons or

collectivities cultural or intellectual contributions” and the much more contentious and culturally specific doctrines of Anglo European intellectual property rights law.

To summarize the problems involved in “making the [indigenous] world over according to” the specific demands of Anglo-European intellectual property rights, the following doctrines, biases and tendencies arise in the case studies examined and in secondary literature as being especially problematic (Shand, 52).

AEIPRs have innovation as the goal, rather than preservation

Avoiding the essentialist position that all traditional cultures are static and synchronic, with “peoples doomed to repeat a diminishing range of known devices,” the tendency of indigenous oral cultures to be “conservative” or traditionalist is well documented by anthropologists Walter Ong and Jack Goody (Talal Asad 1973; see also Freud 1913; Lévi-Strauss 1955; *Quoted in* Shand, 2002, p. 66). This doesn’t apply to all indigenous cultures equally, especially those that have come into contact with many other cultures. In his study of intellectual property and Indonesian batik, Bill Morrow notes that regions such as the “[Yogyakarta [are defined by] culture [that] is an overlay of Islamic, Hindu, Buddhist and indigenous traditions with aspects of Chinese and Western culture” (Morrow, 21). Among peoples that value the distinctive elements of their cultural traditions, AEIPRs appear unfair: protecting most elements of Western culture (since that culture is theoretically authored more recently) while leaving traditional culture open for all to use.

Thus the divergence in the two philosophies remains. AEIPRs involve the notion that progress ought to be encouraged through economic incentives, and that traditional culture does not require protection. Conversely, many traditional cultures exist in a homoeostatic relation to their past. Within many indigenous worldviews, “progress” at any material or cultural cost isn’t seen as a priority necessarily thought to lead to a better society or world.

AEIPRs embed the notion of individual ingenuity, while tribal systems emphasize individual obligations to the collective and the sacred

Indigenous cultural works are often created out of a sense of spiritual obligation (e.g. Igbo mbari) or spring from inter-generational customs. For the Kwakwak’wakw people of British Columbia, a person who might be described as a celebrity artist in western terms is instead seen as a “trained practitioner and master of the formal artistic and creative disciplines of our people” (Neel and Biin 2000, *Quoted in* Shand, 2002, p.65). Although the distinction might be fine, it is reasonable to assume that the Kwakwak’wakw and many other traditional societies don’t attach quite the same

concepts of romantic artistic genius, which still remain powerful and distinctly individualistic socio-cultural convictions in Anglo-European societies (Wolff, 1993).

Additionally, the close connection between things cultural or artistic (categories familiar in the west) and things spiritual is obscured, or even nonexistent in many traditional societies. Many indigenous artisans conceive of their vocation as both a duty and a privilege. For those who use art, crafts and folklore to invoke powerful sacred forces or the spirits of long dead ancestors, the presumption of an individual “owning” and having exclusive control over those artifacts would be unthinkable. Given strong connections between an individual’s vocation and that established by the community as a whole, combined with a sense of indebtedness to previous generations, the individual rarely comes to see the product of their activity as their exclusive property.

AEIPRs protect material expression, rather than non-material (oral) expression

Within the European tradition, copyright and patent laws reflect the “bias of literacy” through the doctrine that only written or materially expressed works can be the subject of a temporary monopoly right. This doctrine is partly arising from an abiding enlightenment-era belief that monopolies are an inherent “evil” to be tolerated for no longer a period than absolutely necessary (Thomas B. Macaulay, London, Longmans, Green, and Co. 1897; *Quoted in* Boyle, 2003, p. 53). When the disparate set of ideas that would eventually form modern intellectual property rights laws were still being considered and debated, monopolies in material works were already considered contentious, without adding oral expression to the mix. Thomas Jefferson conceived of ideas, whether orally expressed or otherwise, as instruments of social good and benefit that normatively belonged beyond the individual’s exclusive control:

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it” (Letter to Isaac McPherson, Monticello, August 13, 1813)

There are many methods for divulging ideas, but none remains so unprotected as oral speech. Presumably, the act of speaking entails a corresponding relinquishment of any rights to those ideas, while the inscription of those same ideas in material form does not. Whether this “bias” in communicative mediums is arbitrary or not, we can be sure the free transmission and propagation of ideas is involved somehow and just as sure that the end result is highly problematic for indigenous peoples.

Recall that the needs of indigenous peoples with respect to any intellectual property right policy is principally, a means of exerting communal control over who uses traditional knowledge, and

how it can be used. We can infer that worries about the corruptive power of monopolies and economic incentives are perhaps, far down on the list of priorities. Instead, the central problem becomes how to exert communal control over traditional, likely exclusively oral culture using AEIPRs that treat that knowledge as essentially ineligible for protection: neither being ideas in an eligible format (expressed on paper, DVD, internet html), nor 'new enough' to deserve protection even if they were expressed materially. Instead, such ideas are assumed to be in the public domain, available for all to use. Were an indigenous person to obtain the tribal and religious permissions necessary to claim an exclusive monopoly right over a given piece of traditional knowledge or culture, their claim likely wouldn't be recognized on grounds that the work in question fails the test of "originality" necessary for a work to be accorded intellectual property right protection.

Some critics suggest that beneath materiality is a more fundamental assumption that protection should only be accorded to works that are permanent in their form. Materiality assures this requirement with the unfortunate consequence that much traditional culture is neither permanent nor material. As Peter Shand describes this condition, "it ignores...[the aboriginal view that] the "things" that most warrant protection are often not physically manifested. The ideas behind the...performances, narratives, principles of design, the meanings of these, the secret and/or sacred nature of these interwoven concerns...can be of greater and more lasting "value" to peoples" (Shand, 64). Ultimately, whether one uses the term permanence or materiality, the end result for traditional custodians (e.g. of visual design principles or sacred dances) is that AEIPRs disenfranchise their ability to stop unauthorized uses and appropriations of the "things" most valued and sanctified.

AEIPRS protect new (original) culture and not older (often traditional) culture from the public domain (non-original)

The claim that traditional knowledge and practice is "unoriginal" seems a culturally contingent, and seemingly insensitive claim. Indeed, perhaps this doctrine is at the heart of condemnations that intellectual property rights are inherently "racist" and "colonialist" (Statements made by COICA in Blakeney, 1997, p. 302). On the one hand, this seems an inaccurate accusation. Some might argue that AEIPRs are culturally blind, since it applies to both the concertos of Mozart and the folkloric traditions of Ghana to be in the public domain.¹⁸ This would be a misleading claim (*see endnote 15*), as AEIPRs are in and of themselves culturally specific, but not inherently racist or colonialist. Instead, the disparagement seems more fitting for those who would apply these culturally specific doctrines to other cultures without taking into account the specific prejudices of these laws and rights.

The requirement of originality before AEIPRs can be invoked is easily one of the most problematic for traditional culture. Even if traditional cultures could be broken down into the

discrete material components appropriate for copyright, the communal nature of most tribal cultural traditions would render that culture ineligible because it is “widely known.” Anything widely known in the Anglo-European tradition, and thus presumably willingly disseminated beyond the bounds of the originating individual artist, is deemed to be in the public domain and cannot be assigned an individual property right. Thus, many indigenous scholars and advocates clash with champions of the public domain (Lessig, 2004; Boyle, 2003; Benkler, 2003) because they see the doctrine not as an enabler of informational democratization or commons-based innovation, but as a means of denying indigenous people control over their cultural heritage (Boateng, 2002, p. 574; Ketley, 2001). However, the claim of ineligibility on the basis of a lack of originality is especially contentious doctrine when one considers that the originality quotient in most “new” creative works is actually quite low.

Within the fields of film criticism and the related area of structuralist cultural studies, there have been many persuasive accounts of how much cultural production (e.g. popular novels, Hollywood/Bollywood or Chinese action films, computer games) often closely reflects an established *genre*. Eminently copyrightable film genres such as “horror” are replete with formulaic narrative devices, sound cues and overall visual guidelines which constrain the universe of possible creative iterations down to a much more manageable set of variables.¹⁹ Within the structuralist school of thought, a cultural tradition such as Golden Age Hollywood films are conceived of in linguistic terms: possessing a certain common grammar and syntax that allows audiences to understand the film’s meaning (Rosen, 1986, p.8; Metz, 1986, p. 59). As David Bordwell writes of this phenomenon, “we should look not only for innovations but for normalization, patterns of majority or customary practice...authorial difference in Hollywood thus dramatizes the range and limits of the classical paradigm” (Bordwell, 1985, p. 32). By dissecting the content carefully, the “romantic genius” of many Golden Age Hollywood directors can be recast in less flattering terms: as the skillful manipulation of film grammar and syntax according to well-established narrative genres and industrial imperatives. Given that genre is by definition a collectively established tradition with individual genre representations often exhibiting a proportionally modest degree of originality, the assumption that indigenous cultural representations are unoriginal by virtue of being widely known and collectively produced seems ignorant and hypocritical. As Michael Brown notes, “...today most works granted copyright or patent protection are the product of corporate laboratories, design studios, software teams, and research-and-development facilities, forms of communalism built on impersonal contracts and financial power rather than shared values and group solidarity” (Brown, 2004, p. 67). If Anglo-European culture reflects a similar collective (though not recognized as such) manipulation of common tropes and devices, the inherent categorization of traditional knowledge as being in the public domain because it is “unoriginal” seems absurd. Although that claim may stem from the

materialist-permanence doctrine already examined or from the pragmatic issue of how to ascertain authorship if that function is ignored or suppressed (e.g. the originator is unknown, unrecognized as such, or is collective in nature) the implication that any material awarded a copyright or patent is therefore “original” or is highly suspect.

In the realm of patents, many scholars have argued that the parallel principle of “non-obviousness” has been applied in a manner similar to that of originality, with multinational corporate actors able to patent indigenous plant varieties and medicines through the introduction of “non-obvious” modifications. The commercialization of plants and medicines formerly held in common (*aka in public domain*) is then argued to pose the risk of depriving the access of indigenous farmers and healers to the same “raw material” that they cultivated in the first place. I have highlighted raw material to emphasize the view that what is deemed to be a naturally occurring substance and what constitutes a non-obvious innovation can be a product of ignorance. As Vandana Shiva and Radha Holla-Bhar describe the position of Indian farmers, “multinational companies have no right to expropriate the fruit of centuries of experimentation and several decades of Indian scientific research” and describe of the specific patents claimed by US corporations, “...the existing patents apply only to methods...that are simply an extension of the traditional processes used for millennia in making Neem based products” (Shiva & Holla-Bhar, 1996, p. 151). These claims significantly undermine two bases for legitimacy claimed by the neem patentee, W.R. Grace, that the material in question is naturally occurring and that the patent in question is “non obvious.” Perhaps corporations should be compelled to take into account the relative obviousness of a patent ‘innovation’ in the region in which they derive the associated raw material.

AEIPRs embed the notion of individual creation and artistic authors, while indigenous societies view creativity as the product of collective traditions

The above discussion and the case examples have discussed the individualistic bias of AEIPRs and the collectivist tendencies of most tribal creative communities many times. Indeed, it would be difficult to discuss the problems of using AEIPRS to inform a set of suitable indigenous cultural policies without confronting this issue. Human rights tribunals provide further indications of the centrality of this issue through the difficulties encountered in using individualistically oriented human rights laws to attempt to protect the rights of groups (Ketley, 2001). Many advocates in the area of human rights and indigenous culture have described the two areas as overlapping and intertwined, stating that the individual human rights of members of traditional societies are violated if the collective rights of that culture or people are violated or denied. Moreover, this conditional relationship includes cultural sustainability as one of its main prerequisites: as Erica Daes,

Chairperson for the UN Working Group on Indigenous Populations describes the relationship, “indigenous peoples cannot survive, or exercise fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors” (Sinjela & Ramcharan, 2005, p. 5). In contrast with this imperative, AEIPRs enshrine the notion that protective rights over culture ought to be granted only to individual authors, and ignore the question of group protective rights over culture. It must be the task of any alternative intellectual property rights regime to create a group right, or adapt existing policies to ensure that sustainability as ‘distinct nations, societies and peoples’ can be assured.

Part VII: Summary of Alternatives and Recommendations to Mitigate Discrepancies

According to the local, national and international dimensions of the relation between intellectual property rights and indigenous peoples sketched out in Part III, the alternatives intellectual property policies put forward here will be similarly categorized. While an ideal policy framework from the point of view of indigenous peoples would involve complementary policies at all three levels, the reality is somewhat different. Sovereignty becomes a key issue with tensions between community level agreements and national procedures and laws, and at a broader level, between state policies and international binding or non-binding agreements. States can still wield a sizeable degree of latitude in determining indigenous affairs, and there are several clauses in the WTO TRIPS agreement and others (the World Summit on Biological Diversity) that specify some breathing room for Sui Generis strategies. Nonetheless, trade liberalization and intellectual property rights harmonization are logics that contrast strongly with the “cultural nationalization” strategies pursued by Ghana and Indonesia, strategies that could prompt criticisms of trade protectionism.

Local Strategies

The local level remains an important but fragile base for creating policy solutions. Generally speaking, community based strategies for dealing with “outsiders” can be short-lived and limited in terms of providing a lasting solution for indigenous cultural rights if they lack state support and the support of broader legal framework sensitive to their needs.

In many cases, “local strategies” may in fact conform to the long established and (often) ecologically and spiritually compatible customary procedures and laws used by traditional societies to regulate the behaviour of an areas inhabitants. As Posey and Dutfield argue, although these strategies are the most appropriate for indigenous peoples, they often suffer from a lack of recognition by national authorities due in part to their tendency to be practiced orally, and evolve over time.

Attempts to codify traditional and customary laws may assist recognition by regional and national

authorities but may hamper the importance of being malleable to evolving social and spiritual concerns (Posey and Dutfield, 1996). On the other hand, customary legal systems are often very complex and codification could assist national authorities and experts in gaining an understanding of just how these rules and laws work (Allot, 1987; *Quoted in* Posey and Dutfield, 1996).

a. Contracts?

Nonetheless, the premise of using a local option such as a contract to specify the terms of a relationship between a traditional people lending the use of its knowledge (whether medicinal or cultural) and a corporation wishing to exploit that knowledge in some way, remains an often-overlooked and relatively simple means of creating a bilateral policy which can be binding for both parties and legally enforceable (Posey & Dutfield, 1996). Tribal communities often regard many parts of their culture and the local land as being inappropriate for outright commercial exploitation. The land may be the territory of a spiritual being and a particular cultural form may be judged to be inalienable from the local shaman, family, or the community as a whole. In these cases, a contract or covenant can specify what cultural aspects can be properly said to be under an individual or group's stewardship and the kinds of exploitation that can be carried out with it.

There are many different kinds of agreements a tribal or traditional community might enter into with an outside party. License agreements offer traditional societies the option of "leasing" rather than selling their intellectual or cultural property outright (and thus being more likely to relinquish control over it through the *first sale doctrine*).²⁰ Posey and Dutfield suggest the GNU (General Public License) software licensing agreement as a useful template for indigenous groups wishing to explicitly state that a given piece of cultural property or knowledge may be used or modified, but that no commercial exploitation can occur with any associated derivative or modification. Clauses can be added specifying which kinds of "uses" can be made, as many tribal groups have concerns over culturally or spiritually inappropriate misuses of their heritage. Nevertheless, a GNU-like license could effectively eliminate an enormous potential for misuse and exploitation by explicitly forbidding commercial usages.

Nevertheless, traditional societies are often unfamiliar with the fine points of contract law and it is important that competent legal observers and NGOs be consulted to ensure that any binding contracts are not hamstrung by vague language, ambiguities and easily exploitable loopholes (Posey & Dutfield, 1996).

National Strategies

The national level (including provinces and states) remains the most critical arena in which indigenous cultural policy issues will be decided. It is no accident that it is within this arena that most case studies have identified problems and solutions.

a. State Ownership: Out of the Pan and into the Fire

As discussed by Boatema Boateng and Bill Morrow of the nations of Ghana and Indonesia respectively, the attempts by the state to assert perpetual ownership over folkloric and traditional textile craft traditions is although laudable, a very problematic policy.

To summarize objections made in the analysis of case study 4 a) and b), the amendments to the copyright acts in these countries runs the risk of usurping royalties that might otherwise flow to the very cultural producers these acts are intended to “protect” (Boateng, 2002, p. 574). The acts also complicate the legal status of the indigenous producers themselves: are they infringing on the state’s property by continuing to participate in the creation of artifacts and knowledge that are “state owned”? Lastly, state ownership is such a broad legal assertion that it places the burden of prosecuting infringements solely on the state rather than offloading some of this burden on individuals, local communities, NGOs and companies that might be capable of prosecuting infringements on a more particularistic basis.

b. Using Sui Generis Principles to Reinforce Customary Rights

The term *sui generis* literally means “unique” or “in a class of its own.” *Sui Generis* legal classifications are said to exist independently of other categorizations due to the specific creation of an entitlement or obligation.²¹ Within the realm of intellectual property rights, *sui generis* rights are unique to specific classes of items or rights-holders, such as plant-breeders, mask works, ship hull designers and database designers.²²

The principle of intellectual property rights that are *sui generis* to database designers, creating special rights that are applicable especially to creators of this kind of intellectual property is very amenable to the indigenous peoples. *Sui generis* rights were awarded to database designers because of the argument that although the creators of these works were not engaged in creating something inherently novel, original or indeed “creative,” they were nonetheless expending effort “sweat off the brow” in the creation of something valuable and intangible.²³ *Sui generis* rights are essentially legal concessions that say that these kinds of creations are special with specific entitlements and obligations attached to the “property” in question. In the seven case studies

examined above and summarized below, a legal tribunal or legislature has attempted to demarcate a special legal terrain within which traditional creators and cultural stewards have protections above and beyond those normally assigned.

i. Common Law

In the *Bulun Bulun and Others v. R & T Textiles*, the plaintiffs settled their initial battle against an infringing third party out of court without difficulty while failing to convince the court that a) the tribal leader had specific rights to the artwork in question and b) that communal rights to the artwork in question entailed a communal right to the land on which the piece's creation depended (a claim not heard because it exceeded the jurisdiction of the court in question) (Brown, 2004, p.64). Nevertheless, the judge ruled that "an artist is entitled to consider to pursue his own interests, for example by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of Ganalbingu culture where action for that purpose is required" (Brown, 2004, p. 64). As a result of this decision and the specifics of its ruling, the Ganalbingu community is entrusted with common law authority to issue grievances against aboriginal artists who refuse to safeguard Ganalbingu culture sufficiently, and where such artists are unable to prosecute misuses themselves, to seek out any third parties themselves.

Effectively, this ruling creates a special sui generis right for the Ganalbingu community regarding what can be done with aboriginal art and culture by outsiders and what options the community, as a collectivity, can pursue to persecute misuses. However, the ruling benefits and suffers from its status as common law precedent. On the one hand, the precedent is likely to have sway in other communities where a similar case arises. However, because it is *only* common law, statutory law or constitutional law may override it - two arenas with an ambivalent legislative sympathy for aboriginal concerns.²⁴

ii. Statutory

Two statutory strategies developed to reinforce the ability of tribal communities to regulate misuses and appropriations of their culture include the recently amended *New Mexico Arts and Crafts Protection Law* and the *Maori-Made Mark*. Both solutions represent remarkably innovative and progressive legal attempts to suppress blatantly misrepresentative cultural appropriations and confront the problematic question of what constitutes an "authentic" tribal craftsman, and how authenticity can be determined according to traditional guidelines for the manufacture of arts of crafts.

a) The New Mexico Arts and Crafts Protection Law

The New Mexico law and its amendments stated that it was the duty of any person selling purportedly Indian items to ensure that the creator was of Indian status (as defined by a federally recognized tribe), that the item was indicated to be either machine or man made, and if the materials were “natural” or semi-processed (Pinel & Evans, 1994, p. 47). The law succeeded in removing many of the legal justifications large-scale commercial appropriators could use in their defence, but also left many questions and issues unresolved.

Many Indian artists objected to having their objects labeled “Indian” whether they wished to have that label applied or not. These artists argued that the act unnecessarily dealt with the authenticity of the individual, when instead it could more effectively achieve its goals through the regulation of craft objects that were more easily verifiable as representative of an authentic craft tradition (as defined by the tribe in question) (Pinel & Evans, 1994, p. 48). The act also left the issue of “intra-group” appropriations unresolved, as the “Indian-made” mark applied as easily to “appropriating” Navajo craftspeople as it did to “authentic” Pueblo artisans. Nonetheless, the act recognized that cultural collectivities, however problematically defined (e.g. only federally recognized groups obtained protection, not extra-tribal individuals or groups) had a right to police infringements and misrepresentations of their cultural heritage and created an administrative and legal infrastructure with which to penalize infringements.

b) The Maori Made Mark (Toi Iho™)

Paralleling developments in Australia²⁵ (the *Aboriginal Label of Authenticity*) and (as documented above) in New Mexico, indigenous Maori have successfully developed a set of trademarks and labels to help differentiate authentic consumer products from “rip-offs” (Shand, 2002, p. 78). As in Australia and New Mexico, imitations of local craft and art traditions ultimately mislead undiscerning tourists and redirect economic benefits away from producers of culturally appropriate and high quality crafts. Also, as with the Pueblo and Galabingu for example, the store of cultural motifs, designs and crafts that indigenous people consider appropriate to market for tourist purposes usually excludes many items reserved for special and/or sacred purposes only. Thus, marking systems such as the Maori Made Mark allow control to be vested in tribal authorities instead of the vagaries of consumer demand.

According to Peter Shand, the central focus of both the New Mexico and Maori-Made-Mark is the authenticity of the “author,” which seems interesting given the complaints against that focus by urban Puebloans uninterested in having their work automatically labelled as “Indian” instead of

something more representative of contemporaneous art forms (e.g. Fine Art). However, unlike the New Mexico law, membership within the Toi Iho system is voluntary, meaning tribal authorities cannot mandate that certain artists' work be labeled 'Maori' without their permission, nor can they compel artists to subscribe to the trademark system if they do not wish to. This creates some problems. As Shand notes, there needs to be a significant "take up" by Maori artists to reduce the amount of unmarked items for sale on the market and increase the likelihood that tourists will purchase goods from Toi Iho registrants (Shand, 2002, p. 80). As evidence of the barriers facing adoption, Shand notes the "fitful progress" proponents of the Aboriginal Label of Authenticity have had in making a dent in popular tourist markets such as Alice Springs: where "authentically made" Didgeridoos can be purchased in the name of Aboriginal peoples who "neither painted nor sanctioned" them. Despite the similarly unfortunate dependence by Toi Iho proponents on the majority of Maori artists and art buyers to "act ethically," the marking system has some distinct advantages over the New Mexico Arts and Crafts Protection Act.



Fig. 1.13 The Three Designations of the Toi Iho (Maori Made) Trademarking System ²⁶

One of the main advantages involves a greater stratification of who can be involved in the creation of cultural work protected by the mark. The Maori-Made Mark explicitly welcomes partnerships of the kind involved in the Moontide Swimwear and Pirirakua Sub-Tribe. Where a third party submits to the quality control standards and consultation mandated by the Toi Iho Co-Production group, they are welcome to borrow from and use Maori heritage and the work of its artists. Such behaviour may translate into not just a mark signifying ethically designated ethicality, but may prove to be economically useful if consumers are willing to discriminate against companies and individuals who borrow without similar permissions. In addition, the "mainly Maori" mark helps prevent disenfranchisement among mostly Maori artisans and craftsmen who explore partnerships with some non-Maori artists. Presumably, this label is intended to prevent strict ethnicity divides from hampering a certain degree of ethnic mixing among Maori creatives, while still ensuring enough "Maori" are present to ensure authenticity.

Although the differentiation among the marks helps make the policy more inclusive, while not making it "too inclusive," problems remain. One of these has to do with the legitimacy of the Toi Iho board to judge the quality of proposed works. As with the tendency of the New Mexico act to create cultural arbitrators out of tribal leaders, the Toi Iho trademarking policy raises "the specter

of an overly deterministic” and top-down approach to determinations of what constitutes “quality” Maori products (Shand, 2002, p. 79). It may be that broader representation on the Toi Iho board may help alleviate concerns about bureaucracy and hierarchal cultural policy making. Localized and community based decision making boards could liason with tribal leaders in assessing the quality, authenticity and appropriateness of any controversial pieces. Ultimately, although these concerns are certainly worth being aware of, it seems that the more urgent concern would be “take up.” If the only concern facing Maori are problems of authenticity and quality determinations within that creative community, then the Toi Iho mark will be a success – having eliminated or sharply reduced the more egregious concern of outsiders using their culture indiscriminately and insensitively.

iii. Constitutional

In his paper *Aboriginal Custom, Copyright and the Canadian Constitution*, David Robbins interprets (at least) two progressive, precedent-setting constitutional law cases, *Sparrow v. the Queen*, and *Delgamuukw v. British Columbia* ²⁷ and the associated rulings associated with each to argue that aboriginal customary rights to specific uses of crests, markings and motifs can be protected under section 35(1) of the constitution act. Section 35(1) states that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” ²⁸ This clause has been interpreted to emphasize the following “the existing aboriginal...rights of the aboriginal peoples of Canada are recognized and affirmed” which strongly indicates that laws already existent in Canada and in use by aboriginal peoples prior to confederation should be recognized and confirmed by the Canadian state. Another term for “laws already in use” by aboriginal peoples are, customary laws, some of which involve specific rights to tribal markings, visual iconography and related motifs. Robbins cites seven case law (common law) principles which strongly suggests that such an interpretation is warranted, of which two are key:

(vii) a) Section 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples,²⁹ and

(vii) b) Where there is any doubt or ambiguity with regards to what falls within the scope and definition of s.35(1), such doubt and ambiguity must be resolved in favour of aboriginal peoples.³⁰

Assuming this interpretation is warranted and is eventually confirmed through future rulings that affirm aboriginal customary law, the question then becomes, just what kind of customary laws are applicable and how do they provide a desirable alternative to existing Canadian Copyright Law and other statutes?

Robbins identifies the Kwakwak’wakw people of British Columbia as having a particularly developed system of intangible rights arising from the potlatch system (Robbins, 1999, p. 18):

Potlatch proceedings...include ceremonial performances, dance, song, speeches, gift-giving...potlatch business includes the conferring and removal of names, titles, rights and obligations as well as dispute resolution and sanction imposition...each position or name carried by a Kwakwak'wakw person entails a bundle of rights and obligations...the social position inherent within the name *Kidiklélongw* includes rights regarding crests, dances, songs, types of ceremonial regalia, etc (Robbins, 1999, p. 19).

In many cases, these complex sets of title-based rights can involve the exclusive, and occasionally perpetual right to produce derivative works (Robbins, 1999, p. 19).

It is easy to see how these elaborate and complex customary laws and entitlement procedures would conflict with third parties' economic right to make derivative works based on any material or source, whether aboriginal or otherwise. Although such an act would be a clear violation of aboriginal customary law, it would be virtually impossible for the Kwakwak'wakw to attempt to prosecute anyone outside the bounds of their tribal community. Arguably, the struggle to have a case such as this heard by the Supreme Court or a similar body will face the problem of whether statutes such as the Canadian Copyright Act extinguish prior common laws, ostensibly including aboriginal customary law.³¹ Despite these arguments to the contrary, the principles outlined by the Supreme Court of Canada in cases deciding aboriginal rights claims, and the legal supremacy of constitutional law, suggests that a future interpretation of these issues by Canada's highest court has a good chance of upholding aboriginal customary law.

A constitutional affirmation of aboriginal customary law has great value as compared to lesser statutes and marking systems. For one, Supreme Court judgments generally apply nationwide, which in Canada, would uphold the customary intangible rights systems of many aboriginal peoples. Moreover, a favourable Supreme Court interpretation sends a strong interpretive guideline to lesser courts that are likely to hear the bulk of cases involving infringements and misuses of aboriginal cultural heritage.

International Strategies

Although there are certainly some international documents at the moment which outline the rights and expectations of indigenous peoples with regard to their cultural integrity and sustainability, there remains international disagreement about the wording of these documents (e.g. the Draft Declaration remains a draft document due to a lack of consensus). Many nations refuse to ratify agreements that entail some degree of responsibility towards indigenous peoples or a curtailment of national sovereignty. Moreover, the agreements are essentially non-binding, meaning that there are no dispute resolution procedures or sanctions that can be placed on states that violate these agreements. The WTO-TRIPS agreement by contrast, has a dispute resolution procedure and is legally equipped to penalize outstanding violations with trade penalties and other sanctions. For this reason, strategies

utilizing the Geographical Indicators (GI) clauses in the TRIPS agreement are more advantageous from an enforceability point of view.

a. Rights Beyond Sale? The Question of Author's Moral Rights

Mira Rajan has argued that despite its strong association between romantic individualism and western artistic traditions, the doctrine of moral rights has been interpreted more broadly in countries such as India, Russia and Mali to help support the preservation of cultural heritage. She examines how an Indian court ruled in favour of a famed muralist plaintiff and against the government's misuse of and destruction of his work using the doctrine of moral rights under the Indian Copyright Act (ratified according to the *Berne Convention*). In *Amar Nath Sehgal v. Union of India*, the court held that an author had a moral entitlement to have his or her work treated with an appropriate amount of care and due diligence, which the state of India was found to have violated through its apparent carelessness (Rajan, 2001, p. 81). Although Rajan notes that the Indian government amended the Copyright Act shortly after this unexpected verdict to limit the precedent left by the courts' unfavourable interpretation, she argues that the decision leaves an important legacy in other ways.

For one, it separates the arbitrary Anglo-European distinction between cultural and intellectual property, since the two are bound together and intertwined from the point of view of traditional societies. In the case of moral rights, the right in question extends beyond to both tangible and intangible spheres. Moral rights in the case of *Amar S. v. Union of India* have clearly entailed a right to have one's work respected physically, while other case examples emphasize the authors right not to be defamed and his or her work unfairly misrepresented. Presumably, any case involving the balance between this latter interpretation of moral rights expectations and the right to satire, parody and free speech would be a fine one. Article 6bis of the Berne Convention states,

(1) Independently of the author's economic rights, and even after the transfer of the 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 honor or reputation.³²

It is possible to see how the "distortion...or derogatory action" wording under article 6bis of the Berne convention could be interpreted by aboriginal plaintiffs to refer to the misuse or misrepresentation of communal cultural heritage by third parties.³³ It is difficult to see how Paco Rabanne and Jean Paul Gaultier's culturally insensitive usage of Maori motifs would not constitute a distortion of the authentic relationship of these motifs to their Maori "authors." Nevertheless, the use of moral rights as cultural policy or traditional customary rights appears to be very untested legal

terrain. Rajan's emphasis on moral rights to prosecute the destruction or loss of traditional cultural property seems more a more tenable strategy for traditional societies, at least in the near term.

Even this may be problematic as many objects of cultural patrimony are very ancient, making the relation between contemporary indigenous authors and the authors of the patrimony in question very remote.³⁴ Similarly, the issue of compelling individual 'representatives' of collective cultural traditions to adhere to the western categories of "artist" or "author" in order to litigate such cases, poses familiar questions of how individuals can legitimately own and represent collectively authored works.

Rajan suggests that despite problems in the use of moral rights litigation to protest cultural misrepresentations, distortions and 'derogatory actions,' mainly due to the expense and time involved in litigation, "[the] TRIPS [Agreement] does, in principle, require member countries to adopt moral rights standards which conform to Article 6bis of the Berne Convention" (Rajan, 90). She indicates that as the TRIPS system matures, moral rights litigation and precedent may become more "fully integrated into the international copyright regime" (Rajan, 90).

b. Geographical Indicators under TRIPS: Rights for Creative Tradition?

It is a normative goal that the customary laws of traditional societies be used in lieu of Anglo European legal systems, instead of the current reverse situation. This goal is arguably threatened by supranational accords such as TRIPS that prompt states to create statutory laws in harmonization with US-EU intellectual property law. For the multinational corporate actors in the United States, Japan and European Union that successfully lobbied their governments to push the TRIPS agreement through the GATT-WTO Uruguay round of negotiations in the first place, increasing protections for pharmaceuticals, software, and electronic entertainment goods in developing countries was the major objective (Matthews, 2002). Although developing countries emphasize technology transfers and increased chances for foreign direct investment as being sufficient incentives for developing countries to amend their intellectual property laws and enforcement mechanisms according to the TRIPS template, it is likely that many countries will lose more resources through higher prices for patented products and medicines than they stand to benefit in increased transfers and investment (Matthews, 2002). Indigenous advocates have been equally critical of the TRIPS agreements failure to explicitly protect indigenous medicinal, plant varieties and ecological knowledge from appropriation and patenting by pharmaceutical and agribusiness corporations (Matthews, 2002; Shiva & Bhar, 1996).

However, it may well be that the TRIPS agreement has some unintended ambivalence in terms of how it can be used by indigenous groups. While many indigenous advocates and scholars in

the field of biopiracy and farmers rights reject geographical indicators as anything other than a complement to sui generis systems, in the area of cultural goods, geographical indicators may provide a more useful set of already existent and internationally applicable intellectual property protections.³⁵ France and Scotland have developed particularly organized and detailed geographical indicators to delineate between the different regions associated with world famous wines, cheeses and scotch whiskeys respectively.³⁶ These geographic indicators make it illegal for other regions to identify their products using the name Scotch or Bordeaux, thus curtailing the trade in illegitimate and misrepresentative products.

One of the main concerns facing indigenous cultural producers is the prospect of imitation products usurping economic gain from traditional craftspeople, while at the same time distorting consumer views of what constitutes high quality traditional arts and crafts (Evans & Pinel, 1994). To remedy this problem, many scholars have proposed the geographic indications (GI) clauses under the TRIPS agreement as a possible means of marking and identifying authentic cultural goods from a specific geographic locality from fake and imitation products.

Thus, tribal groups such as the Pueblo could develop a Puebloan regional distinction or mark, to be applied to all goods exported out of the region (whether to other states and provinces or nations). This strategy may even enable Puebloan storyteller craftspeople to obtain a distinctive geographical indicator or trademark for this specific craft, as a means of preventing inter-tribal cultural appropriations (e.g. Navajo “Storytellers”). Other benefits from this strategy include its particular appropriateness for communities wishing to collectively establish the rules and guidelines associated with the traditional and inter-generational methods and techniques (Downs, 1997, p. 14):

While the production methods can evolve over time, there is a strong emphasis on tradition, with roots that are centuries old (Downes, 1997, p. 14).

While these aspects of geographical indicators seem particularly well suited to cultural producers who maintain a close connection to the land and seek to preserve centuries old traditions, the regional focus of this intellectual property right has earned some criticism.

Bill Morrow has suggested that the ‘obvious flaw’ with geographical indicators has to do with the status of indigenous peoples who travel about the world (both voluntarily and involuntarily) and attempt to continue traditional activities in varying geographical locations. Although this does seem problematic for some groups, it doesn’t seem to be a problem that uniquely faces geographically mobile traditional craftspeople. French winemakers and Scottish brew masters have also traveled the world, using traditional wine and spirit production techniques in varying national

locales. In the same manner that comparatively new wine makers and whiskey manufacturers have had to spend decades building up a positive reputation and distinctiveness, so too do geographically mobile craftspeople need to invest time building up new traditions in different geographies, which presumably can be accommodated with different geographical indicators. Geographical particularities tend to blend with “old” traditions in any case, making any “roving geographical indicators” increasingly unrepresentative (over time) of the traditional practices they would ostensibly continue to claim as common heritage.

c. *Mattaatua Declaration and the Draft Declaration on the Rights of Indigenous Peoples: Do they Matter?*

As one of the last instruments of internationally recognized indigenous intellectual property policy, we have the *Mattaatua Declaration* and the *Draft Declaration on the Rights of Indigenous Peoples*. Without going into great detail about the agreements and their history and significance, we can make a few brief remarks.

Among the lessons we can draw from the *Draft Declaration* is the significance of the ‘schism’ it exhibits in global thinking towards indigenous peoples. It is not significant that the document remains a ‘draft’ due to a lack of consensus towards the issue of indigenous peoples within UN member states. Many states, especially those in Asia, have exhibited an extreme reluctance to even recognize indigenous peoples as groups deserving of special attention and preservative energies. No doubt, one of the reasons for the failure to recognize indigenous peoples a discrete peoples with their own interests and imperatives, is the worry that such recognition risks fragmenting a sense of national unity and cohesiveness (Robbins, 1999, p. 10; Bengwayan, 2002). Additionally, does recognition entail a responsibility to preserve lands and ecological areas from economic development activities such as mining and deforestation?

Compounding the *Draft Declarations* failure to obtain ratification from all party nation states, both international legislative documents remain legally unenforceable within the United Nations or any other supranational body (Genugten, 2004). One asks then, what value do these documents have at all?

In answer, they nonetheless provide a valuable source of progressive legislation that has already seen and withstood extensive consultation with many indigenous NGOs, groups and tribal organizations. For nations with particularly backwards policies towards indigenous peoples, public relations pressures and human rights tribunals and organizations can continue to exert pressure on such nations to harmonize with these agreements (Bengwayan, 2002). As more nations such as the Phillipines use the agreements as a template for very progressive amendments to their human rights and intellectual property rights laws, these pieces of legislation nonetheless operate as set of ethical

guidelines and a de facto 'indigenous point of view' for nations that haven't yet conducted consultative hearings.

Part VIII: Conclusion

Questions to Guide Further Research

A number of questions arose during the course of the research and writing of this paper, which although interesting, involved a prohibitive degree of distanciation from the central variables and relationships at issue. Although many of these questions have been discussed to a degree in some of the literature reviewed and used in the writing of this study, they could certainly benefit from further research.

a. Is Cultural "Protection" a Euphemism for Cultural Isolationism?

It has been the relatively unexamined assumption of this entire paper that protecting indigenous cultures from unwanted outside exposures and borrowings is an ethical and desirable social good in and of itself. Nonetheless, there have been many aboriginal and non-aboriginal voices in the case literature that have questioned the supposedly unmitigated good of cultural protectionism.

Some, such as Bill Morrow, have questioned whether 'traditional society' and 'culturally distinct' necessarily coincide. Morrow argues of overt regionalism, isolationist cultural policies and similar sui generis measures, that

There is a...danger that we may become overly protective towards cultures and fail to recognize that in some regions there are traditions of appropriation. For example, many Cirebon designs have been created by appropriating imagery from a wide number of cultures including China, India, the Middle East and Europe and yet in the Pasisir there has also been a good deal of blatant copying of other people's work including copying of fairy tale illustrations (Morrow, 2000, 20).

The term "traditions of appropriation" is particularly thought provoking. Are the benefits of appropriation, the sharing of knowledge between cultures and the enrichment of our own cultures, social goods that justify interventions that are unwanted and unwelcome by a given community? What if that community is divided, as the Maori appear to have been regarding cultural appropriations by outsiders. While Former Te Tai Hauauru MP Tukoroirangi Morgan and (ironically) high fashion consumer himself,³⁷ stated of Rabanne and Gaultier's borrowings that "the French are just rude and ignorant and they come as no surprise given the history of French and Polynesian people," the enthusiastic John Tamihere remarked that

We must rejoice in our diversity, and not wallow in our differences. It is right to tolerate those who want to wear a kilt, or hemp suit, just as it is right to tolerate and respect those that want to wear a moko. No one has a monopoly on our unending story of nationhood; no one has the manual for our nationhood.³⁸

Tamihere's remarks by no means indicate a consensus of opinion, but it does suggest a complex dialectical relationship. Complete cultural closed-ness even if such a state were possible, carries with it the prospect of isolationism and in its extreme form, xenophobia. In a sense, these quotes exhibit the 'distastful fringes' of the debate. On the one hand, Tamihere seems naively utopian, even irresponsible. Who is he to unilaterally declare that kilts are open season for anyone's cultural identification – as diluted a marker of cultural located-ness though that artifact might be? If no one has a monopoly on cultural isolation, surely even fewer have the authority to declare a distinctive culture open for business, presumably at any cost.

Lastly, Bill Morrow's suggestion that cultural appropriation has benefits, while no doubt true, avoids the prospect of a compromise between appropriation without consent and borrowings with permission. The Toi Iho system, with its 'Mainly Maori' and "Maori Co Production" suggest alternatives that involve a certain degree of partnership between a culture's representatives and interested outsiders.

b. Finding Allies Among the Anti-Proprietarians

Influential anti-proprietarian (or free culture advocates) legal scholars such as James Boyle, Lawrence Lessig, Yochai Benkler, Roland Bettig, and Jessica Littman, to name just a few, have either concocted persuasive arguments in favour of the productive capacity of the commons (or public domain) or against the proprietary ethic and its attendant risks to democracy, free speech and innovation when pursued to excess. In contrast to this group of well-meaning scholars there are many indigenous rights advocates such as Boatema Boateng, Michael Brown and others who have indicated that the automatic assignation of most categories of indigenous culture and knowledge to the public domain is a tendency that assists the appropriation and 'piracy' of indigenous culture.

Can these two positions be reconciled? It is unclear what common ground can be found between these two positions, but both parties would appear to benefit from restrictions in the power of intellectual property industries such as pharmaceutical, agribusiness, entertainment and software industries that in some cases oppose restrictions on private property through the enhancement of the public domain or the expansion of indigenous sui generis intellectual property rights. This appears to be a fruitful area for further research and analysis, wherein commonalities and differences between the motivations behind the free culture movement, global capital and indigenous peoples could be examined in more detail.

c. Problems with Cultural Hybridity and Capital “C” Culture

The preceding discussion has investigated a broad array of elements having to do specifically with AEIPRs, related agents of intellectual property policy and the inconsonant demands of indigenous peoples for postcolonial cultural self-determination. Underlying the logic of AEIPRs and the logics of international trade regulation bodies and multinational corporate actors, is the logic of free trade, and in cultural terms: hybridity and cultural globalization. Against these tendencies lie the criticism from indigenous peoples and their advocates that a mixing of cultures through globalization and free trade tends to be prejudicial towards ‘edge cultures’ and smaller areas of distinctiveness. As Rosemary Coombes argues, “hybridity is no guarantee of postcolonial self-determination; it is as available to the colonizing practices of capital as it is to the local strategies of resistance.” (Coombe, 215).

The briefly documented sketch of power relations between the indigenous and outside world strongly suggests that indigenous demands for resistance and self-determination stand little chance against the overwhelming political and economic demands of the mainstream. She notes that those who defend the culturally marginalizing tendencies of intellectual property rights and unrestricted capital flows under the simplistic banner of ‘innovation’ lose sight of the impact that dichotomous power relations have on smaller ‘c’ cultures. She describes the so-called desires of “capital C culture”—to be free and unconstrained for the benefit of all as being highly ideological stances. Advocates of free and unrestrained access by all to the “commonwealth of human culture” stands in the face of the desires of indigenous peoples to preserve rather than innovate, and localize instead of globalize. Capital assisted cultural hybridity does not necessarily entail a mosaic of cultures, but rather raises the specter of an enormous number of sidelined cultures amidst a more homogenous “monoculture.”

d. What of “Non-Tribal” or “Urban” Aboriginals? Caught between Tribal and National Cultural Policy?

Thus far, the examination of indigenous peoples undertaken has conceived of them as unified groups and totalized tribal identities. This conception has been fragmented by the research of Bill Morrow, Pinel & Evans, Michael Brown and others, who have exposed inter-tribal and inter-group divergences in opinion and practice towards cultural preservation and appropriation. As Michael Brown asks,

What of urban Aboriginals? Will claims be made against the work of aboriginal artists living in urban areas, who may not identify at all with a particular clan or community? The current trajectory of policy and legal decisions may leave urban aboriginals even more marginal than they are at present: denied access to political and economic resources yet regarded as somehow less authentic than their rural counterparts, who stand to benefit from the social changes put into play by the Mabo decision.

(Brown, 2004, p. 66)

Does an expansion of tribal power and sovereignty encompass those individuals who are 'ethnically' indigenous but otherwise urban, or 'mainstream'? Should cultural protection and labeling systems take into account the needs and desires of those who live outside the reserve or community in question?

Summary

This paper began its investigation by questioning the relationship between Anglo European Intellectual Property Laws and the normative interests of indigenous and tribal societies. Following this introduction, the first of the two components of this relationship was questioned and analyzed in greater detail.

The problematic definition of 'indigenous' was explored and challenged from varying points of view. Ultimately, the analysis rested on two important aspects of many traditional societies, a tendency towards spiritual and material holism (an absence of the sacred/secular split found in Anglo-European societies) and societal characteristics manifesting from an oral as opposed to literary communicative mode.

Following this, the second term in the relationship, that of Anglo-European Intellectual Property Law was investigated with an historical overview the capitalistic economic and individualistic tendencies that inform its modern status. Attention was given to the current controversy between proprietarians (advocates of greater property rights) and free-culture/public domain proponents. This controversy was argued to be especially pertinent due to the predominance of the proprietary inclination within agenda setting legislatures in the US and EU, and the close connection between this issue and political economists concerned about inequities in the global production and distribution of protected cultural and biological products (Bettig, 1996; Boateng, 2002).

Given realizations that the secondary variable in this analysis, that of 'intellectual property law' was deemed to arise from a broad array of local, national and international instruments, bodies and organizations, attention was given to these different "levels" of intellectual property law regulation and enforcement. Institutions and agreements examined included the *Berne Convention*, ILO, WTO-TRIPS and others.

Following this, seven case studies were examined in order to compile evidence concerning whether existent intellectual property were conducive to the unique cultural and spiritual needs of the traditional societies examined. In most cases, Anglo European societies were found to be highly problematic, with deficiencies arising from the radically different conceptions of “who creates culture,” which kinds of incentives (spiritual, kinship relationships, economic) should govern its creation and how creators should benefit from their effort. Each of the case studies examined involved an attempt to resolve the discrepancy between indigenous needs and the economic and cultural assumptions embodied in intellectual property laws. Following the initial description of each case, a brief analysis was undertaken with regard to the relative desirability of these solutions.

Next, the problematic economic and cultural assumptions in intellectual property law were examined in greater and more substantial detail. These tendencies were then summarized and supplemented with supplemental information from secondary literature. To refer back to the introductory overview, widespread policy efforts to address these commonly voiced grievances with AEIPRs would likely do much to address the concerns of traditional societies. Among the more needed changes to existing frameworks, the accommodation of group identities and grievances and the full inclusion of tribal and customary law in arbitration procedures are especially relevant.

Finally, the solutions discussed in the case studies and others discussed in secondary literature were analyzed and reviewed in depth, resulting in a detailed comparison of many varying alternative strategies and culturally sensitive indigenous cultural policies. The paper concluded with a brief discussion of some of the many questions and problems that remain unresolved by this investigation, but would make for interesting further research.

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Part VII: Notes

¹ Assuming no alien life forms have landed on earth and mixed with the general population.

² Immigrants is also a misleading descriptor if used exclusively. Conquerors and importers of disease and alcohol is a more viable description for agents of a historical episode entailing much more than a desire of European newcomers to merely coexist with previously existing peoples.

³ Briefly, the Calgary School could be described as the “Assimilationist School.” Kanien’keháka (Mohawk) activist and scholar Clifton Arihwakehte is a notable aboriginal respondent to Flanagan and the Calgary school of thought. See http://www.zmag.org/content/print_article.cfm?itemID=3137§ionID=30 for an insightful and vehement refutation of Flanagan’s claims and the discursive devices used to frame his point of view. Arihwakehte argues:

“The inequality of “free speech” is nakedly exposed in a case like Flanagan’s lecture at McGill. By virtue of his position as politician and academic, Flanagan has easy access to “free speech” and despite the minor controversy surrounding his talk, his “right” to speak was staunchly defended by the campus press. Save the few students who attended the lecture in order to protest Flanagan’s racist arguments, there was no defense of Aboriginal people’s right to self-determination. Indeed, it serves well to ruminate over the protean obstacles, operating on institutional and interpersonal levels, which ensure that “radicals” do not enjoy the same access to “free speech” as politicians like Flanagan, thereby invoking Orwell’s dictum that “all men are equal, but some men are more equal than others.” See above link for more.

⁴ Some early theorists of property rights, such as John Locke, situated property rights as a theme evolving out of concepts of the sacred, so it is problematic to imply that the Anglo-European society based (theoretically) at least on many of Lockes (and others) theoretical writings, is entirely distanced from sacred considerations. Nevertheless, the period following Locke’s dissertations included a ‘turn towards the individual’ and ‘his right to own’ that has little parallel in the sacred understandings of many indigenous peoples. While the sacred might have been invoked (by a few individuals, hundreds of years ago) to justify individual ownership of property (land) in general, the society that evolved with those foundational concepts has long since neglected the holistic spiritual connection found among most indigenous cultures.

⁵ Based on the Igbo people of Nigeria, a country of which Achebe is native.

⁶ Unsurprisingly, this group includes orthodox market economists such as Milton Friedman, who join this “radical” bandwagon out of distrust of monopolies and threats to innovation. Steve Forbes (of the pro-market Forbes magazine) is also said to have lent his support to this cause.

⁷ International governance critics and political scientists point to a continuity of these policies following the advent of the United Nations, suggesting the continued ability of nation states to subvert the intentions of the UN almost as effectively as had been the case with the UN predecessor organization: the League of Nations (Girard et al, p. 72-74).

⁸ See court transcript and Chief Justice Greaves ruling at <http://www.yvwiiusdinvnohii.net/govlaw/rosebud.htm>

⁹ See <http://www.yvwiiusdinvnohii.net/govlaw/rosebud.htm>

¹⁰ Images of Kente cloth types and descriptions from <http://www.ghana.com/republic/kente/kente.html>

¹¹ Images of Batik cloth types and descriptions from <http://www.expat.or.id/info/batik.html>

¹² See quotation from <http://www.nzedge.com/features/ar-moko.html> (The article is also an intriguing and insightful analysis on the politics of outsiders use of Maori culture).

¹³ Some Maori tattoo images collected from <http://www.nzedge.com/features/ar-moko.html>

¹⁴ Images of Moontide Swimwear from Shand, 2002, p. 72

¹⁵ Images of Pueblo Storyteller from <http://penfieldgallery.com/storytellers/LTsosie.shtml>

¹⁶ Images of Navajo Storyteller from <http://www.penfieldgallery.com/storytellers/PNez.shtml>

¹⁷ The specter of the tribal government as a source of creative repression and representational projection is a curious parallel of broader subject-object power relations between indigenous peoples subject to laws intended for the white majority (e.g. these dynamics are especially found in Canada, Australia and the US, and with mainstream Mexicans and those who claim specific tribal identities, e.g. the Zapatistas).

¹⁸ Though, admittedly for different reasons. Mozart concertos would qualify for copyright protection if such doctrines existed in the 18th century, but would have entered the public domain through the expiration of the limited copyright term, while indigenous folkloric traditions would be deemed un-copyright-able due to the fact that the medium of practice and transmission is oral, and thus impermanent (subject to problems such as multiple authorship, widespread knowledge etc, all of which problematize claims of individual ownership). Therefore we again have conditions where culture that is predominantly oral would be subject to discriminatory treatment based on the literate, material (permanency) requirements of the imposing legal-cultural system.

¹⁹ Such genres also providing audiences with significant foreknowledge of “what to expect” of a particular representation of that genre.

²⁰ According to wikipedia,

“The first-sale doctrine is an exception to copyright codified in the US Copyright Act, section 109. The doctrine of first sale allows the purchaser to transfer (i.e. sell or give away) a particular, legally acquired copy of protected work without permission once it has been obtained. That means the distribution rights of a copyright holder end on that particular copy once the copy is sold.” See http://en.wikipedia.org/wiki/First-sale_doctrine

See the analogous “Exhaustion of rights” in applicable European Union Copyright Statutes. Section 109 of the US Copyright Act reads as follows:

“§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord⁴⁰ (a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. Notwithstanding the preceding sentence, copies or phonorecords of works subject to restored copyright under section 104A that are manufactured before the date of restoration of copyright or, with respect to reliance parties, before publication or service of notice under section 104A(e), may be sold or otherwise disposed of without the authorization of the owner of the restored copyright for purposes of direct or indirect commercial advantage only during the 12-month period beginning on...” See <http://www.copyright.gov/title17/92chap1.html#109>

²¹ See http://en.wikipedia.org/wiki/Sui_generis

²² See Endnote 18.

²³ See an insightful discussion of the arguments in favour of and against sui generis protection for databases by two lawyers from Morrison & Foerster LLP (Washington DC): <http://www.dlib.org/dlib/june97/06band.html>

²⁴ Though amendments to constitutional law are not as easily subject to legislative whim, constitutional interpretation through Supreme courts may be subject to the appointments of Parliament (appointments which may vary in their political and thus interpretative leanings).

²⁵ Unexplored here, unfortunately due to breadth constraints. However, this would be a useful site of exploration and analysis for further research.

²⁶ See <http://www.toiho.com/aboutus/>

²⁷ See http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_1010.html

²⁸ See http://www.solon.org/Constitutions/Canada/English/ca_1982.html

²⁹ See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, note 43, applied in *supra*, note 44 at paras. 23-24 (Quoted in Robbins, 1999, p. 18).

³⁰ See *R. v. Sutherland*, [1980] 2 S.C.R. 451, referred to in *supra*, note 44 at para. 25. (Quoted in Robbins, 1999, p. 18)

³¹ See Robbins, 1999, p. 24-25.

³² See http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P123_20726

³³ See Endnote 29.

³⁴ This issue is no doubt involved in the (July, 2005) US Ninth Court of Appeals ruling against the desire of indigenous peoples to secure exclusive access to the body of Kennewick man, an unearthened homo sapien who died over 9,000 years ago. A BBC online report details the case as follows: "Eight anthropologists sued to study the bones after the US government seized them on behalf of Native American tribal groups, who claim Kennewick Man as an ancestor and want to rebury his skeleton. Since early 2004, when the US Ninth Circuit Court of Appeals ruled in the anthropologists' favour, scientists have been negotiating with government agencies on a study protocol, said Paula Barran, a lawyer for the plaintiff scientists." See <http://news.bbc.co.uk/1/hi/sci/tech/4651831.stm>

³⁵ See Vandana Shiva's online article "The Basmati Battle and Its Implications For Biopiracy & TRIPs" http://www.navdanya.org/articles/basmati_battle.htm

³⁶ For example, Bordeaux, Champagne, Rhône, Loire Valley, are distinctive and exclusive geographical indicators for French wine, and Speyside, Highlands, Islay and Lowlands serve similar functions for world famous Scottish Single Malt Whiskey.

³⁷ See <http://www.nzedge.com/features/ar-moko.html>

³⁸ See <http://www.scoop.co.nz/stories/PA0002/S00128.htm>