SPIRITUAL BUT NOT INTELLECTUAL? THE PROTECTION OF SACRED INTANGIBLE TRADITIONAL KNOWLEDGE

*Daniel J. Gervais**

> "[E]ach legal concept [. . .] represents the clustered result of sustained efforts at solution of the problem concerned, efforts which are sometimes superb, sometimes merely adequate, sometimes purblind, occasionally puerile. Nowhere can one study more effectively the partial conditioning of solution by the manner of diagnosis, or the amazing ability of man to muddle through despite inadequacy of diagnosis."[1]

---

* Oslers Professor of Technology Law, Faculty of Law (Common Law Section), University of Ottawa. dgervais@uottawa.ca. The author wishes to acknowledge the research assistance of Joddie-Lynn Waddilove, and the editing assistance of Elizabeth Bullard.

[1] KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY 43 (University of Oklahoma Press) (reprinted 1983).

INTRODUCTION

On September 26th, 2001, *The Globe and Mail*, Canada's leading daily newspaper, published a full-page advertisement for Bell Canada's high-speed internet service[2]. The ad shows a shaman most likely from the Tlingit nation[3] in full regalia performing the "Raven Dance."[4] This dance is performed as part of an important ceremonial event.[5] The ad also contains the word "go" in large print and the caption "Actually, it's a huge world after all." The ad credits neither the Tlingit people nor the photographer or dancer.

The use of sacred aboriginal art is nothing new. It is fairly common to see dream catchers[6] hanging from rear-view mirrors in cars. In Australia, sacred aboriginal designs are often found on tea towels, rugs and restaurant placemats.[7] In the United States, people routinely commercialize "Navajo rugs" containing both sacred

---

[2] *See* www.bell.ca/go. Bell Canada is Canada's largest telecommunications company and in most areas a company enjoying a monopoly on local telephone service. A copy of this ad is on file with the *Journal.*

[3] The Tlingit are an aboriginal people who have traditionally resided in Alaska and Northern British Columbia. If not from a Tlingit artist, then the mask and ornaments are from a nearby nation, perhaps the Kwakwaka'wakw.

[4] The raven figure was used by the Tlingit to "graphically depict the magical acts of which the shaman is capable—transformation, communication with animal spirits, and the torture of witches." Objects such as the raven figure are buried with the shaman "because of the powers with which al these objects are imbued. . .they pose a danger to ordinary people after the shaman's death. . .[. . .] Tlingit shamans' equipment has come into museums primarily through its unauthorized removal from graves by determined collectors." JANET CATHERINE BERLO & RUTH B. PHILIPS, NATIVE NORTH AMERICA ART 191-92 (Oxford University Press) (1998).

[5] *See id.*, and ALDINA JONAITIS, THE ART OF THE NORTHERN TLINGIT (University of Washington Press) (1986) (offering a structuralist reading of the Tlingit masks, using a method similar to Claude Levi-Strauss' in his famous treaty STRUCTURAL ANTHROPOLOGY (Basic Books) (2000)). Interested readers should also consult SUSAN KAPLAN AND KRISTAN J. BARSNES, RAVEN'S JOURNEY: THE WORLD OF ALASKA'S NATIVE PEOPLE (University of Pennsylvania Press) (1986) (discussing at length the central function of the raven figure in Northwest Coast First Nations).

[6] Dream catchers were traditionally placed above sleeping children to filter out bad dreams. It is composed of an outer ring, which symbolizes the community; and a webbing of intertwining lines that represent the interconnectedness of the people within a nation (or tribe). There is a hole in the center, which may be seen as an entrance for the spirits. A hanging feather catches dreams and spirits traveling inside the webbing. Negative dreams and spirits remain stuck in the webbing and burn off at sunrise. *See* L. Doolittle, H. Elton and M. Laviolette, *Appropriation: When Does Borrowing Become Stealing*, 5 LAST ISSUE 20, 21-33 (1987); Susan Scafidi, *Intellectual Property and Cultural Products,* 81 B.U. L. REV. 793, 827 (2001).

[7] *See* Kamal Puri, *Cultural Ownership and Intellectual Property Rights post-Mabo: Putting Ideas in Action*, 9 INTELL. PROP. J. 293, 304 (1995). Mabo, (1992) 175 C.L.R. 1 (Aust.) was the first case in which an Australian court recognized a native (*i.e.*, prior to European

and profane designs with no connection to the Navajo nation.[8] A 1992 study showed that in that year alone, $800 million worth of "Indian" crafts imported from Asia were sold in the United States.[9] Another more recent example is the taking of sacred Ami[10] chants by the German rock group Enigma for its song *Return to Innocence*.[11]

Can and should these sacred crafts and practices be protected and, if so, what is the place of intellectual property in this picture? Part I of this paper is definitional in nature and examines the place of sacred intangible traditional knowledge in the debate about the interface between traditional knowledge generally and intellectual property.[12] In Part II, we will propose possible solutions within and without the framework of intellectual property rights proper to protect at least certain forms of sacred intangible traditional knowledge. In Part III, we will briefly specific discuss constitutional arguments that may apply to sacred intangible traditional knowledge in Canada.

PART I: DEFINING SACRED INTANGIBLE TRADITIONAL KNOWLEDGE

The Elements of Traditional Knowledge

There are three fundamental expressions that must be defined in order to define sacred intangible traditional knowledge, namely "sacred," "intangible" and "traditional knowledge."

a) **"Sacred"** is used to refer to any expression of traditional knowledge that symbolizes or pertains to religious and spiritual beliefs, practices or customs. It is used as the opposite of profane or secular, the extreme forms of which are commercially exploited

---

colonization) title over land based on customary laws. *see also* Milpurrurru v. Indofurn Pty Ltd., (1994) 54 F.C.R. 240 (Aust.) (sacred imagery was reproduced on woolen carpets).

8 *See* Alan Jabbour, *Folklore Protection and the National Patrimony: Developments and Dilemmas in the Legal Protection of the Law*, 17 COPYRIGHT BULL. 10, 11 (1983).

9 *On the Warpath*. THE ECONOMIST, Sept. 5, 1992, at 94.

10 The Ami are Taiwan's indigenous people.

11 *See* Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L. J. 175, 176-77 (2000). The case was particularly egregious because Enigma used the chant as sung by tribal elder Lifvon Guo.

12 While this paper uses examples mostly from Native North American nations, hopefully the discussion will find a favourable echo in other jurisdictions.

forms of traditional knowledge[13]. As we shall see later,[14] an object should be considered sacred not because an individual says so, but rather because it derives its status from community recognition that it is in fact sacred. The expression "sacred objects" is used in the Native American Graves Protection and Repatriation act of 1990 (NAGPRA),[15] where it is defined as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."[16] Anthropologists differentiate among various categories of sacred indigenous objects.[17] While this may not affect the legal analysis as far as intellectual property is concerned, it may be relevant to better understand the type of property in question. A first category comprises burial offerings intended to accompany the dead into the next world; a second consists of things "carefully conserved by Native people over many generations because of their inherent medicine power,[18] their importance in ritual or as historical records."[19] Many of these sacred objects "go on display in community centres or museums from which they can be removed for use in ceremonies . . . "[20] The third and largest category of Native North American historical art available for study consists of non-sacred and non-ceremonial objects.[21]

b) **"Intangible,"** which simply means incorporeal, when applied to property, would include intellectual property.[22] It is thus quite distinct from the possession by museums of sacred objects

---

13 *See* Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229,243 (1998).

14 *See infra.*

15 25 U.S.C. §§ 3001-3013 (1994).

16 *Id.* § 3001.

17 *See* BERLO and PHILIPS, *supra* note 4 at 9-11.

18 *See* Naomi Roht-Arriaza, Of Seeds and Shamans: *The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 Mich. J. Int'l L. 919, 926 (1996); and Shayana Kadidal, *Plants, Poverty, And Pharmaceutical Patents*, 103 YALE L. J. 223, 224 (1993).

19 *Id.* at 10.

20 *Id.* at 11. The authors note also that "[n]ative representatives have requested that certain kinds of objects be permanently removed from display and that their photographs not be reproduced because their inherent powers may cause harm to casual viewers." I have not been able to determine whether this could be said of the raven figure in the Bell Canada ad.

21 *Id.* at 12-13.

22 BLACK'S LAW DICTIONARY (7th ed. 1999).

belonging to aboriginal peoples and is used as opposed to tangible or "material" traditional knowledge.[23]

c) **"Traditional knowledge"** is used in a broad sense, similar to the definition proposed in the WIPO[24] Report,[25] where it is basically defined as a subset of the broader concept of "heritage." According to the Chairperson of the United Nations Working Group on Indigenous Populations, heritage itself may be defined as:

> "[E]verything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which contemporary international law regards as the creative production of human thought and craftsmanship, such as songs, music, dances, literature, artworks, scientific research and knowledge. It also includes inheritance from the past and from nature, such as human remains, the natural features of the landscape, and naturally occurring species of plants and animals with which a people has long been connected."[26]

And according to WIPO, the subset of "heritage" referred to as traditional knowledge comprises:

> "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[27]

In the above definition, "tradition-based" "refers to knowledge systems, creations, innovations and cultural expressions that have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its terri-

---

23 *See* ROBERT K. PATERSON, *Claiming Possession of the Material Cultural Property of Indigenous Peoples*, 16 CONN. J. INT'L L. 283 (2001).

24 *See* World Intellectual Property Organization [Hereinafter "WIPO"] *at* www.wipo.int.

25 WIPO. INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS. REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998-1999) (Geneva: WIPO, 2001), 25 [Hereinafter "WIPO Report"] *available at* http://www.wipo.int/globalissues/tk/report/final/pdf/part1.pdf.

26 *See* UNITED NATIONS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, WORKING GROUP ON INDIGENOUS POPULATION, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (1997), iii.

27 WIPO Report, *supra* note 25 at 25.

tory have generally been developed in a non-systematic way, and are constantly evolving in response to a changing environment."

Characteristically, traditional knowledge is thus knowledge that:

— is traditional only to the extent that its creation and use are part of the cultural traditions of a community—"traditional," therefore, does not necessarily mean that the knowledge is ancient or static;

— is representative of the cultural values of a people and thus is generally held collectively;

— is not limited to any specific field of technology or the arts.

Because traditional knowledge encompasses several forms of cultural expressions, it also applies to religious and sacred arts, customs and other expressions of faith and ancient beliefs. To quote again from the WIPO report,

> Intertwined within practical solutions, traditional knowledge often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also often have symbolic value for the community. Many sculptures, paintings, and crafts are created according to strict rituals and traditions because of their profound symbolic and/or religious meaning.[28]

This leaves open the question of who is the appropriate person to decide whether a particular traditional knowledge expression is sacred, which in turn poses an interesting question of cultural relativism: can one culture define what is sacred in another? Adding to the complexity of this task, the sacred/secular distinction is not necessarily made by many, perhaps most North American and other Native peoples. In fact, the dichotomy has been criticized as a "western overlay on Native modes of thinking."[29] Superimposing such a test on indigenous customs and practices, even if portrayed as "objective," is thus potentially fraught with controversy.[30] Mainstream sacred property is recognized in various ways. When

---

28 *Id.* at 212.

29 *See* BERLO and PHILIPS, *supra* note 4 at 13.

30 Romans considered their city walls to be *res sacrae*. Who are we to say they were wrong? The perils of imposing one's cultural views are apparent in the analysis of human rights, which in Western culture are perceived as sacred and even a fundament of humanity, where in fact other cultures do not perceive them that way. Should these countries respect the Western tradition in their dealings with the West or impose their own views? See Catherine Powell, *Locating Culture, Identity, And Human Rights,* 30 COLUM. HUM. RTS. L. REV. 201, 203-4 (1999):

the State wants to expropriate church property, specific rules may apply, such as the extent to which it may interfere with religious freedom.[31] Certainly, the political consequences may be non-negligible.

A safer, more objective test consists of using the eyes of the people whose traditional knowledge is at issue. Identifying an object or practice as sacred should not be the work of an individual within the relevant community, but rather should follow from the fact that the object or practice is treated as sacred. In other words, asking whether a certain expression of traditional knowledge is sacred can be rephrased as follows: based on the actual practice of the people concerned, can the expression in question fairly be considered as sacred? This implies verifying against the established traditions of that people whether the expression is treated as sacred in the sense define above, i.e., as an expression of traditional knowledge that symbolizes or pertains to spiritual or religious and spiritual beliefs, practices or customs.

This approach is consistent with NAGPRA,[32] which defines "sacred object" as an object needed by a religious leader in performing a practice associated with a native North American religion.[33] It also seems to mesh well with the definition of "cultural patrimony" in the same Act, which recognizes the value attributed by the native people concerned: "'cultural patrimony' shall mean

---

> For decades, scholars have discredited the construction of non-Western countries as the culturally primitive 'other,' which allowed the West to define a contrasting identity as rational and civilized—a device used in the service of colonialism and imperialism. Today's selective invocation of 'culture' and relativism to describe human rights non-compliance by non-Western countries, while non-compliance by Western countries is rationalized, recreates a West/Rest dichotomy that is preoccupied by an assumed default Western conception of human rights. Ironically, non-Western governments play along with these assumptions, shielding their non-compliance behind charges that human rights is a form of cultural imperialism and enabling Western governments to mask their non-compliance as rational.

See also Karen Engle, *Culture And Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 303-310 (2000); Matthew A. Ritter, *Human Rights: The Universalist Controversy. A Response To Are The Principles Of Human Rights "Western" Ideas? An Analysis Of The Claim Of The "Asian" Concept Of Human Rights From The Perspectives Of Hinduism, By Dr. Surya P. Subedi,* 30 CAL. W. INT'L L.J. 71, 80-85 (1999).

31 *See* Tilton v. Richardson, 91 S.Ct. 2091 (1971); *see also* John W. Whitehead, *Tax Exemption And Churches: A Historical And Constitutional Analysis,* CUMB. L. REV. 521, 523 (1992) (discussing religious tax exemptions linked to expropriation). This is obviously in addition to the protection against takings contained in the Fifth Amendment.

32 *See supra* note 15.

33 *See supra* notes 15-16 and accompanying text.

an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American."[34]

The Various Categories of Traditional Knowledge

Traditional knowledge as defined above thus can be divided according to a simple matrix:

Q1: SACRED TANGIBLE	Q2: SECULAR INTANGIBLE
Q3: SACRED INTANGIBLE	Q4: SECULAR TANGIBLE

Q1 includes rights, including property rights in tangible objects used as part of or pertaining to something sacred, as defined above. Examples include sacred sites.[35]

Q2 includes rights in photographs, choreographies, music or audiovisual productions used in non-sacred events and ceremonies and often offered for sale to visitors and tourists;

Q3 is the main focus of this paper. It would include intellectual property and other intangible rights applicable to the costume, choreography and photographs of a sacred dance;

Q4 includes tangible arts and crafts (to which intangible rights may also apply); it may also be extended to apply to natural resources.[36]

"Secular" in this context includes material proper for commercial exploitation, the extreme form of which is mass commoditization,[37] but also items such as the family crests used in ceremonial occasions on clothing, masks, dance screens, etc.[38]

---

34 *Id.*

35 Such as the Chimney Rock case. *See* Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988); *see also* Howard J. Vogel, *The Clash Of Stories At Chimney Rock: A Narrative Approach To Cultural Conflict Over Native American Sacred Sites On Public Land*, 41 SANTA CLARA L. REV. 757 (2001).

36 *See* S. James Anaya and Robert A. Williams, Jr., *The Protection Of Indigenous Peoples: Rights Over Lands And Natural Resources Under The Inter-American Human Rights Systems*, 14 HARV. HUM. RTS. J. 33, 41-53 (2001).

37 *See* Scafidi, *supra* note 6, at 819; and Long, *supra*, note 14.

38 *See* BERLO, *supra* note 4, at 198.

PART II: LEGAL PROTECTION OF SACRED TRADITIONAL KNOWLEDGE

Are Traditional Knowledge and Intellectual Property Commensurable?

Traditional knowledge and intellectual property seem irreconcilable,[39] and this has prompted several authors to ask for *sui generis* protection.[40] In this paper, we will not address the wisdom or feasibility of *sui generis* protection, but look at the current legal framework and possible adaptation thereof to the needs of sacred traditional knowledge holders. With respect to tangible property, aboriginal people have property rights that can be transferred and used like most other rights. The fact that these rights may be communal in nature is not a major impediment to the application of the "Western" legal systems. Clearly, intellectual property rights, in particular copyright, may be used to protect several forms of commercial intangible traditional knowledge. If an object is commercial in nature, the fact that its author comes from aboriginal nation is not a compelling reason to extend copyright protection beyond what is offered to non-native authors. There may be specific difficulties in the case of aboriginal authorship, however, such as showing who the actual, individual author is especially in the case of folklore and works derived from there. Aboriginal peoples are often at a disadvantage because much of their traditional knowledge, almost by definition, has been around for decades (or centuries) and, therefore, can only benefit from intellectual property if and when an original "version" (derivative work) is produced. Even then, the protection is rather thin because the underlying "work" is in the public domain.

---

[39] As Susan Scafidi put it: "Intellectual property protects the new and innovative; cultural property protects the old and venerated. Cultural products derive from ongoing expression and development of community symbols and practices, and are thus neither new nor old, but in a sense both. Any extension of intellectual property law to cultural products must take into account the singular configuration of this category of intangible property." *Id.* at 814.

[40] *See Elements Of A Sui Generis System for the Protection of Traditional Knowledge*, WIPO document WIPO/GRTKF/IC/3/8 of March 29, 2002; *see also* Michael Halewood, *Indigenous and Local Knowledge in International law: A Preface to Sui Generis Intellectual Property Protection,* 44 MCGILL L.J. 953 (1999); Erica-Irene Daes, *Intellectual Property And Indigenous Peoples*, 95 AM. SOC. INT'L L. PROC. 143, 146 (2001); and Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 25-27 (2001).

Two additional remarks should be made at this juncture in our analysis. First, the fact that intellectual property rights generally are initially owned by the originator (of the work, invention or other subject matter) is not a fundamental obstacle. A least some aboriginal nations fully recognize individual "ownership." In their well-known book on legal ethnology *The Cheyenne Way,*[41] Karl Llewellyn and Adamson Hoebel give numerous examples of individual ownership of certain tangibles among the Cheyenne, such as horses, killed buffalos, and war loot.[42] The exclusivity of the right was greatly "tempered," however, by an obligation to be beneficent, which took the form of complex rules regarding gifts.[43] Second, as Lllewellyn and Hoebel noted, "no highly developed regime of incorporeal property in names, songs, and the like, appeared."[44] It seems that, in such a case, "ownership" fell on the default rule, which seemed to have been communal rather than individual property. In the case of the Cheyenne, there is no obvious aboriginal tradition, custom or law that would play the role of what is generally referred to as "intellectual property."

Other Forms of Protection of Sacred Traditional Knowledge

A specific form of protection for tangible traditional knowledge in the United States is contained in the Indian Arts and Crafts Act (IACA).[45] The Act provides *inter alia* for the issuance of certification marks through the Indian Arts and Crafts Board.[46] The Act was referred to as a "paper tiger,"[47] since no prosecution has been attempted until 1998, and no conviction has yet been secured.[48] This has been blamed in part at least

41 *See infra* note 101 and accompanying text.

42 *See id.* at 232-34.

43 *Id.* at 235.

44 *Id.* at 237.

45 Of Aug. 27, 1935, ch. 748 § 1, 49 Stat. 891 (codified as amended at 25 U.S.C. § 305 (1994)).

46 *Id.* § 305(a)(3).

47 *See* Leonard D. Duboff , *Protecting Native American Cultures*, 53-NOV OR. ST. B. BULL. 9, 14.

48 *See* Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 51 (1997); *see also* William J. Hapiuk, Jr., *Of Kitsch And Kachinas: A Critical Analysis Of The Indian Arts And Crafts Act Of 1990,* 53 STAN. L. REV. 1009, 1037-8 (2001); Jon Keith Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 497-509 (1993).

on the failure to adopt implementing regulations in a timely manner.[49]

The Federal Trade Commission has also ruled on several occasions that the word "Indian" could not be used in a way that could mislead the public.[50] Section 43(a) of the Lanham Act[51] may also offer a relevant cause of action.[52] While these forms of protection apply indiscriminately to commercial and sacred tangible traditional knowledge, they may also apply indirectly to certain types of sacred intangible commercial traditional knowledge. IACA in particular has been referred to as a new intellectual property right.[53]

The exploitation of sacred objects and intangible knowledge poses different problems. Aboriginal peoples wishing to use available legal means, including intellectual property, to prevent the use of sacred traditional knowledge are likely concerned less about financial compensation then about desacralizing (uses that, based on the customs of the people concerned, would be considered "sacrilegious") such knowledge. The focus, therefore, is not as much on a financial, incentive-based view of intellectual property, but on the preservation of cultural and spiritual dignity. Sacred traditional knowledge may be manipulated by people of different cultures without the requisite knowledge that such knowledge is sacred or that its use its sacrilegious. In other words, it may be manipulated "without the full perspective of the culture in which it is rooted and from which it derives its meaning."[54] Such a use may thus be perceived quite differently by the community from which it originates versus a non-community user. In many cases, the user simply does not know that the object (or practice, etc.) is sacred. Therefore, the object "takes on the external social characteristics of (ordinary) property."[55]

---

49 Regulations were promulgated in late 1996. *See* William J. Hapiuk, Jr., *supra* note 48 at 1036-7; and Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111, 136.

50 *See* David J. Stephenson Jr., *The Nexus Between Intellectual Property Piracy, International Law, The Internet, and Cultural Values*, 14 ST. THOMAS L. REV. 315, 330-1 (2001).

51 15 U.S.C. § 1127 (1994).

52 *See* Guest, *supra* note 49 at 130.

53 *See* Stephenson Jr, *supra* note 49 at 329, referring to GAIL K. SHEFFIELD, THE ARBITRARY INDIAN, THE INDIAN ARTS & CRAFTS ACT OF 1990, 137 (1997).

54 Stephenson, Jr., *supra* note 50 at 324.

55 *See* Scafidi, *supra* note 6 at 810-1.

Protection of Sacred Traditional Knowledge in International Instruments

There are several relevant international instruments tending to confirm the view that indigenous peoples should have some legal control over the exploitation of their traditional knowledge when such knowledge has special cultural significance.[56] Article 7(1) of the International Labor Organization's Revised Convention of 1989[57] recognizes the right of indigenous peoples to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

The United Nations draft Declaration on the Rights of Indigenous Peoples[58] is perhaps the most relevant international document in this area. Still in draft form, its Article 29 currently reads as follows:

> "Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts."[59]

---

[56] *See* Stephenson Jr, *supra* note 50 at 324-8. This paper focuses on instruments most directly relevant for sacred traditional knowledge holders. A more complete inventory of international instruments, especially with respect to patent and patent-like protection, is contained in Michael Halewood, *Indigenous and Local Knowledge in International law: A Preface to Sui Generis Intellectual Property Protection, supra* note 40. The impact of current WTO negotiations is analyzed in Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 250 (2001).

[57] C169 Indigenous and Tribal Peoples Convention, 1989. It came into force on Sept. 5, 1991. *See* http://ilolex.ilo.ch:1567/scripts/convde.pl?C169 (last visited April 3, 2002). This Convention revised Convention 107 of 1957 and was ratified by Convention No. 169, which revised Convention No. 107, has been ratified by 13 countries: Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay and Peru.

[58] E/CN.4/Sub.2/1993/29/Annex I of Aug. 23, 1993 *available at* http://www.cwis.org/fwdp/drft9329.html.

[59] *Id. See* Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U.J. INT'L L. & POL. 291, 305-6 (2000).

Who Can Consent to the Use of Sacred Traditional Knowledge?

Assuming for the moment that use of a particular manifestation of sacred intangible traditional knowledge requires an authorization; who can consent to use? Any discussion of a potential right, intellectual property or otherwise, in traditional knowledge inevitably leads one to ask: who is the appropriate rights-holder? An interesting question about the Bell Canada advertisement described in the introduction[60] is- whether the dancer (assuming he did consent to the use of his image) could in fact validly give such consent? Is there a clash between the "Western," Lockean-based tradition,[61] which clearly would recognize the right of an individual (because he is the originator and hence the one who should be rewarded) to give such consent, and traditional aboriginal customs, which may not? This clash may also reflect a cultural divide sometimes attributed to the religious Judeo-Christian foundations of Western society, because[62] the role and concept of the "community" is seen in a very different light in most indigenous cultures when compared to its use in the dominant "Western" culture, where it tends to be overused and has perhaps become meaning-

---

60 *See supra* note 2 and accompanying text.

61 *See* Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE, 16 (Martha Woodmansee & Peter Jaszi eds., 1994); *see also* Scafidi, *supra* note 6 at 803-4.

62 *See* Rebecca Tsosie, *Tribal Environmental Policy In An Era Of Self-Determination: The Role Of Ethics, Economics, And Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996):

> The alienation expressed in Christianity had a counterpart in the European cultural world view that placed paramount value on individual endeavor and inspired a 'spiritual and intellectual alienation' from the body 'as well as from nature.' This intellectual alienation became 'the galvanizing force for the celebration of the individual in a variety of endeavors: scientific thought, philosophy, and religion.' The celebration of individual enterprise became particularly apparent during the Industrial Revolution when progress, machination, labor, cultivation, and civilization were identified as human 'goods' and the state of nature as an 'evil.' In the New World, this European perception of alienation was transposed onto Native American peoples and used as a justification for dispossessing Indian nations of their lands.

(quoting J. BAIRD CALLICOTT, IN DEFENSE OF THE LAND ETHIC: ESSAYS IN ENVIRONMENTAL PHILOSOPHY 182 (1989); Williamson B.C. Chang, *The 'Wasteland' in the Western Exploitation of 'Race' and the Environment*, 63 U. COLO. L. REV. 849, 854 (1992); and Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious*?, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES, (Austin Sarat and Thomas R. Kerans eds., 1996)); *see also infra* note 85 and accompanying text.

less.[63] In several North American aboriginal cultures, a community is not an accidental amalgamation (or categorization) of individuals, but rather lies at the core of human existence.[64] With such high importance it necessarily has a direct impact on indigenous laws, customs and practices.

The Australian case of Yumbulul v. Reserve Bank of Australia[65] offers an interesting example. The plaintiff, an aboriginal artist, filed suit against the Reserve Bank of Australia because it had used one of his sculptures on a ten dollar note. The sculpture, a morning star pole, is used in ceremonies commemorating the death of important members of the clan.[66] The plaintiff had a valid copyright on the sculpture and had licensed its use to the Reserve Bank, but nonetheless later claimed he did not have the authority to grant the license because, according to customary laws of the Galpu people, it had to come from the elders.[67] He also claimed that the

---

63 *See* Siegfried Wiessner, *Defending Indigenous Peoples' Heritage: An Introduction*, 14 ST. THOMAS L. REV. 271 (2001) ("The indigenous view of the world, generally speaking, is the antithesis to the Western paradigm: communitarian, not individual, focused on sharing rather than shielding things, respect for land and all living things as sacred rather than as objects ripe for exploitation and consumption.") In fact, the concept of an "individual" is also culturally determined. *See* Linda Ross Meyer, *Unruly Rights*, CARDOZO L. REV. 1, 10 (2000) ("self is itself a concept, which, like all concepts, is a product of social understandings, not something that exists apart from or before the social."); *see also* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY, 11-12 (Harvard UP, 1992).

64 *See* John W. Ragsdale, *Some Philosophical, Political And Legal Implications Of American Archaeological And Anthropological Theory*, 70 UMKC L. REV. 1, 25-7 (2001):

> At the most foundational level, it has long been observed that virtually all the tribes have demonstrated a sacred communal relationship with their traditional land bases, with particularized tenure held by usage only and with reversionary rights in the group. Though commonality with respect to land and resources has led to overuse and destruction among the competitive, individualistic non-Indian societies, it has tended to foster—or accord with—the primacy of tribal identity over personal preference among Indians and the Indian belief in the non-comodification of land. Commonality may also relate to the Indian communities' demonstrable tendencies toward internal generosity and cooperation instead of self-serving individualistic competition, material accumulation, and capitalization of wealth and resources. This centrality of internal sharing and redistribution is historically linked to the pervasive and foundational egalitarianism. . ..

65 21 I.P.R. 481, Austl. (1991).

66 *See* Michael Blakeney, *Protecting Expressions of Australian Aboriginal Folklore Under Copyright Law*, 17 EUR. INTELL. PROP. REV. 442, 442-3 (1995).

67 See Monroe Price & Aimee Brown Price, *Custom, Currency, and Copyright: Aboriginal Art and the $10 Note*, CARDOZO LIFE 19, 21-22 (Fall 1996).

license was unconscionable and that he had been fraudulently induced into signing it.[68] The case was settled out of court.[69]

NAGPRA[70] offers another example. In defining the expression "cultural patrimony," the Act seems to recognize a form of collective ownership:

> . . . An object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.[71]

"Communal" or collective property of rights in sacred traditional knowledge may be an answer to some of the questions posed above, but can it be applied to intellectual property rights or only to those specific statutory right that allow this kind of ownership?

Communal Intellectual Property

Communal authorship of copyright and patents does not seem to conform to existing concurrent ownership methods. However, there also are no compelling policy reasons to exclude it, unless we find the only possible economic philosophy and, therefore, interpretation of intellectual property laws and the underlying constitutional clause is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."[72] Even then, this aim may be achieved by a community-based ownership, which in turn ensures that individual creativity is compensated.[73] But before discussing whether communal intellectual property is possible or desirable, more common forms of intellec-

---

68 *See* Farley, *supra* note 48, 31-2.

69 *See* Colin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights,* 14 EUR. INTELL. PROP. REV. 227, 299 (1992).

70 *See supra* note 15.

71 *See supra* notes 15-16 and accompanying text.

72 Mazer v. Stein, 347 U.S. 201, 219 (1954). *See infra* the section entitled "Collective property."

73 The model of collective management of copyrights, where at least part of the distribution of funds is based on decisions made by the Board on behalf of member authors, comes to mind in this respect. *See* MICHÁLY FISCOR, COLLECTIVE ADMINISTRATION OF COPYRIGHT AND NEIGHBOR RIGHTS, 80-82 (Geneva: WIPO, 1990).

tual property ownership could possibly apply, such as joint authorship, rights transfers or even the work-for-hire doctrine.

Current Forms of Multiple Ownership

Joint authorship is generally inapplicable because rarely would the entire community qualify as the author of a unique, "versioned" derivative copyrighted work, because joint authorship requires collaboration on the work and an intent to merge the contributions of each author into "inseparable or interdependent parts of a unitary whole."[74] At best, the community is the source of "inspiration" for the traditional knowledge that underpins the creation of the work. An author cannot be joint author with her ancestors, because the intent to merge the contributions must be present at the time the contribution is made.[75]

Alternatively, rights of individual authors could be transferred to the "community" especially if the community created a corporate or similar structure to administer its rights. Several national laws require that such an assignment be in writing.[76] Moreover, this seems to run contrary to aboriginal customs where the clan or nation *is* the initial (communal) owner of rights. Rights transfers are thus a way to superimpose a mechanism that circumvents the problem rather than addressing it directly.

The work-for-hire doctrine[77] seems similarly inapplicable. An aboriginal author is not an employee of his people; and the community rarely if ever specially orders or commissions a work "for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[78]

---

74 Copyright Act, 17 U.S.C. § 201 (1976). Joint ownership of intellectual property causes several practical problems and "should be avoided." Carey R. Ramos & Joseph P. Verdon, *Joint Ownership of Intellectual Property: Pitfalls, Alternatives, and Contractual Solutions*, 559 PLI/Pat 17, 26 (1999).

75 *See* Christine Haight Farley, *supra* note 68 at 33-34.

76 Canadian Copyright Act, R.S.C., Chap. C-42; § 13(4) (1985) (Can.); Australian Copyright Act, § 196(3) (1968) (Austl.).

77 Copyright Act, 17 U.S.C. § 201(b) (1976); *see* Canadian Copyright Act, R.S.C., § 13(3) (1985) (Can.) (applies to works created "under a contract of service or apprenticeship.").

78 Copyright Act, 17 U.S.C. § 101 (1976).

Collective property

The concept of "collective property" is recognized, *inter alia*, in the Universal Declaration of Human Rights, Article 17(1) which states that "Everyone has the right to own property alone as well as in association with others."[79] Article 13(1) of ILO Convention 169[80] also recognizes a form of collective ownership.[81] NAGPRA[82] recognizes that there are certain "cultural" objects that cannot be alienated by individual members of an indigenous people[83] and there are, therefore, forms of traditional knowledge[84] that belong to the "collective." It is also clear that collective property is the norm in several indigenous cultures.[85] The "individualistic" model[86] clashes with the needs and concerns of those who are intent on preserving the integrity of their sacred traditional knowledge.[87] Convincing pleas for collective ownership of intellectual property in intangible traditional knowledge have been offered, in-

---

79 G.A. Res. 217A, U.N. Doc. A/810 (1948).

80 *See supra* note 57.

81 "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

82 *See supra* note 15.

83 *See supra* note 71 and accompanying text.

84 We assume that the sacred objects and other forms of property covered by NAGPRA would fall under our definition of traditional knowledge. *See supra* note 26 and accompanying text.

85 *See* WIPO Report, *supra* note 27 at 219-20 ("Generally speaking, the collectivity of creation and ownership of TK poses challenges for the IP system and the testing of options for the collective acquisition, management and enforcement of IPRs by TK holders' associations is desirable. Further study could include the possible applicability of collective management of IPRs to TK."); *see also* Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA.L. REV. 691, 697 (1993); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURIS. 217, 218 (1991).

86 *See* Riley, *supra* note 12 at 203:

> In the Western world, if groups are addressed at all, it is only as a conglomerate of individuals, each with a distinct, particularized identity. Society itself is understood as the result of a compact occurring among independent individuals and the state. This individual-based system is foreign to Native peoples. They understand their place in the world as that of a people born into a network of group relations, and whose rights and duties in the community arise from, and exist entirely within, the context of the group. For these groups, one's clan, kinship, and family identities make up personal identity. The individual sees his/her rights and responsibilities as arising exclusively within the framework of such familial, social, and tribal networks.

87 *See* Herz, *supra* note 84.

cluding a proposal for an Indian Copyright Act."[88] As Benjamin Kaplan pointed out, even among non-indigenous peoples, collective or team creation is increasingly important.[89]

In light of the above analysis, there is no policy or legal impediment to the recognition of some form of collective or communal ownership of a property right or interest in sacred intangible traditional knowledge, using either collective management of copyright[90] or collective marks[91] as a possible model. But what kind of intellectual property rights might apply?

Is Sacred Traditional Knowledge Intellectual Property?

Before determining whether intellectual property rights apply to traditional knowledge, we must first ask, what is intellectual property? It is usually defined as a list of statutory rights, with some additional protection under contract[92] or tort law.[93] A good example is afforded by Article 2 of the Convention Establishing the World Intellectual property Organization,[94] which reads as follows:

> (viii) "intellectual property" shall include the rights relating to:
> — literary, artistic and scientific works,
> — performances of performing artists, phonograms, and broadcasts,

---

88 Riley, *supra* note 11 at 215-216:

> A group approach to intangible property is essential in protecting the works and, in fact, the very survival of indigenous groups. Recognition of group rights to property would give Native Americans control over cultural patrimony, allowing them, as groups, to diminish the destruction of Native culture and sacred objects . . . The communal approach to entitlements in cultural property will not only preserve group property generally, but it will secure the work in the cultural context from which it arose, ensuring that the creation endures through time to be enjoyed by individuals whose identity is inextricably bound to the cultural work.

89 BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, 117 (1967).

90 *See supra* note 73.

91 *See* 15 U.S.C. § 1054; *see also* Richard Guest, *Intellectual Property Rights And Native American Tribes*, 20 AM. INDIAN L. REV. 111, 129 (1996); Mark Hannig, *An Examination of the Possibility to Secure Intellectual Property Rights for Plant Genetic Resources Developed by Indigenous Peoples of the NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties*, 13 ARIZ. J. OF INT'L AND COMP. L. 175, 204-5 (1996).

92 E.g., confidential information protected by non-disclosure and other similar agreements.

93 E.g., certain forms of unfair competition, palming off or passing off which may not have been codified.

94 21 U.S.T. 1770 (July 14, 1967); 828 U.N.T.S. 3 (last amended Sept. 28, 1979).

— inventions in all fields of human endeavor,
— scientific discoveries,
— industrial designs,
— trademarks, service marks, and commercial names and designations,
— protection against unfair competition,
— and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.[95]

Another "definition" is contained in the United States Constitution, probably the only document of its kind to define (a) the object ("Writings and Discoveries") ; (b) method of protection of intellectual property ("by securing for limited times to authors and inventors the exclusive right. . ."); and (c) purpose ("to promote the progress of science and useful arts") of certain forms of intellectual property.[96] Against this backdrop, why would intangible traditional knowledge not qualify as something that "promotes the progress of science or useful arts."[97] It is even more difficult to say, as does the WIPO Convention, that traditional knowledge does not "result. . . from intellectual activity in the industrial, scientific, literary or artistic fields."[98] Yet, traditional knowledge does not fit well within the usual parameters of intellectual property rights, namely:[99]

— An identifiable author, inventor or other originator (who will be individually rewarded);
— An identifiable work, invention or other object; and
— Defined restricted acts.[100]

But are these characteristics historical accidents or truly the essential elements of what we call intellectual property? Put differently, which characteristics of intellectual property rights (IPRs)

---

95 *Id.* Text of the Convention *available at* http://www.wipo.int/members/convention/index.html [hereinafter "WIPO Convention"].

96 U.S. CONST. art. I, § 8, cl. 8. Certain forms of intellectual property (e.g., trade-marks) have a different constitutional basis, namely the Commerce Clause, which is often invoked as a back up by Congress even in copyright and patent matters.

97 A related debate is why art from Native North American artists is often found not in art museums, but rather in natural history or anthropological/ethnological museums.

98 *See supra* note 95 and accompanying text.

99 Duration is not. While the Constitutional text seems to prescribe a limited duration for copyrights and patents, other intellectual property rights, in particular confidential information and trademarks, can be protected indefinitely. The issue of excessive duration in light of the constitutional limitations is now before the Supreme Court in *Eldred v. Reno*, 239 F.3d 372 (DC Cir. 2001), *cert. granted* 122 S.Ct 1062 (2002).

100 Defined here as acts that require the authorization of the rightsholder unless a statutory exception applies.

are part of the very essence of intellectual property which result from an unfinished process of evolution? If all or some of these characteristics are not essential components of IPRs, contemplating changes and adaptations to the intellectual property regime to render it more neutral (from an ethnocentric perspective) is possible. From a policy-setting angle, the question is, how far can the intellectual property system be extended to the needs of indigenous peoples (in an effort toward cultural relativism), without endangering the foundations of the system itself?[101] While there may be rational justifications for the law, the way laws are instituted and interpreted in any given spatial and temporal context is clearly linked to the dominant cultures' beliefs and social mores.[102] Law and legal ideologies are a facet of culture,[103] especially if culture is

---

101 The work of Karl Llewellyn is relevant in this context. Perhaps in fact adapting the system to meet the needs of indigenous peoples will lead to improvements available to all, as Llewellyn suggested with respect to dispute settlement in his seminal book *The Cheyenne Way* (*see supra* note 1). For a recent account of the impact of Llewellyn's thinking, see Ajay K. Methrotra, *Law and the 'Other': Karl L. Llewellyn, Cultural Anthropology, and the Legacy of the Cheyenne Way*, 26 LAW & SOC. INQUIRY 741, 762-70 (2001). We could also quote from Professor Ragsdale's work in this area:

> Personal values—beliefs, visions, world views, and cosmologies—are the building blocks of consensus which, in turn, underlies the politics, the customary restraints, and the codified law. The origins of law, even the supposedly non-political decisional law of judicial opinions, are rarely neutral, since they flow from multi-faceted feelings and passions. Moreover, in the long-term sense, there must generally be an ongoing union between the personal values and beliefs of an effective majority of the polity and the law for the precepts to survive.

John W. Ragsdale, *Some Philosophical, Political And Legal Implications Of American Archaeological And Anthropological Theory*, *supra* note 64 at 3.

102 *See* RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 2, 3 and 20 (Oxford UP, 1996) (defending the thesis that law cannot be analyzed out of its broader context. This approach has led to the call for cosmopolitan jurisprudence and legal studies); *see also* WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 254 (Butterworths, 2000) (". . .general jurisprudence is broader and more intellectually ambitious,". . . "[it] includes all the intermediate stages between two or more legal orders, traditions, or cultures, viewing law in the whole world and beyond. 'General' is relative in a way that 'global' is not." This was also reflected in the 1947 by the American Anthropological Association's 1947 Statement that a universal bill of rights would not be possible because of the particularities of each culture. *See* AAA, Statement on Human Rights, 49 AM. ANTHROPOLOGIST 539, 542 (1947). The U.S. Bill of Rights is similarly "individualistic." *See also* John Kincaid, *The New Federalism Context Of The New Judicial Federalism,* 26 RUTGERS L.J. 913, 936 (1995) ("The nationalization of the U.S. Bill of Rights, which is necessarily individualistic rather than communitarian or majoritarian in orientation, transformed the federal government in the second half of this century into a vehicle for liberating persons from the coercion of state and local jurisdictions.").

103 *See* Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 49-50 (2000).

defined as the "interactive aggregate of common characteristics that influence a human group's response to its environment."[104] There is a risk of cultural hegemony[105] when imposing dominant cultural values, such as personal gain for individual effort.[106] This risk was the focus of the so-called Bellagio declaration, which argues that intellectual property, and copyright law especially, "unduly emphasizes the role of individuals in knowledge creation. Consequently, intellectual property laws fail to reward those knowledgeable communities and collaborators that provided the raw intellectual material that formed the true basis for the copyrighted work or patented invention."[107]

Similarly, one must be careful not to confuse cultural relativism with various economic and political movements that seek protection for certain forms of traditional knowledge, especially medicinal,[108] and reject the neoliberal exploitation of earth's resources.[109] These issues are not relevant for the purposes of this

---

104 GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES 25 (1980), quoted in Nora V. Demleitner, *Combating Legal Ethnocentrism*, 31 ARIZ. ST. L. J. 737, 739 (1999).

105 *See* ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW. (Duke UP, 1998); and ROBERT C. POST, CONSTITUTIONAL DEMOCRACY, COMMUNITY MANAGEMENT 64-67 (Harvard UP, 1995). One is reminded of Justice Jackson's words in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

106 This was invoked as the very reason for the existence of copyright in *Mazer v. Stein*, 74 S.Ct. 460, 471 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

107 Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, *supra* note 56, at 250. *See also* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (Harvard UP, 1996).

108 *See* Rosemary J. Coombe, *The Recognition Of Indigenous Peoples' And Community Traditional Knowledge In International Law*, 14 ST. THOMAS L. REV. 275, 277 (2001) ("I have been attending these and related WIPO meetings regularly as part of a multi-sectoral ethnography of international law-making practices, where I am concerned with the emergence of incipient forms of governance under neoliberal conditions.").

109 In an interesting example of the clash between the intellectual property system and the needs of indigenous peoples, patent law is used to protect the exploit of traditional medicinal knowledge by people other than the traditional keepers of such knowledge, and in some cases, patents may even prevent these peoples from seeing their own extant knowledge, a phenomenon referred to as "biopiracy." Several examples are mentioned in Miriam Latorre Quinn, *Protection For Indigenous Knowledge: An International Law Analysis*, 14 ST. THOMAS L. REV. 287, 290-1 (2001).

paper because the argument at issue is not that the neoliberal model must be discarded, but that sacred property belonging to indigenous peoples deserve as much respect as the sacred property of the dominant culture. Accordingly, within this context, this paper examines how intellectual property law may be used to achieve this objective. The risks of adapting intellectual property and in particular the expanding communal or collective ownership are minimal, especially if the absence of a coherent doctrine concerning communal and co-ownership situation is due to a (dated) consequence of the Romantic ideal[110] of authorship.[111] Applying intellectual property to traditional knowledge requires the recognition of communal ownership of the object of the right. It does not require the precise identification of the author or originator.[112] The existence of an object that could not exist but for an act of creative authorship should suffice to obtain copyright protection. A statutory amendment may be necessary (in line with NAGPRA[113] and IACA[114]) to recognize communal ownership of all applicable intellectual property rights.[115] This is not an impossible

---

110 *See* BRAD SHERMAN AND LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW, (Cambridge UP, 1999). Basing themselves on the history of copyright and patent law in the United Kingdom, the authors describe the temporary influence of French-inspired Romantic ideals on the protection of intellectual property.

111 *See* Scafidi, *supra* note 6 at 806-7; *see also* Laura G. Lape, *A Narrow View of Creative Cooperation: The Current State of Joint Work Doctrine*, 61 ALB. L. REV. 43, 51 (1997). (describing hostility towards the joint work doctrine and its subordination to the work-for-hire doctrine). The fact that the Internet allows cooperation among several "authors" who do not know one another is an example of a collective work for which copyright law is ill-equipped. *See* Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257 (1996).

112 *See* DANIEL GERVAIS, LA NOTION D'OEUVRE DANS LA CONVENTION DE BERNE ET EN DROIT COMPARE 135 (Droz 1998):

> Can we conceive of an Internet folklore? The Internet networks millions of users who participate in interactive forums that allow computer users around the world to exchange data but also parts of copyright works, including photographs and series of sounds, which are then stored and often indexed automatically on a server or a network of computers. In many cases, the resulting compilations may look like copyright material, but no identifiable author, no one, including legal persons, has true control over or responsibility for the result. Each participant can, at the time and place that he or she chooses, add whatever he or she wants. These planetary happenings resemble folklore because the creative process is similar only incredibly accelerated by this new tool. . ..

(author's translation).

113 *See supra* note 15.

114 *See supra* note 45.

115 *See supra* note 91 and accompanying text.

task as these concepts are not incommensurable.[116] In fact, several precedents exist: land title, and in the field of intellectual property certification and collective marks.[117]

The law traditionally proves reluctant to manage or direct internal affairs of a group of co-owners.[118] Why then would intellectual property law impose individual ownership of a "collective good"? Perhaps the problem lies with the concept of author and its emotional charge.[119] The point made here is not to attack anti-authorialism *a la* Foucault.[120] Rather, the point is to suggest a new authorialism not limited to the recognition and reward of individual "derivatives" of traditional knowledge — one that can also recognize appropriately communal ownership of collectively-held creativity in its myriad manifestations. At the very least, communal ownership of manifestations of sacred intangible traditional knowledge should be allowed. There is no fundamental bar to this legal recognition (consider acceptance of tribal or communal ownership of land as argued in the so-called "Indian Commerce Clause" contained in the US Constitution.)[121]

---

116 On whether certain legal traditions are in fact incommensurable, see H. Patrick Glenn's interesting essay, *Are Legal Traditions Incommensurable*, 49 AM. J. COMP. L. 133; *see generally* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (Simon & Schuster, 1996).

117 *See supra* note 91. Another example is the protection of geographical indications in the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round Vol. 31; 33 I.L.M. 1197 ("TRIPS Agreement"). Article 22(2) of TRIPS provides that "Members shall provide the legal means for interested parties to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good." The expression "interested parties" is sufficiently broad to encompass communal or group rights. *See also* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 122-28 (Sweet & Maxwell, 1998).

118 *See* Scafidi, *supra* note 6 at 798.

119 *See* SHERMAN, *supra* note 110.

120 *See* Michel Foucault, *What is an Author, in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Oren Harari ed., 1980) (His and other attempts to "abolish the author" seem fundamentally misguided and philosophically untenable. *See also* SEAN BURKE. THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT, AND DERRIDA (Edinburgh UP, 1992).

121 U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). *See* Angela Riley, *supra* note 11 at 205-6. ([The Constitution] "verifies the philosophical underpinnings of a group-rights model in two ways first, by demonstrating that Indian nations are quasi-sovereigns, who exist separate and distinct from the majority state; and second, by recognizing that Congress' power to regulate trade extends not to individual Indians, but to Indian nations. The

This type of ownership is also recognized in several land-related treaties, such as the treaty between the Nisga'a people and the Canadian province of British Columbia,[122] and the older James Bay Agreement concerning compensation for use of rivers in Northern Quebec for hydroelectric production, but which also dealt with self-government and land use generally.[123] Interestingly, while the Nisga'a treaty gives jurisdiction over matters of culture, language, and education and allows the Nisga'a to make laws on the devolution of Nisga'a cultural property, intellectual property was carved out and remains under (Canadian) federal jurisdiction.[124] An argument may also be made that the state has a fiduciary duty to protect the indigenous peoples it conquered. In the United States, the basis would be the doctrine of trust responsibility,[125] and in Canada, the common law, which "recognizes that aboriginal title is collective and inheres in the group, with individual use determined internally by the group according to its traditional land use system."[126]

There is also empirical evidence that it is possible to adopt a collective intellectual property system because a number of countries have done so, apparently successfully. For example, Article 84(8) of the 1998 Ecuadorian Constitution specifically requires that "collective intellectual property" be protected .[127] Article 2 of the Panamanian Law Concerning the Special System for Registering the Collective Rights of Indigenous Peoples, for the Protection and

---

Constitution itself manifests the group-rights approach the United States would take in Indian relations, and confirms that the majority government has and must continue to deal with native peoples' communal existence.").

122 *See* Douglas Sanders, *We Intend to Live Here Forever: A Primer on the Nisga'a Treaty*, 33 U.B.C. L. REV. 103 (1999); *see also* Robert K. Paterson, *Claiming Possession Of The Material Cultural Property Of Indigenous Peoples*, 16 CONN. J. INT'L L. 283, 293 (2001).

123 *See* James Bay and Northern Quebec Claims Settlement Act, S.C. 1975, ch. 32; *see also* An Act Approving the Agreement Concerning James Bay and Northern Quebec, S.Q. 1976, ch. 46 (Can.).

124 *See* Sanders, *supra* note 121.

125 *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495 (1994) ("Reduced to its essence, the doctrine is a creature of the judiciary and is used to harness actions taken by the other two branches of government, and as a basis for compensating wrongs committed by those branches against the Indian people.").

126 *See* Anaya, *infra* note 127 at 65; *see also Guérin v. Canada*, [1984] S.C.R. 335.

127 *See* James Anaya and Robert A. Williams, Jr. *The Protection Of Indigenous Peoples' Rights Over Lands And Natural Resources Under The Inter-American Human Rights Systems*, 14 HARV. HUM. RTS. J. 33, 62-63 (2001). The relevant parts of Article 84 are as follows:

Defense of Their Cultural Identity and Traditional Knowledge, and Setting Out Other Provisions provides very road protection of traditional knowledge of indigenous peoples, including "beliefs, spirituality, religion [and] cosmic view."[128] A similar protection also exists in several other Latin American countries, namely Bolivia,[129] Brazil,[130] Chile[131], Colombia,[132] Mexico[133] and Nicaragua.[134]

PART III: CONSTITUTIONAL ARGUMENTS IN CANADA

Canada may be in a unique position when it comes to applying (and respecting) customary laws in the nature of communal property rights over traditional knowledge. Section 35(1) of the Canadian Constitution[135] reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court of Canada has interpreted this

---

Art. 84. "The State shall recognize and guarantee the following *collective rights* to indigenous peoples, in conformity with this Constitution and the law, and respecting public policy and human rights:

1. To maintain, develop and enhance their identity and traditions in matters of *spirituality*, culture, language, as well as social, economic and political matters;

6. To keep and develop their methods of management of biodiversity and the environment;

8. To the *collective intellectual property* in their ancestral knowledge, and to their exploitation, use and development in conformity with the law;

12. To their traditional medicinal systems, knowledge and practices, *including the right to protect sacred rituals and places*, as well as plants, animals, minerals, ecosystems of vital importance from the point of view of traditional medicine;" (author's translation; emphasis added).

128 Act No. 20 of June 26th day, 2000 (*Gaceta Oficial* (Official Gazette) No. 24,083 of June 27, 2000). Article 2 reads as follows: "The customs, t*raditions, beliefs, spirituality, religion, cosmic view, folkloric* expressions, artistic manifestations, traditional knowledge and all other traditional forms of expression of indigenous peoples are part of their cultural heritage; they can therefore not be the object of exclusive rights of any kind on the part of third parties that have not been authorized via the intellectual property system, such as royalties, industrial designs, brands, geographical indications and other indications, unless expressly requested by the indigenous peoples. [. . .]." (unofficial translation on file with author).

129 *See id.* at 59.

130 *Id.* at 60.

131 *Id.* at 60-61.

132 *Id.* at 61-62.

133 *Id.* at 63.

134 *Id.* at 64.

135 Constitution Act, 1982.

constitutional provision fairly broadly. In R. v. Adams,[136] Chief Justice Lamer wrote:

The purpose of the entrenchment of §35(1) was to extend constitutional protection to societies prior to contact with Europeans. If the exercise of such practices, customs and traditions effectively continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification test. . . The fact that a particular practice, custom or tradition continued following the arrival of Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which received the legal approval of British and French colonizers."[137]

In this dispute which concerned fishing rights, the Court held that claims to land were simply one manifestation of a broader-based conception of aboriginal rights. Further, that where an aboriginal group had shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then under §35 that group has an aboriginal right to engage in that practice, custom or tradition.[138] This case gives a broad enough definition of aboriginal rights to cover traditions and customs concerning sacred objects and intangibles. This conclusion is reinforced by the conclusions reached by the same court in R. v. Van der Peet,[139] in which the Supreme Court defined "aboriginal right" as including "elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[140] Other practices that were found to be protected under §35(1) include games and gambling,[141] hunting,[142] and

---

136 3 S.C.R. 101, Can. (1996).

137 *Id.*, at note 33.

138 *See id.* The Court rejected a conviction for violation of fisheries regulations in a parallel case, *R. v. Côté*, 3 S.C.R. 139, Can., (1996).

139 2 S.C.R. 507, Can. (1996).

140 *Id.*, at note 46.

141 *See R. v. Nelson*, 180 D.L.R. 4th 186 (Man. C.A., 1999), leave to appeal refused [1999] S.C.C.A. No. 541; *contra R. v. Jim*, [1996] 3 W.W.R. 30 (B.C.C.A.); leave to appeal refused, [1996] S.C.C.A. No. 14.

142 *See R. v. Dick*, [1993] 5 W.W.R. 446 (B.C.C.A.).

exchange, trade and barter.[143] In a case involving the use of tobacco,[144] the Nova Scotia Court of Appeal drew a distinction between use of tobacco for trading purposes, for which no aboriginal practice (and, consequently, no §35 right) could be established, and use of tobacco for spiritual or ceremonial purposes, for which the provincial regulation did not apply because it was barred by §35.[145] The Court showed great deference towards a sacred practice as opposed to mere "commerce." In another relevant case, the Supreme Court clearly stated that to be protected a practice had to be covered by rights existing in 1982 (or later), *i.e.*, it is unprotected under §35 if extinguished by regulations in force on or before that date.[146] However, the Court also noted that an aboriginal right was not extinguished merely by its being controlled in great detail by such regulations[147] and, further, that the test of extinguishment to be adopted was that the Sovereign's intention had to be clear and plain to extinguish an aboriginal right.[148] Logically, the Crown has the onus to show extinguishment. Intellectual property statutes in Canada generally do not deal with aboriginal customs and practices. Certain treaties only reserve the subject matter, but that seems far from a clear and plain intention to extinguish an aboriginal right.[149] One could conclude that Parliament has failed to expressly extinguish such rights. There seems to be no bar to a claim that customary rights concerning sacred traditional knowledge were not extinguished and can only be regulated by the Canadian Parliament to an extent compatible with §35(1). Given the fact that Canadian courts tend to rely on aboriginal peoples to determine what these practices are and the deference shown in a case involving a sacred practice,[150] it is reasonable to conclude that a court would find that §35(1) covers several forms of sacred traditional knowledge.

The next question is, what right would that provide for members of aboriginal nations in Canada? If a property or other use control right was indeed shown to have existed (and the govern-

143 *See R. v. Smokehouse*, [1996] 2 S.C.R. 672; and *R. v. Gladstone*, [1996] 2 S.C.R. 723.

144 *R. v. Murdock and Johnson,* [1997] 2 C.N.L.R. 103 (N.S.C.A.).

145 See *id.* at ¶1(c) ("the Mi'Kmaq are unrestricted in their ability to gather wild tobacco or grow their own tobacco for spiritual, ceremonial, and cultural practices.").

146 R. v. Sparrow, 1 S.C.R. 1075 (1990).

147 *See id.*, at ¶36.

148 *See id.*, at ¶37.

149 *See id.*

150 *See supra* note 145 and accompanying text.

ment failed to prove its extinguishment prior to 1982), then constitutionally the Canadian legal system could not simply abrogate this right. As a consequence, if free use of the sacred intangible concerned was not authorized under aboriginal practices and customs, courts would have a duty not to apply any inconsistent federal or provincial legislation and perhaps even to impose an appropriate remedy. The question whether existing intellectual property laws are in keeping with §35 can take a number of practical forms, including: whether laws that are consistent with existing intellectual property laws cannot grant communal rights compatible with §35; and, are such laws that allow sacred aboriginal intangibles to become part of the public domain compatible with §35?

A similar set of questions and governmental obligations could perhaps be said to exist under the government's fiduciary duty towards aboriginal peoples of Canada, though if such such obligations exist, they would not be constitutionally entrenched.[151] Canada may thus have to face interesting challenges §35, from aboriginal peoples asserting rights in the nature of intellectual property in their intangible traditional knowledge.

CONCLUSION

Aboriginal peoples in North America and elsewhere around the world possess a vast amount of what is now generally referred to as "traditional knowledge," including medicinal knowledge and folklore. Over the past few years, a significant amount of scholarly work, including major reports and meetings under the aegis of the World Intellectual Property Organization, have dealt with the protection of such knowledge and its relationship with intellectual property. However, the subset of "traditional knowledge" consisting of sacred intangible knowledge has been the subject of less attention, in part because it is often less commercially compelling.

This article has offered a definition of what constitutes sacred traditional knowledge. In examining the relationship between sacred traditional knowledge and intellectual property, it had to be determined who an appropriate rights-holder might be. Usual models of joint ownership and work-for-hire do not easily apply in this context. This article suggested a model based on collective or "communal" authorship, which already exists in trademark law and related fields. The question then turns to whether intellectual

151 *See supra* note 126 and accompanying text.

property rights could apply and it was found that existing rights could protect at least certain newer versions of sacred traditional knowledge. Other forms of statutory protection were examined that may apply to certain forms of sacred traditional knowledge in the United States.

Finally, a legal theory applicable to the Canadian situation based on the recognition of aboriginal rights in the Constitution that may justify a government obligation to protect, *inter alia*, sacred traditional knowledge was offered.