

**MODERN AGE PROTECTION: PROTECTING
INDIGENOUS KNOWLEDGE THROUGH
INTELLECTUAL PROPERTY LAW**

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ABSTRACT

Protecting Indigenous knowledge and culture has long been a concern both within and outside of the legal community. In the last decade an increased awareness and attempt to protect the rights and dignity of Indigenous innovation, knowledge, and culture has spread to the realm of intellectual property law. Efforts have been made to protect folklore and art through copyright law, insignia through trademark law, and biotechnology and genetic resources through patent law. This paper addresses the foundations of individual national laws aiming at protecting Indigenous culture through intellectual property law as well as the current draft of international law by the World Intellectual Property Organization (WIPO). Part II explains the background concept of sui generis intellectual property law and how Indigenous' protections evolved to fall under the umbrella of Intellectual Property law. Part III analyzes intellectual property laws of five independent nations that have taken steps through intellectual property to protect the knowledge and culture of their Indigenous populations and questions whether these individual laws are adequate or whether international protections would be more beneficial. Part IV will introduce and outline the basic concepts and theories behind the WIPO draft attempting to create an international declaration protecting Indigenous Knowledge through intellectual property law. Part IV also includes a discussion of the ongoing debate over the arrangement of the final draft of the declaration. Finally, in Part V, this essay suggests recommendations for the final WIPO declaration and reflects on the proper course of action to most securely implement these new intellectual property laws in a way that will most fully protect Indigenous knowledge and culture.

INTRODUCTION, TO A MODERN AGE

Stereotypically, Indigenous peoples are stuck in an ancient world with very little recognition in modern times. Although Indigenous practices and ideas may seem antiquated to a majority of the international population, Indigenous peoples have recently been recognized among several nations as having rights in intellectual property law.¹ The international community has responded and the World Intellectual Property Organization (WIPO) is currently in the process of drafting international regulations to protect Indigenous traditional cultural expression, traditional knowledge, and

1. See *infra* pp. 15-27 (discussing the intellectual property protections of Australia, New Zealand, South Africa, Canada, and the United States).

genetic resources.² Ancient peoples are moving forward in the modern age, adapting current legal trends to protect their rights alongside their national counterparts, and to protect from overzealous misappropriation of Indigenous culture by those hoping to make a profit. Although national recognition is a good beginning to Indigenous intellectual property protection, only binding international regulations will grant Indigenous people equal treatment for full protection of their intellectual property.

I. BACKGROUND: DEVELOPMENT OF DOMESTIC, SUI GENERIS, AND INTERNATIONAL INTELLECTUAL PROPERTY LAW PROTECTION

A. United States Intellectual Property Forms and Definitions

Intellectual property law in the United States has been recognized for several hundred years, but it is still a rather modern phenomenon, having become a common colloquial phrase in the late twentieth century.³ A burst of pervasive intellectual property law began at the forefront of the computer and bio-technology boom when scientists and innovators were apprehensive about losing control of their ideas and, as a result, the profits those ideas would bring.⁴ Intellectual property law has transitioned over the years to become what copyright, patent, and trademark law are in the United States (and around the world) today. For the purpose of this paper, the focus will remain on international intellectual property agreements and U.S. intellectual property protections for Indigenous peoples. For the most part, intellectual property protection of Indigenous traditional knowledge and cultural heritage does not conform to the Western conception of intellectual property protection.⁵ For example, traditional knowledge encompasses much more than the Western intellectual property regime, such as “beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural experience and expression” rather than Western tendencies toward protecting scientific, technological, artistic, and literary innovation through hardline tests of patent, copyright, and trademark law.⁶ Furthermore, diffusion of Indigenous traditional knowledge significantly varies from the

2. See *Intergovernmental Committee*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/tk/en/igc/index.html> (last visited May 23, 2012) [hereinafter *Intergovernmental Committee*].

3. Benjamin Coriat & Fabienne Orsi, *Establishing a New Intellectual Property Rights Regime in the United States: Origins, Content, and Problems*, 31 RES. POL’Y 1491, 1493 (2002).

4. *Id.* at 1498-99.

5. See Panel Discussion, Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, WORLD INTELLECTUAL PROPERTY ORGANIZATION 13 (1999), available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>.

6. Tonina Simeone, *Indigenous Traditional Knowledge and Intellectual Property Rights*, PARLIAMENT OF CANADA (Mar. 17, 2004), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0338-e.htm>.

Western tendency towards hard copy documentation.⁷ Traditional knowledge is typically transmitted via “songs, proverbs, stories, folklore, community laws, common or collective property and invention, practices and rituals.”⁸ Increasing misuse and exploitation of traditional knowledge and cultural heritage pieces led the United States and various international communities to create and expand intellectual property protections for traditional knowledge.⁹

In the United States, Indigenous intellectual property protections slowly began to emerge through privatized programs. Private organizations initiated a movement in the 1970s to protect the marketing of Indigenous arts and crafts with the creation of the Indian Arts and Crafts Association (IACA).¹⁰ At that time, legislation to protect the market of Indigenous arts and crafts was barely in existence, so the IACA came together demanding the dignity of authentic Indigenous arts and crafts.¹¹ As a result of the IACA’s advocacy, the Indian Arts and Crafts Act of 1990 was signed into law at Public Law 101-644.¹² Under the Indian Arts and Crafts Act, civil and criminal penalties may be assessed in the United States for unlawfully misrepresenting arts and crafts as those of a federally or state recognized American Indian tribe.¹³ An artisan must truthfully mark all works with the proper tribal affiliation to prevent misuse and protect traditional knowledge needed for constructing these artistic works.¹⁴ Another influential protection mechanism from 1990 is the Native American Graves Protection and Repatriation Act (NAGPRA), which can be found at 25 U.S.C. § 3001.¹⁵ Unfortunately, this statute is limited to protection of human remains and items of cultural heritage that are specifically held by museums or institutions receiving government funding.¹⁶ These reflect a number of attempts by the United States to protect Indigenous Knowledge, but they were instrumental to enhance protections for this newly recognized subject matter.

7. *Id.*

8. *Id.*

9. See generally Wayne Shammel & Dave Stephenson, *Protecting American Indian Intellectual Property in the Twenty-First Century: The Case of the Cow Creek Tribe and Indian Motorcycle*, 24 CULTURAL SURVIVAL Q. (Winter 2000), available at <http://www.culturalsurvival.org/ourpublications/csqa/article/protecting-american-indian-intellectual-property-twenty-first-century-th>.

10. About IACA, INDIAN ARTS AND CRAFTS ASS’N, <http://www.iaca.com/About%20IACA.htm> (last visited Mar. 27, 2012).

11. *Id.*

12. U.S. Dep’t of the Interior, *The Indian Arts and Crafts Act of 1990*, THE INDIAN ARTS AND CRAFTS BOARD, <http://www.doi.gov/iacb/act.html> (last visited Mar. 27, 2012).

13. *Id.*

14. *Id.*

15. Nat’l Park Serv. Dep’t of the Interior, *Laws, Regulations, and Guidance*, NATIONAL NAGPRA, <http://www.nps.gov/nagpra/MANDATES/INDEX.HTM> (last visited Mar. 27, 2012); Shammel & Stephenson, *supra* note 9.

16. 25 U.S.C. § 3001 (2006).

B. Sui Generis

Intellectual property law is traditionally a combination of copyrights, patents, and trademarks that delineates rights of property ownership and allows for protection against unfair competition.¹⁷ Definitions within intellectual property statutes are a source of contention between individual nations and international organizations.¹⁸ Each statute can have its own definitions for what is covered under the specific statute, not one of them completely aligning with another.¹⁹ Definitions in statutes are typically variable by nation as a result of diverse traditional, philosophical, and legal ideas.²⁰ Despite differences in exact definitions, establishing intellectual property rights primarily creates a property right allowing the owner to exclude others from use.²¹ Sui generis is a Latin term simply meaning “of its own kind.”²² Similarly, in the legal community sui generis “is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines.”²³ Under sui generis law, when intellectual property laws do not generally protect an object, a statute can be enacted specifically for the purpose of using intellectual property law to protect untraditional subject matter. Sui generis protection stems from a belief that a new form of invention needs legal protection, but does not conform to the current intellectual property protections available.²⁴ Theoretically, “a sui generis system could be created individually and enacted differently from one country to another.”²⁵ Scholars believe the purpose and need for sui generis protection evolved as a way to stem creativity for new inventions; authors were afraid to create when their work would not be rewarded with protection.²⁶ In the United States and the European Union, sui generis protection has regularly been employed over the years to develop new protections for biotechnology, design patents, and databases.²⁷ It is strongly

17. Drahos, *supra* note 5.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Sui generis*, REFERENCE.COM, <http://dictionary.reference.com/browse/sui+generis> (last visited May 24, 2012).

23. BLACK'S LAW DICTIONARY (9th ed. 2009) (Westlaw).

24. John Bagby, *Who Owns the Data?*, ONLINE RESEARCH: PENN STATE (Jan. 1, 2003), <http://www.rps.psu.edu/0301/data.html>. John Bagby, *Who Owns the Data?*, ONLINE RESEARCH: PENN STATE (Jan. 6, 2003), <http://www.rps.psu.edu/0301/data.html>.

25. STEPHEN A. HANSEN & JUSTIN W. VANFLEET, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: A HANDBOOK ON ISSUES AND OPTIONS FOR TRADITIONAL KNOWLEDGE HOLDERS IN PROTECTING THEIR INTELLECTUAL PROPERTY AND MAINTAINING BIOLOGICAL DIVERSITY 27 (2003).

26. See Bagby, *supra* note 24 (discussing *sui generis* protection for a new form of intellectual property, protection of databases).

27. *Id.*

argued that without this novel protection many of these inventions would not have been developed.²⁸ Previously, there was no guarantee on return of investment, but sui generis protection guards against pirating and infringement that would severely harm profits.²⁹ For example, the sui generis form may be adopted to support access and benefit sharing through newly formed legal rights that acknowledge traditional knowledge.³⁰ Costa Rica adopted this method of sui generis protection admitting “intellectual rights, the knowledge, practices and innovations of indigenous peoples and communities related to the use of components of biodiversity and associated knowledge” whether the traditional knowledge is officially documented or not.³¹

Similarly, Canada adopted sui generis protections and created Aboriginal Title, a new form of property ownership for real property.³² In 1982, the Constitution Act annulled common law precedent, which did not allow for Aboriginal Title, by creating specific clauses that referenced and called for application of this new form of property protection.³³ To move into the modern realm, sui generis protection must be extended to intangible property such as intellectual property. Dr. Harry Chartrand argues First Nations peoples have the opportunity to create brand names (among other intangible properties) in the global community.³⁴ Chartrand also argues that restrictions on the right to interact in these markets impinge the First Nations peoples’ competitiveness in global markets.³⁵ One avenue Canada may pursue is adopting international conventions that protect cultural heritage via intellectual property law, like the 2003 UNESCO *Convention on Intangible Cultural Heritage*.³⁶ Canada has recently taken steps to become involved in cultural protections through intellectual property law. Canada is currently one member of the WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC) and takes part in the discussions regarding drafting international Indigenous intellectual property law protections.³⁷ Departing from common law, which

28. *Id.*

29. *Id.*

30. HANSEN & VANFLEET, *supra* note 25.

31. *Id.* (citing National Legislation of Costa Rica, Biodiversity Law, art. 82 (R.D.-Ley. 1998, 7788)(Costa Rica)).

32. Harry Hillman Chartrand, *Equity and Aboriginal Title: A Cultural Economics Research Note on Post-Colonial Consciousness*, COMPILER PRESS 7-8 (2008), available at <http://www.compilerpress.ca/CCR%20PRN/EQUITY.pdf>.

33. *Id.*

34. *Id.* at 7.

35. *Id.*

36. *Id.* at 9.

37. Daniel Pruzin, *Treaties: WIPO Cites Progress in Advancing Treaty On Protection of Traditional Knowledge*, PATENT, TRADEMARK, & COPYRIGHT LAW DAILY: NEWS (May 17, 2010), available at http://proxy.law.msu.edu:2055/ptdm/display/batch_print

does not always allow for precedent, and incorporating intellectual property through statutory measures is the answer for incorporating cultural heritage into intellectual property and allowing Indigenous people to interact with the modern global economy.³⁸

C. International Intellectual Property Protections

International intellectual property is distinctly more complex than the intellectual property law of individual nations. According to Drahos, development of international intellectual property protection has three distinct periods: (1) the territorial period, which was characterized by an absence of international protections; (2) the international period, which was highlighted by several international countries joining the WIPO and agreeing to form the international Paris³⁹ and Berne Conventions⁴⁰ to protect industrial property and literary and artistic works respectively; and (3) the global period, which is characterized by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁴¹ that links trade and intellectual property.⁴² Intellectual property protection morphed from

_display.adp?searchid=16652417 [hereinafter *Treaties: WIPO Cites Progress in Advancing Treaty On Protection of Traditional Knowledge*].

38. See Chartrand, *supra* note 32, at 9.

39. The Paris Convention was concluded in 1883 with several later amendments. *Summary of the Paris Convention for the Protection of Industrial Property (1883)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited May 24, 2012). It established an international form of protection for industrial property and was open to all nations to join. *Id.* Industrial property included “patents, marks, industrial designs, utility models . . . trade names . . . geographical indications . . . and the repression of unfair competition.” *Id.*

40. The Berne Convention was developed and open to all nations in 1886 to create property protection for authors of literary and artistic works. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited May 24, 2012). There were three basic principles of the Berne Convention: (1) all works will have the same protections in the originating state as well as in all other member states of the Berne Convention, (2) protection cannot be conditional upon any additional formalities – protection is automatic, and (3) protection under the Berne Convention is generally independent of those protections established by the originating nation, but may be subject to protection termination conditions. *Id.*

41. The TRIPS Agreement came into effect significantly later, in 1995, and was developed by the World Trade Organization, and in effect, it created the most comprehensive intellectual property protection to date. *Overview: the TRIPS Agreement*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar. 15, 2013). The rights covered under the TRIPS Agreement are copyright, trademark, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information, i.e. trade secrets. *Id.* The three distinct aims of this agreement are (1) standards for protection, including complying with the Paris and Berne Conventions; (2) domestic enforcement of protection rights; and (3) dispute settlement between World Trade Organization members. *Id.*

42. Drahos, *supra* note 5.

having protection only in the country of origin to global agreements on reciprocal intellectual property protections.⁴³ All member countries that subscribe to global agreements agree to abide by specific protection rules and regulations in consideration for receiving the same protections for their own intellectual property in all other member countries.⁴⁴ Two of the most influential institutions that draft multi-nation declarations to protect international intellectual property are the World Trade Organization and the World Intellectual Property Organization. Additional international documents that protect important Indigenous intellectual property rights are the Universal Declaration of Human Rights, the Universal Declaration of the Rights of Peoples, and the United Nations Declaration on the Rights of Indigenous Peoples.

1. World Trade Organization

The World Trade Organization (WTO) can be credited with protecting international intellectual property within the scope of international trade.⁴⁵ It is most notable for its creation of the TRIPS agreement, which focuses on national and territorial intellectual property treatment.⁴⁶ The TRIPS Agreement is binding on all WTO members, making protections uniform across participating nations, and resulting in highly functional intellectual property protections.⁴⁷ Over the years, there has been a greater expectation for nations to comply with the TRIPS Agreement to secure trade with other nations.⁴⁸ This trend suggests compliance with international intellectual property agreements will become the standard and eventually enforceable across the globe, rather than merely permissive in some nations.⁴⁹ The TRIPS agreement is on the forefront of global advancement in its regulation of contract and property.⁵⁰ Objects of property can now be exchanged globally through contract, creating a diverse market.⁵¹ The TRIPS Agreement has opened doors to nations to trade globally without fear of theft of innovations, has streamlined intellectual property protections, and has paved the way for Indigenous communities to break into the global trade market.

43. *See id.*

44. *See Understanding the WTO: The Agreements, Intellectual Property: Protection and Enforcement*, WORLD TRADE ORGANIZATION, available at www.wto.org/English/thewto_e/tif_e/agrm7_e.htm (last visited Mar. 12, 2012).

45. *See id.*

46. Drahos, *supra* note 5.

47. *Id.*

48. *See* Drahos, *supra* note 5 (stating that before trading the U.S.A. and European countries ask whether international traders comply with TRIPS during negotiations for trade).

49. *See id.*

50. *See id.*

51. *Id.*

2. World Intellectual Property Organization

The WIPO is a United Nations agency that specializes in promoting innovation and creativity between international countries and cultures through a uniform intellectual property law system.⁵² The WIPO was established fully in 1967 and currently has 185 member states participating in its programs.⁵³ It also works in conjunction with the WTO through a cooperative agreement to manage global intellectual property laws within trade.⁵⁴ Most notably, for discussion within this paper, the WIPO has created the Intergovernmental Committee and is currently debating and drafting an international legal instrument for the protection of intellectual property, genetic resources, traditional knowledge, and folklore of Indigenous peoples.⁵⁵ These documents will be exceptionally important to Indigenous people on a global level, developing a forum for rigorous protection of Indigenous property through modern legal application. Although these new adoptions will not replace what has already been lost, hopefully these regulations will change the course of history by safeguarding Indigenous communities from further loss.

3. Universal Declarations of Human Rights and the Rights of Peoples

The 1948 Universal Declaration of Human Rights (UDHR) is an important international document that furthered the ownership rights of Indigenous peoples. Although this document does not speak specifically to intellectual property rights, these rights can be inferred from the language of the UDHR.⁵⁶ For example, Article 27 seems to fundamentally protect those creations generally protected by intellectual property law.⁵⁷ Article 27(1) grants everyone the right to “freely . . . participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁵⁸ Furthermore, Article 27(2) says “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific,

52. *What is WIPO?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/about-wipo/en/>, (last visited May 19, 2012).

53. *Id.*; see also *WIPO: A Brief History*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/about-wipo/en/history.html>, (last visited Mar. 15, 2013) [hereinafter *WIPO: A Brief History*].

54. *WIPO: A Brief History*, *supra* note 53.

55. *Intergovernmental Committee*, *supra* note 2.

56. Drahos, *supra* note 5.

57. *Id.*

58. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 27 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a27>.

literary or artistic production of which he is the author.”⁵⁹ Article 17, covering the universal right to own property, reinforces article 27(2). Article 17(1) confirms there is a universal right to own property either solely or in conjunction with others.⁶⁰ Article 17(2) enforces that no one, who owns property, will be deprived of that property arbitrarily.⁶¹ These rights extend to ownership of intellectual property and support the right of Indigenous People to own and to control their own property; this right may be regulated by the state, but it must not be done arbitrarily.⁶²

The Universal Declaration of the Rights of Peoples (UDRP) similarly protects every person’s right to participate in their community through arts and property ownership. Indigenous Knowledge is generally preserved through Indigenous customs and traditions like oral histories, craftsmanship, and everyday life practices. The UDRP recognizes community traditions, historic values, arts, etc. and preserves the right of all persons to maintain and preserve traditions and their own specific ways of life.⁶³ Intellectual property rights are specifically mentioned in the UDRP.⁶⁴ Article 5 stipulates “[a]ll peoples have the right to sovereignty over the natural wealth and resources within their territories. All peoples also have the right to intellectual property.”⁶⁵ Article 14 emphasizes the right of all people to develop and preserve their traditional way of life, which for Indigenous peoples, is paramount to the preservation of their culture.⁶⁶ Article 15 expounds on cultural preservation, asserting “[a]ll peoples have the right to self-identification and have the right to know, learn, preserve and develop their own culture, history, language, religion and customs.”⁶⁷ Acceptance of these Declarations will promote conservation of Indigenous Knowledge through modern intellectual property systems, particularly because Indigenous Knowledge will be able to legally protect Indigenous culture from slavish copying. Claiming and protecting cultural heritage is not widely popular within Western legal systems, so it has been difficult for Indigenous people to expound on the rights evident in these Declarations.⁶⁸ However, it seems Indigenous communities are increasingly grasping ahold of intellectual property protections to reclaim traditional knowledge and resources.⁶⁹

59. *Id.* at art. 27(1).

60. *Id.* at art. 17(1).

61. *Id.* at art. 17(2).

62. Drahos, *supra* note 5.

63. See *Universal Declaration of the Rights of Peoples*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION, at Pmb1 (Feb. 17, 2004), <http://www.unpo.org/article/105>.

64. *Id.* at art. 5.

65. *Id.*

66. *Id.* at art. 14.

67. *Id.* at art. 15.

68. Drahos, *supra* note 5.

69. *Id.*

4. *United Nations Declaration on the Rights of Indigenous Peoples*

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms that rights of Indigenous peoples are equal to those of every other individual.⁷⁰ The UNDRIP expressly denotes traditional protection and intellectual property rights.⁷¹ Article 11 specifically lists protections and restitution available to Indigenous peoples for improper taking of Indigenous cultural items or making improper representations.⁷² For example, Article 11 states “Indigenous peoples have the right to practise [sic] and revitalize their cultural traditions and customs” including the rights to “maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, [sic] designs, ceremonies, technologies and visual and performing arts and literature.”⁷³ Many of these protections can be achieved through copyright, trademark, and patent laws.⁷⁴ The UNDRIP, in Article 24, also manifests the right to protect “traditional medicines and to maintain . . . health practices, including the conservation of . . . vital medicinal plants, animals and minerals,”⁷⁵ which falls within the rapidly expanding area of biotechnology intellectual property law. In Article 31, UNDRIP conserves Indigenous peoples’ right to

maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.⁷⁶

Article 31 purposely mentions the “right to maintain, control, protect and develop . . . intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions” to give Indigenous peoples a recognized forum to protect their rights.⁷⁷ Today, intellectual property law is a widely recognized forum for Indigenous Knowledge protection, and as

70. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295Annex, U.N. Doc. A/RES 61/295, at 1 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

71. See *id.* at arts. 11, 24, and 31 for specific examples of specific protections of tradition through intellectual property law.

72. See *id.* at art. 11.

73. *Id.*

74. *Id.*

75. *Id.* at art. 24.

76. *Id.* at art. 31.

77. *Id.*

it continues to grow, it will become more apparent regardless of whether this is the proper forum for preservation or merely a temporary fix.

II. NATIONAL LAWS FOR THE PROTECTION OF INDIGENOUS CULTURE

Several nations with numerous Indigenous communities have assisted in the protection of Indigenous Knowledge by creating their own national statutes for such protection. The following nations of Australia, New Zealand, South Africa, Canada, and the United States have taken progressive steps to incorporate intellectual property protections within their statutes, which allow Indigenous communities to participate in the modern legal system.⁷⁸ Though these nations have attempted to incorporate Indigenous protections into their national law, difficulties remain. Schools of thought between Western legal systems and Indigenous communities are vastly contradictory.⁷⁹ While Western schemes attempt to break areas of law into smaller fractions, forming separate rules that may be unconnected to other areas of law, Indigenous systems attempt to incorporate the whole, finding a connection between all things.⁸⁰ The following section will dissect national statutes and other protection methods adopted for these several nations. The next section will also evaluate the functionality of the statutes and will examine whether Indigenous peoples would benefit from international cooperation.

A. Australia

Australia has attempted to incorporate intellectual property protections of patent, trademark, and copyright law within Indigenous communities to protect traditional knowledge and culture. For example, Australia allows patent applications to be entered to preserve traditional knowledge of plants.⁸¹ David Claudie still knows traditional remedies from plants coming from the homelands of the Kuuku l'yu Northern Kaanju of Australia, which have been passed down for generations, and now he works closely with researchers to develop this knowledge.⁸² The Chuulangun Aboriginal Corporation and the University of South Australia collected and tested these plants, and then they filed a joint patent application on the final

78. See *infra* pp. 14-23.

79. Drahos, *supra* note 5, at 19.

80. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, AMERICAN INDIAN DEVELOPMENT ASSOCIATES (2004), http://www.aidainc.net/Publications/ij_systems.htm; Drahos, *supra* note 5, at 19.

81. *Chuulangun Aboriginal Corporation and University of South Australia*, AUSTRALIAN GOVERNMENT/IP AUSTRALIA, <http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/chuulangun-aboriginal-corporation/> (last updated Oct. 12, 2012).

82. *Id.*

innovation.⁸³ Joint patent ownership rights allowed the Indigenous community to share the benefits derived from the patent.⁸⁴ This is a positive example of how Indigenous peoples can benefit from the commercialization process and profits stemming from their traditional knowledge.⁸⁵

Trademark law is another technique that can be used for protecting Indigenous culture. For illustration, trademark law can be applied to register traditional names and symbols of an Indigenous community.⁸⁶ Malcolm Mabo did just that when he created a clothing business using his family name Mabo and symbols from his community.⁸⁷ When applying for his trademark, another company, Mambo, disputed the mark for being too similar.⁸⁸ The parties agreed that both could continue to use their individual marks.⁸⁹ This example shows the individual avenues available to engage in cultural protection while introducing Indigenous economic markets to global consumers.

The National Indigenous Arts Advocacy Association has raised awareness of the importance of protecting Indigenous culture through intellectual property laws, but questions whether Australia's laws are adequate.⁹⁰ Copyright law has also been engaged to protect Indigenous culture, but Australia's Copyright Act requires a work to be original, to be reduced to material form, and to have an identifiable author.⁹¹ These may be legitimate qualifications to most of Australia, but Indigenous authors can rarely meet these rigorous prerequisites because Australia's law does not correspond to Indigenous norms, like communal ownership.⁹² Generally, individualized forms of ownership, popular within Western legal systems, are unsuitable for Indigenous culture and traditions because the community owns the traditions and culture, rather than one individual owning the culture or tradition.⁹³ Australia's concept of copyright protection "only protects the material medium rather than the idea or concept."⁹⁴ Another concern of Indigenous communities is the limited time period for copyright

83. *Id.*

84. *Id.*

85. *See id.*

86. *Mabo and Mambo*, AUSTRALIAN GOVERNMENT/IP AUSTRALIA, <http://www.ipaustalia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/mabo-mambo/> (last updated Oct. 12, 2012).

87. *Id.*

88. *Id.*

89. *Id.*

90. ANITA HEISS, DHUULUU-YALA = TO TALK STRAIGHT: PUBLISHING INDIGENOUS LITERATURE 83-87 (2003), available at *Indigenous Culture and Intellectual Property Rights*, AUSTRALIAN LITERATURE RESOURCE, www.austlit.edu.au/specialistDatasets/BlackWords/BlackWordsExtraNotesCh6.xml.

91. *Id.*; *See Copyright Act 1968* (Cth) (Austl.).

92. HEISS, *supra* note 90.

93. *Id.*

94. *Id.*

protection. According to Part III of the Copyright Act, copyright protection for an original work only subsists for seventy years after the death of the original author, which only grants protection for a limited time.⁹⁵ Overall, Australia's copyright protection falls short of being effective for Indigenous communities.⁹⁶ Although countless communities have provided information for research and literature, they are not entitled to any of the proceeds resulting from sales because they cannot meet the requirements of ownership under current copyright law.⁹⁷ Scholars effectively use and profit from Indigenous culture and knowledge instead of Indigenous communities supplying the information.⁹⁸

For example, unauthorized photographs were taken of Wik Apalech dancers from Cape York, Australia and later distributed and sold as photographs, postcards, and CDs.⁹⁹ This was offensive to the Wik Apalech because only specific people within the Indigenous community have the authority to see this dance and distributing these images violated that tradition.¹⁰⁰ While the Copyright Act would not have assisted because the dancers could not claim ownership of the photos, the Wik Apalech could have claimed intellectual property protection under performers' rights.¹⁰¹ Under current intellectual property laws, Indigenous culture is vulnerable to unlawful taking. Although there are laws attempting to protect it, conforming Indigenous ideas to Western intellectual property law remains difficult.

B. New Zealand

New Zealand also tried to incorporate protections for Maori Indigenous Knowledge into its intellectual property statutes. In 1999, a Trade Mark Act Focus Group recommended to the Cabinet that there should be an advisory committee formed for consultation on issues relating to Maori marks and symbols that ought to be protected by trademark law.¹⁰² In September of

95. *Part III: Copyright in Original Literary, Dramatic, Musical, and Artistic Works, Copyright Act 1968* (Cth) pt. III (Austl.).

96. *See* HEISS, *supra* note 90.

97. *Id.*

98. *Id.*

99. *Wik Apalech Dancers*, AUSTRALIAN GOVERNMENT/IP AUSTRALIA, <http://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation/wik-apalech-dancers/> (last updated Nov. 12, 2012).

100. *Id.*

101. *Id.*

102. *16 Maori Advisory Committee & Maori Trade Marks: History*, NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, <http://www.iponz.govt.nz/cms/trade-marks/practice-guidelines-index/practice-guidelines/16-maori-advisory-committee-maori-trade-marks/2-history> (last updated Aug. 3, 2012) [hereinafter *16 Maori Advisory Committee & Maori Trade Marks: History*].

1999, this recommendation was accepted.¹⁰³ Now Part 5 of the Trade Mark Act of 2002 controls appointment of a Maori Trade Mark Advisory Committee to help identify and preserve Maori marks as well as determine whether marks would constitute an offense against the Maori.¹⁰⁴ Although this advisory committee is an important step to the protection of Indigenous marks, the committee's recommendations are not binding on the Commissioner, but where a mark is determined to be Maori in nature, there will be an indication on the trademark file.¹⁰⁵ A separate Maori Advisory Committee has also been assigned to the patent branch of the New Zealand Intellectual Property Office. The advisory committee will "advise the Commissioner of Patents on patent applications involving Maori traditional knowledge, and indigenous plants and animals."¹⁰⁶ Like the recommendations of the Trade Mark Advisory Committee, suggestions from the Patent Advisory Committee are just that, suggestions, and are not mandatory.¹⁰⁷

As of 2001, New Zealand had not included any copyright protections for its Indigenous people.¹⁰⁸ As the Maori began to recognize misappropriations in art and popular culture, they began to express a strong desire to extend Indigenous Knowledge protections to New Zealand copyright laws in a similar fashion as patent and trademark law.¹⁰⁹ The challenge comes from the difference between Maori property ownership beliefs and Western property ownership beliefs.¹¹⁰ The Maori believe property ownership, including copyright ownership, extends to perpetuity, whereas the New Zealand law currently has copyright ownership ending after the passing of fifty years after the death of the author.¹¹¹ Again we see a conflict between Indigenous ideas of property rights and those of the Western world. Currently, intellectual property protections would only be influential and

103. *Id.*

104. *16 Maori Advisory Committee & Maori Trade Marks: Introduction*, NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, <http://www.iponz.govt.nz/cms/trade-marks/practice-guidelines-index/practice-guidelines/16-maori-advisory-committee-maori-trade-marks/introduction> (last updated June 23, 2008).

105. *16 Maori Advisory Committee & Maori Trade Marks: History*, *supra* note 99; *Maori Advisory Committee & Maori Trade Marks: Identification of Maori Signs*, NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, <http://www.iponz.govt.nz/cms/trade-marks/practice-guidelines-index/practice-guidelines/16-maori-advisory-committee-maori-trade-marks/3-identification-of-maori-signs> (last updated Nov. 16, 2009).

106. *Patents Bill – First Reading in Parliament*, NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, <http://www.iponz.govt.nz/cms/iponz/latest-news/expired-items/patents-bill-first-reading-in-parliament?searchterm=maori> (last visited Mar. 15, 2013).

107. Patents Bill 235 2010-2 cl. 277 (N.Z.).

108. *Copyright Laws to Protect Maori Heritage*, BBC NEWS (Aug. 10, 2001), <http://news.bbc.co.uk/2/hi/business/1482203.stm>.

109. *Id.*

110. *See id.*

111. *Id.*

end appropriation for a period of time; time limits and individual designation of property ownership does not conform to Indigenous tradition.

C. South Africa

The South African Trade Minister acknowledged that traditional knowledge extends to “knowledge generated and owned by communities and includes knowledge about medical practices, production of food products, cultural expressions, songs, and designs.”¹¹² In 2008, the Research and Communication Division of the Directorate-General International Cooperation of the Ministry of Foreign Affairs in the Netherlands carried out a study to “stimulate strategic and effective use of knowledge for development.”¹¹³ Researchers noted there is mistrust between Indigenous Knowledge holders and those trying to acquire that knowledge.¹¹⁴ Over the years, outside entities have abused access to South African Indigenous Knowledge.¹¹⁵ The South African government, realizing its startling loss of resources, took a more active role in creating a binding legal instrument to protect itself from further economic loss.¹¹⁶ South Africa has made strides to protect Indigenous Knowledge from misappropriation by pushing through draft bills on Intellectual Property Rights, which aim to protect findings from public research institutions.¹¹⁷ One draft bill aims to limit licensing agreements for Indigenous Knowledge and attempts to “keep the benefits . . . in public research, reduce reliance on overseas technologies, build capacity within South Africa, and utilise [sic] South Africa’s available resources.”¹¹⁸ Economic development related to Indigenous Knowledge is currently focused on Indigenous medicinal plants to fight healthcare issues in South Africa.¹¹⁹ Since those being affected by disease in South Africa are generally poor, it is difficult to get funding for these research projects.¹²⁰

112. Paul Stinson, *Critics Fault South Africa IP Bill For Failing to Protect Traditional Knowledge*, PATENT, TRADEMARK & COPYRIGHT LAW DAILY (Nov. 18, 2011), http://news.bna.com/ptdm/PTDMWB/doc_display.adp?fedfid=23620062&vname=ptdbulallissues&fcn=2&wsn=501042000&fn=23620062&split=0.

113. LIDEWYDE H. BERCKMOES, PROTECTING INDIGENOUS KNOWLEDGE IN SOUTH AFRICA: DEBATES ON INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT, RADBOUD UNIVERSITY NIJMEGEN 5 (2008), available at <http://www.hivos.net/Hivos-Knowledge-Programme/News/Protecting-Indigenous-Knowledge-in-South-Africa>.

114. *Id.* at 8 (stating Indigenous knowledge holders distrust scientists, policy makers, NGOs, and industry).

115. *See id.* at 29.

116. *Id.* at 29; see also Daniel Pruzin, *WIPO Cites Progress on Advancing Draft Texts for Protection of Folklore*, PATENT, TRADEMARK & COPYRIGHT LAW DAILY (May 23, 2011), http://news.bna.com/ptdm/PTDMWB/doc_display.adp?fedfid=20933668&vname=ptdbulallissues&fcn=7&wsn=502940000&fn=20933668&split=0.

117. BERCKMOES, *supra* note 110, at 29

118. *Id.*

119. *Id.* at 30.

120. *Id.*

South Africa has looked to patent law as a way to gain capital through licensing the findings to other scientists or research institutions.¹²¹ The real debate over Indigenous Knowledge is who should be paid for its procurement? South African government and NGOs have been disputing this issue.¹²² A compromise is needed between the researchers and government who have developed and funded these large-scale patent projects and the local communities that are the original holders of the Indigenous Knowledge.¹²³

Traditional healers recognize the value of their Indigenous Knowledge, calling the country's genetic and biological resources "green gold."¹²⁴ They insist they deserve the proper legal representation to protect their knowledge and are entitled to suitable compensation before appropriation.¹²⁵ Traditional healers question whether Intellectual Property Rights legislation is the proper remedy for protection of these valuable resources.¹²⁶ They fear limiting aspects of legislation will create reduced access to traditional remedies, produce legal monopolies on certain biological resources, and limit, rather than stimulate, the sharing of knowledge because of economic prospects.¹²⁷ These negative results do not correspond with traditional access to Indigenous Knowledge. Although Intellectual Property Law Amendment Bills were drafted to protect Indigenous Knowledge, critics suggest these measures are flawed.¹²⁸ Similar to the situation in Australia, the originality and authorship requirements tend to be a difficult hurdle because traditional knowledge is generally passed down over generations, and not able to be identified with a single author or origination date.¹²⁹ When Indigenous Knowledge cannot meet the demanding criteria for protection, it will not be secure and will be open for appropriation.¹³⁰ Government officials urge that time is of the essence for protecting Indigenous Knowledge, and a binding solution needs to be developed quickly.¹³¹ Although South Africans are hopeful for global WIPO intellectual property protections for Indigenous Knowledge, they are wary whether it is possible to wait for their completion before the South African government acts.¹³²

121. *Id.* at 31.

122. *Id.* at 31-32.

123. BERCKMOES, *supra* note 113, at 32.

124. *Id.* at 35.

125. *Id.* at 34.

126. *Id.* at 36.

127. *Id.*

128. Stinson, *supra* note 112.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

D. Canada

Under Canadian law, traditional knowledge includes “beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural experience and expression that belong to indigenous communities worldwide.”¹³³ Canada recognizes it is important to safeguard Indigenous Knowledge of Aboriginal Canadians, protect fundamental justice, and promote one’s cultural heritage.¹³⁴ Canada also recognizes the fairness in giving these communities a fair monetary reward for their innovations, just as other Canadian citizens would receive.¹³⁵ Unfortunately, Canada has not enacted any legislation to distinctly protect Indigenous Knowledge, but has left Aboriginal communities to engage in their own forms of protection.¹³⁶ Aboriginal Canadians have run into similar problems as the previously mentioned Indigenous communities.¹³⁷ Current intellectual property laws are incompatible with Aboriginal property.¹³⁸ Aboriginal knowledge and traditional creations do not fit the requirements for protection under Canadian intellectual property laws.¹³⁹ Canada’s laws encompass many traditionally Western ideas, including economic gain, which conflict with Aboriginal concepts of community ownership, group identity, and survival.¹⁴⁰ Recognizing the importance of protecting Indigenous traditional knowledge, Canada has taken part in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources.¹⁴¹ Where international intellectual property law has generally been oriented towards protecting multinational, rather than Indigenous interests,¹⁴² the WIPO Committee creates a real opportunity to extend the same protections to all communities globally rather than orient protections to one ideological group.

E. The United States

The United States Patent and Trademark Office (USPTO) regulates the United States’ intellectual property rights. The job of the USPTO is to create rules for the protection and enforcement of intellectual property

133. Simeone, *supra* note 6.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Simeone, *supra* note 6.

140. *Id.*

141. *Id.*

142. *Id.*

rights of patents, trademarks, and copyrights within the United States.¹⁴³ The United States has incorporated protections for Indigenous Knowledge into its intellectual property regime. First, the USPTO created a database for the voluntary registration of Indigenous insignia and symbols of state and federally recognized tribes.¹⁴⁴ However, although there are guidelines for entering insignia, there is no investigation as to whether this is the official insignia of the registering tribe. Since the database is voluntary and is merely a collection of insignia, no intellectual property protections are gained through the database, like trademark rights.¹⁴⁵ To gain trademark registration, Indigenous communities have to meet the specific trademark criteria of the USPTO, which generally cannot be met.¹⁴⁶ The database is used as a reference device to aid in examining trademark applications to refuse admittance of marks that “falsely suggest a connection with particular institutions” per 15 U.S.C. § 1052(a)(2)(a).¹⁴⁷

As previously mentioned, the United States also codified NAGPRA at 25 U.S.C. § 3001, protecting Indigenous artifacts with particular cultural value.¹⁴⁸ Not too long ago there was no recourse for misappropriation of Indigenous intellectual and cultural property, but now there are criminal penalties for violation of these protections.¹⁴⁹ To date, Indigenous peoples have appealed to the courts, integrating Indigenous intellectual property with twenty-first century legal practices by filing lawsuits to protect their rights.¹⁵⁰ For example, the Cow Creek Band of the Umpqua Tribe of Indians in Oregon joined the Indian trademark case involving the Indian Motorcycle Company consortium to “promote pride, dignity, and knowledge about Native American heritage.”¹⁵¹ The federal suit was originally filed because Indian Motorcycles, a motorcycle manufacturing company, violated the Indian Arts and Crafts Act of 1990 by using “Indian” in its name.¹⁵² The Cow Creeks joined the suit with federal encouragement, and the case was one of the first to challenge the limited corporate responsibility when using Indigenous names and symbols.¹⁵³

143. *Office of the Administrator for Policy and External Affairs*, THE UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/ip/global/index.jsp> (last updated Feb. 20, 2013).

144. *Native American Tribal Insignia Database*, UNITED STATES PATENT AND TRADEMARK OFFICE (June 27, 2011), <http://www.uspto.gov/trademarks/law/tribal/index.jsp>.

145. *Id.*

146. *Id.*

147. *Id.*

148. Shammel & Stephenson, *supra* note 9.

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.*

153. *Id.*

Recently, there has been collaboration between the USPTO and the Native American Intellectual Property Enterprise Council (NAIPEC).¹⁵⁴ The groups joined together and signed the Memorandum of Understanding, which aims to increase Native American inventors' patent and trademark filing.¹⁵⁵ The goals are to participate in "research and identify the IP education needs of specific Native American communities, and to provide that education in whatever way works best."¹⁵⁶ A new office in the USPTO will facilitate their interactions and allow direct access for Native American intellectual property advocates.¹⁵⁷ This new collaboration is a prime example of how nations can work in unison with their Indigenous communities to create systems that function in harmony to meet the needs of all.¹⁵⁸

III. INTERNATIONAL LAW PROTECTIONS ON INDIGENOUS CULTURE

A. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

Established by the WIPO in October 2000, the IGC was created to form an international legal instrument to protect "traditional knowledge (TK), traditional cultural expressions (TCEs)/folklore and genetic resources."¹⁵⁹ Since October 2000, a series of commenting processes and meetings have allowed committee members to advance a working document that protects Indigenous peoples' intellectual property rights.¹⁶⁰ In May 2010, international representatives convened and began the foundational arrangements for the IGC, most importantly creating the Intersessional Working Group.¹⁶¹ The Intersessional Working Group has held talks on traditional knowledge to increase productivity on overly technical issues between the biannual meetings of the IGC.¹⁶² Draft provisions, developed from the aforementioned commenting processes and Intersessional Working

154. Panel discussion, *Expanding Outreach to the Native American Community*, UNITED STATES PATENT AND TRADEMARK OFFICE (Jan. 31, 2012), http://www.uspto.gov/new/speeches/2012/kappos_NAIPEC.jsp [hereinafter *Expanding Outreach to the Native American Community*].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Intergovernmental Committee*, *supra* note 2.

160. *See id.* For the outline of the first three Intersessional Working Group meetings and documents. *See Draft Provisions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html (last visited Mar. 31, 2012) [hereinafter *Draft Provisions*] for a list of the first three commenting processes.

161. *Treaties: WIPO Cites Progress in Advancing Treaty On Protection of Traditional Knowledge*, *supra* note 37.

162. *Id.*

Group meetings, represented various discussions between national, regional, and community experiences of various Indigenous peoples, cultural communities, and other interested parties generally stating international objectives and principles that have been successfully implemented on regional and national levels.¹⁶³ The WIPO allowed a commenting process and subsequently redrafted the provisions based on comments from interested parties.¹⁶⁴ During the first commenting session between November 2004 and February 2005, more than 200 pages of comments were submitted.¹⁶⁵ All of the comments made on this and subsequent draft provisions were taken into account by the IGC and implemented in successive drafts.¹⁶⁶

On March 4, 2010, the Intersessional Working Group spent two weeks creating and approving the draft texts for traditional knowledge and genetic resources that will serve as the basis for future negotiations and hopefully for the final draft of the legal document.¹⁶⁷ The draft on traditional knowledge and genetic resources was reviewed for approval in May 2011, but instead of being fully approved, discussions on the drafts continued. The Twenty-first Intersessional Working Group took place April 16-20, 2012 and emphasized funding, draft articles on the Protection of TK including gap analysis provisions, representation of Indigenous communities, and updates for the Glossary of Key Terms.¹⁶⁸

During the Nineteenth Intergovernmental Committee Session in July 2011, several like-minded countries discussed common goals and objectives for the protection of genetic resources.¹⁶⁹ The conclusive objectives stated during this Session were to (1) assure individuals or entities using genetic resources or their derivatives comply with national intellectual property laws and agreements be mutually fair and agreed to; (2) prevent intellectual property rights from being granted in bad faith or where they do not satisfy

163. *Draft Provisions*, *supra* note 160; *see also* Pruzin, *supra* note 35 (stating working documents on objectives and principles for intellectual property and genetic resources have been submitted by Australia, Canada, Norway, the USA, and New Zealand).

164. *Draft Provisions*, *supra* note 160.

165. *Id.*

166. *Id.*

167. Daniel Pruzin, *WIPO Makes Progress on Draft Legal Texts For Traditional Knowledge, Genetic Resources*, PATENT, TRADEMARK & COPYRIGHT LAW DAILY (Mar. 7, 2011) [hereinafter *WIPO Makes Progress on Draft Legal Texts*].

168. WIPO, *Brief Summary of Documents*, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, 21st Sess., Apr. 16-Apr. 20, 2012, WIPO/GRTKF/IC/21/INF/2, (Mar. 27, 2012), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_inf_2.pdf.

169. WIPO, *Like-Minded Countries Contributions to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources*, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, 19th Sess., July 18-July 22, 2011, WIPO/GRTKF/IC/19/11 (July 18, 2011), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_19/wipo_grtkf_ic_19_11.pdf [hereinafter *Like-Minded Countries*].

the eligibility conditions; (3) ensure intellectual property enforcers have adequate genetic resources information; (4) establish a coherent and effective system to support relationships between genetic resources' intellectual property rights and existing intellectual property protections; and (5) prevent negative effects associated with the intellectual property system from affecting Indigenous communities.¹⁷⁰ Similar committees gathered and discussed TK and TCEs.¹⁷¹ The Intergovernmental Committees accepted the responsibility of preparing preliminary draft articles for each of the forms of Indigenous intellectual property.¹⁷² The Committees addressed objectives such as providing equal protection, extending fair negotiations, and protecting the local communities.¹⁷³

By the end of 2012, the IGC realized a single text for GRs and advanced copies of the texts for TK and TCEs.¹⁷⁴ However, there are still difficult divergences in the text that need to be resolved before a final draft can be approved.¹⁷⁵ Diligent negotiations occurred in 2012, and climactic movement is expected towards a finalized legal document before the General Assembly meeting at the end of 2013.¹⁷⁶ There are currently IGC meeting dates scheduled to discuss all three types of cultural protection.¹⁷⁷ February 2013 will be devoted to discussing GRs, the April IGC meeting will discuss TK with a focus on subject matter and scope of protection, and the July IGC meeting will dedicate several days to discuss TCEs, also with a focus on subject matter and scope of protection.¹⁷⁸ At the end of July, the committee is marked to review and amass the full text of the draft legal

170. *Id.*

171. See WIPO, *Draft Report*, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, 22d Sess., July 9-July 12, 2012, WIPO/GRTKF/IC/22/6 (Nov. 5, 2012), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_ref_grtkf_22_6_prov_2.pdf (discussing the section-by-section debate of the regulations for TK and TCEs).

172. See WIPO, *The Protection of Traditional Knowledge: Draft Articles*, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, 21st Sess., Apr. 16-Apr. 20, 2012, WIPO/GRTKF/IC/21/4, (Jan. 18, 2012), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_4.pdf; See WIPO, *The Protection of Cultural Expressions: Draft Articles*, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge and Folklore, 22d Sess. WIPO/GRTKF/IC/22/REF/FACILITATORS TEXT (July 13, 2012), available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_facilitators_text.pdf.

173. See *Like-Minded Countries*, *supra* note 169.

174. Press Release, WIPO, WIPO Assemblies Agree Roadmaps for New Int'l Instruments, PR/2012/723 (Oct. 9, 2012), available at www.wipo.int/pressroom/en/articles/012/article_0022.html.

175. *Id.*

176. *Id.*

177. *Important Dates 2013*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/tk/en/documents/pdf/igc_work_program_2013_-_ga_decision.pdf (last visited Jan. 19, 2013).

178. *Id.*

instrument for protection of GRs, TK, and TCEs and make a recommendation to the General Assembly on the content of the final legal document.¹⁷⁹ The finalized legal document will not likely be effective immediately, but instead, have a trickling effect as more nations appreciate its significance and apply its multitude of protections.

1. Traditional Cultural Expressions

Traditional Cultural Expressions (TCEs) consist of Indigenous folklore, a form of Indigenous Knowledge that is not typically protected under Western concepts of intellectual property law.¹⁸⁰ The United States, in particular, is skeptical about adding TCEs into a globally protected category, arguing for spending more time negotiating draft text for basic intellectual property concepts.¹⁸¹ The draft text on folklore is surprisingly more advanced than either that of TK or GR because it is the least controverted.¹⁸²

2. Traditional Knowledge

Traditional Knowledge (TK) is the knowledge that is developed over time and used to sustain a community.¹⁸³ TK can consist of experience, culture, environment, local resources, animal knowledge, or plant resources.¹⁸⁴ Communities expand their TK over many years and develop and research new innovative practices to encourage growth in farming and medicine.¹⁸⁵ Traditional knowledge is generally considered part of the collective ownership of the community and is transmitted across generations through traditional stories to select people in the community.¹⁸⁶ Traditional Knowledge encompasses the broadest collection of protections, so this section is likely to be the longest. Options for TK protections vary due to the differences between Western and Indigenous ideologies.¹⁸⁷ Possibilities include exclusive control over TK with a grant to beneficiaries, authorizing or denying access to TK, forms of use upon consent, benefit sharing, and use without requiring mandatory disclosure.

179. *Id.*

180. Pruzin, *supra* note 37.

181. *Id.*

182. *Id.*

183. HANSEN & VANFLEET, *supra* note 25, at 3.

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Pruzin, *supra* note 163.

3. Genetic Resources

Genetic Resources (GR) encompasses medicines, hard sciences, and plant genetics.¹⁸⁸ Large concerns for participating nations involved with global access to genetic resources are compliance to conditions to access, use and benefit sharing, and monitoring activity across several jurisdictions.¹⁸⁹ Countries concerned with global monitoring suggest that national patent laws and regulations take precedence when determining who has access to particular materials.¹⁹⁰ Currently, the text on GRs is the most highly debated and in the most questionable form.¹⁹¹ WIPO members greatly contest this issue and, even with a basic draft text completed, there is not an end to the negotiations in sight.¹⁹²

B. Creating Streamlined Intellectual Property Regulations

The original goal of the WIPO's Intergovernmental Committee was to create a draft text of an international legal instrument to be voted on by the General Assembly.¹⁹³ The draft text is not finished, but it will contain provisions such as key definitions, authorities, who may obtain access, consents, liabilities, sanctions, and remedies (etc.). No matter how thorough this WIPO draft text is, it will still need to compete with other international intellectual property protections.¹⁹⁴ Other protections have been drafted or are in the course of being drafted from other organizations, which makes it difficult for all parties to come to an agreement, especially an agreement that is supposed to override all others.¹⁹⁵

C. Permissive or Mandatory: Should the Regulations be Binding or non-Binding?

The dispute still centers on whether the WIPO's legal instrument should be binding or non-binding.¹⁹⁶ For various reasons, different countries are lining up on opposite sides of the line to raise arguments for or against a binding agreement.¹⁹⁷ For example, Africa generally wants to create a binding instrument, whereas the United States recommends a non-binding agreement.¹⁹⁸ A binding instrument would likely be in the form of a treaty

188. Pruzin, *supra* note 37.

189. *Id.*

190. *Id.*

191. Pruzin, *supra* note 163.

192. *Id.*

193. Pruzin, *supra* note 37.

194. Pruzin, *supra* note 163.

195. *Id.*

196. *See* Pruzin, *supra* note 37.

197. *See* Pruzin, *supra* note 37.

198. Pruzin, *supra* note 37.

and any non-binding agreement would consist of recommendations, model practices, or global guidelines.¹⁹⁹ It is likely this issue will not be resolved until the final stages of negotiation, so everyone may be in suspense for a few more years until all other issues are resolved.²⁰⁰

IV. ENSURING THE SUCCESS OF WIPO INTERGOVERNMENTAL COMMITTEE REGULATIONS

A. Mandatory Regulations

One of the most controversial debates within the Intergovernmental Committee is whether the WIPO regulations should be permissive or mandatory for participating nations. The WIPO is afraid there will be less acceptance if the regulations are mandatory. If, however, the regulations are permissive, then there is no incentive for nations to abide by them. If the WIPO wants its Indigenous Knowledge intellectual property regulations to be successful in protecting Indigenous Knowledge, the regulations need to be mandatory. Indigenous people have fought for and awaited international protections, and permissive incorporation of WIPO regulations will not send the same strong message as mandatory regulations. Permissive regulations would allow nations to choose whether or not to protect the intellectual property of a portion of its population, which should not be available. When all other intellectual property rights are *required* under the WIPO and WTO, a nation should not be allowed the opportunity to refuse intellectual property protections for Indigenous people. It is shocking to think there could be an exception when it comes to protecting Indigenous rights. The strongest regulations should be applied to the most vulnerable populations, and it is not debatable that Indigenous populations are one of the most vulnerable when it comes to intellectual property misappropriation. The current list of regulations is rather lengthy. An alternative to publishing the entire transcript of voluntary regulations would be to begin with publishing fewer mandatory regulations that all nations could agree on, and then continue to add new regulations as they are agreed upon. Implementation of new regulations takes time, so it may be more beneficial to begin with less and add more as the regulations become more globally accepted.

An additional problem with voluntary implementation of Indigenous intellectual property protections is monetary cost. To implement and regulate compliance with the new regulations, an agency or governing body will need to be created. With many countries struggling financially, the additional cost of complying with the Indigenous intellectual property regulations will be daunting and discouraging. Financially struggling nations will not readily accept the additional costs associated with

199. Pruzin, *supra* note 163.

200. Pruzin, *supra* note 163.

implementing voluntary regulations. Therefore, it is a better option to begin with fewer, but mandatory regulations and allow nations a reasonable time to comply with such regulations.

B. Incorporate Indigenous Concepts of Ownership

As mentioned throughout this discussion, Indigenous concepts are not equivalent to those of Western society. Differences in societal values make it difficult for the WIPO to draft a cohesive declaration that encompasses and includes all participants. The first issue the WIPO needs to address is communal versus individual ownership. The Indigenous concept of ownership focuses on communal ownership, rather than one individual having the rights to a piece of property. This is the stumbling block in several nations' intellectual property laws, such as Australia, because single ownership/authorship cannot be determined. Many times Indigenous intellectual property goes unprotected because it does not meet the rigorous standards set out in traditional intellectual property law. The WIPO needs to address this issue by creating less rigorous ownership requirements for Indigenous intellectual property. The regulations need to be formatted in a non-traditional manner that will allow not just one, but multiple forms of authorship. The WIPO needs to expand on the traditional format of intellectual property law and allow ownership rights of a community, rather than a single individual for the WIPO regulations to be successful in protecting Indigenous intellectual property.

Secondly, the WIPO needs to expand its understanding of the time restrictions currently placed on intellectual property protection. Generally, Indigenous communities allow ownership rights to extend to perpetuity. Many nations have patent, copyright, and trademark laws that only protect registered intellectual property for a few decades. Indigenous Knowledge and culture has been passed on from generation to generation, so often protecting Indigenous intellectual property for the life of the original author/creator is not sufficient. Many Indigenous nations are wary of sharing their knowledge because, first, Indigenous communities are typically cautious of Western ideology, and, second, limited protections for their knowledge lead to appropriation of Indigenous intellectual property. Limited intellectual property protection means all protections will be gone at the end of the legal limitation and the intellectual property will extend to the public domain to be used by all. Indigenous Knowledge has traditionally not been used for profit; rather, it was a benefit of being part of the community. If the WIPO regulations do not address the fears of Indigenous communities regarding the length of the protections, Indigenous communities will need to find alternative safeguards for their knowledge. As a result of this tension, the WIPO regulations should either lengthen the time restrictions for protection of Indigenous intellectual property or create

a separate category of intellectual property for Indigenous knowledge that allows rights to extend into perpetuity.

CONCLUSION

Intellectual property law has greatly expanded over the last century. It now comprises some of the most vulnerable populations and allows Indigenous people to combat misappropriation with twenty-first century legal protections. One way to fully incorporate Indigenous Knowledge, a non-traditional property right, into intellectual property law is to develop sui generis intellectual property laws. Sui generis laws are for something that is “of its own kind,” so they would allow nations to draft their own laws speaking specifically to Indigenous intellectual property. Although many nations with large Indigenous populations have already incorporated Indigenous Knowledge into their intellectual property systems, the WIPO is currently aiming to draft a global declaration. The WIPO’s ambitious undertaking is essential to global recognition of Indigenous Knowledge protections. The Intergovernmental Committee has the opportunity to create one-of-a-kind protections that will safeguard Indigenous Knowledge beyond any other declaration or statute, but the WIPO must take into account the differences between Western and Indigenous concepts. To be successful, the WIPO needs to draft mandatory regulations and incorporate Indigenous concepts of ownership.

