


January 2008



Dr Mira T. Sundara Rajan, DPhil (Oxon)⁺
Canada Research Chair in Intellectual Property Law
Faculty of Law, The University of British Columbia

INTELLECTUAL PROPERTY AND ABORIGINAL PEOPLES: CONFLICT OR COMPROMISE?*

1. Introduction

The part of North America known prosaically as the Pacific Northwest is also a different world. It is an ancient and historic place, peopled by spirits of the past and future, and the unsurpassed spirituality of the land is deeply embedded in the stories of its natives, including the Haida people of coastal British Columbia and the Queen Charlotte Islands.¹

The Haida know their land as the land of the Eagle and the Raven. Their history, emerging from the shadows of human memory, is so intertwined with the land that the separations between history and myth, animal and spirit, so essential to the Western mode of thought, are of little importance. As in so many cultures of the world, stories carry in themselves the seeds of history, knowledge, and the law. For example, the traditional territory of the Haida, so difficult to establish accurately through purely historical methods, may be characterized quite simply and directly as the land where the Raven flies.²

⁺ The author gratefully acknowledges the research assistance of Tom Horacek, LLB 2008, UBC.

* The ideas proposed in this paper are addressed to the widest possible audience. The term "Aboriginal" is therefore used to include Canadian Indian, First Nations, Inuit, and Métis peoples, international Aboriginal cultures, such as those of the Australian Aborigines or Indian "tribals," as well as, Native Americans.

¹ The Islands are known by them as Haida Gwaii. British Columbia has historically been populated by a number of Aboriginal groups, including the Gitksan and Wet'suwet'en nations, who were victorious in establishing the concept of Aboriginal title to land in the landmark case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

² In *Delgamuukw (ibid.)*, the Supreme Court of Canada confronted the question of how the oral histories of Aboriginal peoples should be dealt with by common-law courts. In particular, what is the evidentiary value of oral histories in court proceedings? The particular example of the raven is drawn from the work of Professor Michael Jackson of the University of British Columbia Faculty of Law, in conversation, Fall 2006.

The interest of this idea is far from theoretical: the Haida, like many other Aboriginal peoples, are in the midst of land claims litigation. An important practical question arises: will this interpretation of Haida territory be something that is acceptable in a court of law in Canada? If it is not accepted as conclusive evidence, can a court work with it as a claim to be assessed and negotiated? And, would such a compromise approach be acceptable to the Haida?

This example raises a troubling question of cultural compatibility. Interestingly, the Supreme Court of Canada in the landmark 1997 decision of *Delgamuukw* not only recognized this potential incompatibility, but it also advocated a dramatic solution: the laws of evidence must be changed to accommodate the use of oral history. As Chief Justice Lamer affirmed:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists [*sic*] of historical documents.³

Canada's Aboriginal peoples live in a rich cultural tradition, but they are also increasingly engaged in a modern society built largely on Western cultural perspectives. To a great extent, their future development will depend on the decisions they make about their relationship with what has long been accepted as the Canadian mainstream. On what terms should the two co-exist?

The relevance of this question is hardly limited to land claims. It also surfaces in relation to another area that is at least as significant as land, although it is much more difficult to describe and quantify: culture. Canada's Aboriginal peoples are highly proactive about protecting and re-claiming their rights in relation to traditional lands. But, what about traditional culture? In other words, what is the status of the non-material wealth of Aboriginal peoples - their traditions, skills, arts, beliefs, and knowledge of their environment? For Aboriginal peoples, who have traditionally recognized a close relationship between traditional lands and traditional culture,

³ *Delgamuukw* (*supra* note 1), para 87.

considering the state of traditional knowledge seems like a natural sequel to the momentum behind the recognition of Aboriginal title.⁴ The future of traditional knowledge is a vast question, but there can be little doubt that intellectual property rights will have a major impact on its status.

2. Intellectual Property and Aboriginal Rights

Intellectual property is clearly among the most important questions confronting Canadian Aboriginal groups. With the spread of information and communications technology, Canada and the world have become dependent on knowledge and culture as never before. Very often, however, the approach to knowledge in the information society is controversial, and involves taking, borrowing, or adapting cultural wealth that has actually existed since time immemorial.

The cultural wealth of Aboriginal peoples throughout the world is a classic example. Aboriginal culture provides a rich warehouse, in the Renaissance sense, of artistry, images, sounds, music, and environmental knowledge to the modern world. Yet the treatment it receives is highly ambiguous. Questions arise at every level, from the philosophical issue of whether it is right to treat cultural knowledge as a commodity, to the practical issue of who should consent to the use of Aboriginal knowledge, and who should derive the benefits.

For better or for worse, these questions invariably raise the spectre of intellectual property rights. Over the past fifteen years - and specifically, since the creation of the World Trade Organization (WTO) in 1994⁵ - they have become the dominant

⁴ See *Delgamuukw*, *supra* note 1. The recognition of Aboriginal title in *Delgamuukw* is defined by Chief Justice Lamer as a *sui generis* right based on the special connection of a people with its land, and accordingly, imposed certain limitations on the treatment of land to which Aboriginal title is held: see *Delgamuukw* (n 1) para 117 and following. Another interesting development involving Aboriginal land rights in Canada was the creation of the Canadian territory of Nunavut in 1999, pursuant to the Nunavut Land Claim Agreements Act of 1993 (S.C. 1993, c. 29). Nunavut represented Canada's first territory administered directly by Aboriginal peoples. The Treaty divided Nunavut land into Crown-owned land with Inuit rights of use, and Inuit-owned land held in fee simple: see the Agreements, Treaties, and Negotiated Settlements Project: <<http://www.atns.net.au/agreement.asp?EntityID=1955>> (accessed March 27, 2008).

⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, being Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 33 I.L.M. 1197,

mechanism in the world for controlling the creation, use, and dissemination of culture. The new importance of intellectual property rights is a product of their role in securing the economic value that culture and knowledge represent in a digital environment.

Culture provides much of the “raw material” for technology to operate: without it, Internet sites, MP3s, and DVDs would be utterly devoid of content. Culture has therefore become something of immense and unprecedented “value” to the world economy. Due to its intangible quality, however, it is very difficult to control the movement of culture in a digital environment. At the same time, like anything else, culture can only generate economic value if it remains exclusive. It is entirely natural that the commercial exploitation of culture has come to rely heavily on a legal mechanism that largely replaces practical restraints on the movement of knowledge and information: intellectual property law.⁶

Intellectual property rights are a crucial part of the cultural landscape, and they present both dangers and potential opportunities for Aboriginal traditions. Aboriginal peoples confront a situation where their cultural wealth is in danger of being

<http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> (accessed March 27, 2008) (hereafter cited as TRIPs Agreement, Its provisions are enacted in Canada through the Canadian *Copyright Act*, R.S.C. 1985, c. C-42, the *Patent Act*, R.S.C. 1985, c. P-4, and the *Trade-marks Act*, R.S.C. 1985, c. T-13.

⁶ Mira T. Sundara Rajan, *Copyright and Creative Freedom* (London: Routledge, 2006). The use of technology to re-introduce practical barriers to the movement of knowledge is an important trend. Technological restrictions on the circulation of works include so-called Technological Protection Measures (TPMs) that restrict access to works, such as security keys and codes; Digital Rights Management (DRM) techniques, which identify, as appropriate, the authors and provenance of works; and anti-circumvention technologies that make it illegal to tamper with technological restrictions. Common examples are security codes for software and, to an extent, region codes for DVDs. The WIPO Internet Treaties, as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are collectively known, are the latest international copyright treaties, and they deal extensively with these kinds of measures: WIPO online, <http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html> and <<http://www.wipo.int/treaties/en/ip/wppt/>>. (Accessed March 27, 2008). For an interesting discussion around technological measures, see the website of the Case Law School symposium (November 2006) on “The 1996 WIPO Copyright Treaties: 10 Years Later” [*symposium publication forthcoming*]. A comprehensive discussion of technological measures in the US context may be found in JM Besek “Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts” (2004) 27 *Columbia Journal of Law and the Arts* 385.

converted into intellectual property by outsiders. For example, an Aboriginal story can become the basis of a book in which the author holds copyright, with no obligation to acknowledge the Aboriginal source, to pay for the privilege of use, or to ensure that he has made proper use of the story. The same applies to music, where Aboriginal sounds could inspire a music CD with no benefit returning to the people themselves. At the same time, Aboriginal people may want to make use of the considerable power of intellectual property rights to control the use of their own knowledge - to prevent anyone from misusing or misrepresenting it, or to ensure that the benefits of commercializing or publicizing knowledge return to the community.

From an intellectual property lawyer's perspective, three points about the relationship between traditional knowledge and intellectual property are noteworthy. First, there is often a strong tension between the concepts of culture underlying intellectual property systems and Aboriginal concepts of culture. Secondly, the current intellectual property framework leads to an exaggerated potential for the unfair and unethical exploitation of cultures that fall outside the parameters of the current norm, including those of Aboriginal peoples. Thirdly, and perhaps most controversially, the potential opportunities for Aboriginal peoples to use intellectual property concepts and tools for their own benefit tend to be thoughtlessly brushed aside. Nevertheless, they are important and may be empowering, and should therefore not suffer neglect by policy-makers.

This paper seeks to provide an introduction to intellectual property rights, and to illustrate their importance for Canada's Aboriginal peoples. It will point out some of the significant dangers and potential opportunities arising out of the national and international framework for the protection of intellectual property rights, consider some of the experiences, to date, of Aboriginal peoples in Canada, and worldwide, with intellectual property, and conclude with an attempt to offer some constructive suggestions as to how Aboriginal peoples may want to approach the intellectual property debate.

3. Intellectual Property Rights: The Legal Framework

a. A Definition

Intellectual property law is concerned with creative developments in all fields of intellectual and artistic endeavor. It is an umbrella term that includes different kinds of rights that apply to different types of human activities. The classic separations are copyright for the arts, patent for the sciences, and trademark for business. The idea of products that are dependent on geographical factors for their quality - foods, liquors, agricultural products, and local craftsmanship - is recognized as "geographical indications."

Geographical indications may be understood either as a subset of trademark law, or as an area of protection in their own right, and they are worth a special mention in the context of Aboriginal culture.⁷ As a result of international lobbying by European, and some Asian, governments, this area of intellectual property rights is increasingly prominent.⁸ It may be of special interest to Aboriginal peoples because of its basic premise that environmental factors and human craftsmanship can join to make unique

⁷ Annette Kur & Sam Cocks, "Nothing But A GI Thing: Geographical Indications Under EU Law" (2007) 17 Fordham Intellectual Property Media & Entertainment Law Journal 999, 1005-16.

⁸ France is keenly interested in promoting Geographical Indications (GI), and has been instrumental in doing so at the international level: interview with Jean-Baptiste Mozziconacci, Bureau Chief, Bilateral Affairs and International Cooperation (Chef du service, Affaires Bilatérales, Coopération Internationale), Institut National de la Propriété intellectuelle (INPI), December 2007. Among developing countries, India can lay claim to a degree of leadership in this area, with a highly active movement towards national recognition of geographical indications in areas as diverse as toys (Kondappalli wooden toys), textiles (Kancheepuram silk saris), and food (Darjeeling tea, or the less widely known Tirunelveli halva). For example, see the government of India web site, which includes a list of geographical indications currently recognized in that country: <http://www.patentoffice.nic.in/ipr/gi/geo_ind.htm>. (accessed March 27, 2008) In this light, the controversial French treatment of Darjeeling tea is interesting: see SC Srivastava, "Protecting the Geographical Indication for Darjeeling Tea" *Managing the challenges of WTO participation: case study 16*; http://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm. (accessed March 27, 2008)

products. Famous examples include French Champagne, but also, textiles, toys, and handicrafts from diverse countries.⁹

b. Historical Development

While all of these branches of intellectual property law have ancient antecedents, they developed in their modern form over a period of roughly a century, from the mid-1700s to the mid1800s.¹⁰ This century was a time of far-reaching social change. The first copyright statute was passed in 1709, and reflected intense debate over freedom of the press and the need to abolish censorship.¹¹ Patents came to be seen as a driving force behind the Industrial Revolution during the nineteenth century. In contrast to the current belief that intellectual property law is purely economic in nature, a historical perspective reveals that the rationales behind modern intellectual property laws were actually complex and responded to a variety of social needs associated with the modern era.

An understanding of the historical processes shaping the development of intellectual property rights illuminates much about the current legal framework. For example, the debate surrounding copyright law arose in a time of dynamic intellectual growth. The shape of copyright law was determined by forces as diverse as advocacy for freedom of the press and breaking the tradition of censorship exercised on behalf of the British Crown by the Stationers' Monopoly, famously supported by John Milton,¹² and an emerging understanding of the relationship between man and his own work developed in the writings of rising intellectuals like John Locke.¹³ It was precisely in order to

⁹ At the present time, the international recognition of geographical indications is limited to wines and spirits, although France and other countries would like to see this recognition expand: see TRIPs Agreement, Article 22, *supra* note 5.

¹⁰ Benjamin Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967).

¹¹ Sundara Rajan, *supra* note 6; Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968).

¹² *Areopagitica* (1644), <<http://www.uoregon.edu/~rbear/areopagitica.html>>. (accessed March 27, 2008).

¹³ Sundara Rajan, *supra* note 6. The scope of these theories is too broad to trace here; as a beginning, Locke's theory of labour is often used to justify intellectual property rights, and Hegelian ideas of human beings realizing themselves through their work are certainly relevant,

provide recognition for the creative labor of the author that modern copyright was first expressed as an author's right in his or her own work.¹⁴ At the same time, fear of a continuing monopoly over printing, made possible by the broad interpretation of copyright principles, led English judges to limit the sources of copyright law severely, excluding common-law and cultural ideals and restricting it exclusively to the letter of the Statute of Anne of 1709.¹⁵

c. Current Canadian Law

The modern Canadian law of intellectual property is strongly shaped by its historical origins in the English common-law tradition. Intellectual property rights in Canada are purely statutory rights - or as close to being such as is possible in a legal system that also allows judges to make rules through case precedents.¹⁶ In practice, what this means is that Canadian statutes define the content of intellectual property rights, determining who is entitled to hold them, how long they will last, what kind of work is entitled to protection, and how to enforce that protection. The historic rationales behind intellectual property protection - the need to protect creators, the social value of free speech, and the economic importance of innovation - are deeply embedded in the law, of course, but the level of recognition for these underlying values really depends on the will of legislators, who must give them legislative expression before they can be considered a recognized part of the law.

It is clear, therefore, that the content of Canadian intellectual property law is almost infinitely malleable. This impression is strengthened by the approach of the

as well. For example, see the discussions in Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot: Ashgate, 1996).

¹⁴ For example, see *Millar v Taylor* (1769), 4 Burr 2303, 98 Eng Rep 201 (KB).

¹⁵ Copyright Act 1709 8 Anne c.19. This issue was debated by the judges and resolved in two cases, *Millar v. Taylor* (*supra* note 14) and *Donaldson v. Becket* (1774), 4 Burr 2408, 1 Eng Rep 837 (HL).

¹⁶ Tort actions approximating, or related to, intellectual property rights remain, particularly in the area of authors' moral rights. In the United States, they are often used as a justification for limiting reform of copyright statutes. For example, defamation is widely considered to approximate the moral right of attribution, although there are serious questions about the validity of these kinds of claims: see Sundara Rajan, *supra* note 6 and D. Nimmer, "Conventional Copyright: A Morality Play" (1992) 3 *Entertainment Law Review* 94. Interestingly, the US position was shared by Britain until the 1988 reforms to its copyright law, which saw the adoption of codified provisions for the moral rights of the author for the first time: *Copyright, Designs & Patents Act 1988*, c 48, Chapter IV.

Supreme Court and Federal Court of Canada,¹⁷ which have recently developed surprisingly independent judgments on copyright and, especially, patent issues.¹⁸ Amendments to the Canadian Copyright Act, for example, can bring about profound changes in the content and practice of copyright. By design, Canadian copyright law can be shaped to serve policy goals of our choice. The power of a political lobby can have a tremendous impact on the concept and practice of Canadian copyright. Changes to the law may or may not be true to its historical origins. However, changes that move away from the human values underlying intellectual property rights are sure to be controversial. Arguably, this is what is currently behind the acrimony surrounding intellectual property rights in Canada - a sense that they protect private interests instead of the public, and favor corporations at the expense of creators.¹⁹

d. A Global Perspective

In recent years, globalization has brought a new dimension to intellectual property rights. Where intellectual property is concerned, globalization is no mere catchword. It represents a fundamental departure from the past, and has profound significance for Canada. Accordingly, the globalization of intellectual property rights deserves to be understood clearly.

In fact, intellectual property law has long had an international element. By the mid-nineteenth century, the technological potential for the international movement of goods led to a need for some commonalities in how intellectual works were to be treated. The first international treaties on patent and copyright, the Paris and Berne

¹⁷ The Federal Court system is responsible for dealing with copyright matters as an area of federal statute, and the rulings of the Federal Court of Appeal shape the law in this area. The provincial courts also have concurrent jurisdiction in relation to intellectual property rights: David Vaver, *Intellectual Property Law* (Toronto: Irwin Law, 1997).

¹⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, 236 D.L.R. (4th) 395, and *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45 / *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902.; in particular, Justice William I. Binnie developed the terminology of "higher life forms" in *Harvard Mouse* that is a new term not to be found in the statute or in relevant jurisprudence, although it appears to have been used by the Commissioner of Patents, and in Ted Schrecker, et al. *Ethical Issues Associated with the Patenting of Higher Life Forms*. (Ottawa: Industry Canada, 1997, cited by the Supreme Court in its decision.

¹⁹ Sundara Rajan, *supra* note 6.

Conventions, respectively, were established in 1883 and 1886.²⁰ Through periodic revisions, they have remained the primary instruments of intellectual property rights in the international community.²¹

International intellectual property conventions ultimately came to be administered by the United Nations through a specialist body of UNESCO, the World Intellectual Property Organization (WIPO).²² The system, based as it was in the United Nations framework, was characterized by a consensus-based approach that came to include bloc voting by developing countries on issues of concern to them. Indeed, it is noteworthy that the WIPO framework was the first to include developing countries as independent members of the intellectual property arena. Previously, most developing countries were automatically included in international agreements when their colonial rulers signed on. As a result, WIPO became the first forum for the consideration of non-Western and non-mainstream issues in the field.

With the entry of post-colonial member countries, concerns about education, literacy, scientific development, and the protection of cultural heritage in a modern context, were discussed in the international arena for the first time during the Sixties. This led to some intriguing progress in areas of concern. For example, the term “folklore” came to be used to refer to the traditional culture of developing countries, and WIPO prepared some “model legislation” to help developing countries to accommodate their concerns about folklore within modern intellectual property laws.²³ However, these

²⁰ *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 U.N.T.S. 305, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html (accessed March 27, 2008); *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 1161 U.N.T.S. 3, <http://www.wipo.int/treaties/ip/berne/index.html> (accessed March 27, 2008) (hereafter cited as Berne Convention).

²¹ The Berne Convention is especially significant, because copyright, as a right that flows automatically from the creation of a work, lends itself naturally to greater international integration than patent, which is dependent on lengthy and complex registration procedures at the domestic level.

²² WIPO was founded in 1967 as a specialist agency of the United Nations; the Convention Establishing the World Intellectual Property Organization is available on the WIPO website: http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html#article_1.

²³ For example, see the Tunis model law of 1976: *Tunis Model Law on Copyright for Developing Countries* (adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from 23 February to 2 March 1976, with the assistance of WIPO and UNESCO), http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-

ideas were not as powerful as they could have been, because of inadequate understanding and support from the developed world, which was preoccupied with other issues that were perceived to have greater economic and political significance.²⁴

Dissatisfaction with the WIPO system from the developed world reached a quiet crisis during the 1980s. With the development of information technology, the United States, in particular, became concerned that intellectual property laws were not progressing at an adequate pace to adapt to technological change. During the Uruguay Round of trade negotiations at the GATT, the US initiated negotiations for a new international framework governing intellectual property. This initiative culminated in the creation of the World Trade Organization (WTO) in 1994.

As one of its founding instruments, the WTO included an Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPs was not especially innovative in terms of the concept of intellectual property laws, since it operates by incorporating into itself the substance of the earlier agreements administered by WIPO.²⁵ However, the small innovations that it did introduce, generally derived from US law, could be quite significant. For example, Article 9.2 makes “fixation” a requirement of international copyright protection, while Article 10 explicitly requires that computer programs must be recognized as copyright works. This provision could eventually create problems for the growing recognition of software patents, by translating into an excessively strong regime for the simultaneous protection of software through both copyright and patent.

If the substantive changes to intellectual property at the WTO seem subtle at first glance, there can be no doubt whatsoever about the structural significance of the

[web.pdf/tunis_model_law_en-web.pdf](#)> (accessed March 27, 2008). Tunisia became the first country to include protection for folklore in its copyright law: see Edward W. Ploman & L. Clark Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge & Kegan Paul, 1980), part IV. Tunisia, 130.

²⁴ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London: Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987), c 11.

²⁵ For example, TRIPs Article 9.1 requires member countries of the WTO to adhere to Articles 1-17 of the Berne Convention, which set out the substance of copyright norms: see the TRIPs Agreement, *supra* note 5.

change. TRIPs is linked to the general dispute settlement mechanism of the WTO, which means that country-level complaints about intellectual property rights can lead to economic sanctions against the offending country. So, for example, if Canada's regime for the protection of pharmaceutical patents is deemed to be unsatisfactory, the United States can make a complaint to the WTO and, if the ruling supports the complaint, retaliate economically against Canada. This has been the process behind the reform of pharmaceutical patents in India, the subject of the first TRIPs dispute brought by the United States against India, leading to dramatic changes in its generic drug industry and raising questions about the continued accessibility of medications for the poor.²⁶

The significance of the new system is to make internationally-driven law reform perhaps the most important source of law at the domestic level. Intellectual property is informed by a unique paradox: it is an area of "purely statutory" law, fundamentally territorial in nature, that now depends on international rules for its content. In theory, this could be seen either as a positive or a negative development; it would depend on the processes driving international norms. The reality, though, is disappointing. The post-TRIPs landscape for intellectual property has been strongly dominated by a narrow agenda: the push for increased protection of intellectual property rights by powerful lobby groups in key US industries, including recorded music, film, and pharmaceuticals. Their interests shape the international regime for intellectual property rights, and through it, future laws in Canada and every other member country of the WTO.

Alternative approaches to intellectual property may be initiated in Canada, but they cannot escape the requirement of conformity with international law. Canadian proposals must ultimately be compatible with international movements, or they must seek to promote change at the international level, if necessary, by active opposition to an American agenda. To an extent, this explains the reluctance of the Canadian

²⁶ A summary of the proceedings and an update of their current status may be found on the WTO website: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm>. (accessed March 27, 2008). For critical commentary, see Martin J. Adelman and Sonia Baldia, "Prospects and Limits of the Patent Provision in the Trips Agreement: the Case of India," (1996) 29 *Vanderbilt Journal of Transnational Law* 507; for a comprehensive overview of India's pharmaceutical industry, see Henderson, E., "TRIPs and the Third World: The Example of Pharmaceutical Patents in India," (1997) 19 (11) *European Intellectual Property Review* 651.

government to undertake legislative reform of intellectual property rights in spite of the urgent need for leadership in Canada: the choices that Parliament has to make may prove to be exceedingly unpopular ones.

e. Concluding Remarks

These considerations are of great significance to Aboriginal peoples, and three noteworthy conclusions should be drawn. First, the intellectual property framework is one that Aboriginal peoples confront at multiple levels - nationally and internationally, conceptually and practically. Secondly, because of international and industry forces at play, it is difficult to contradict current views of intellectual property rights when putting forward new proposals. Thirdly, when exploring strategies to pursue the concerns and interests of Aboriginal peoples, the proposals must be persuasive at both the national and international levels. It is not likely to be enough to approach the federal (or provincial) governments in Canada; international strategies also need to be developed. This may mean that proposals to reshape intellectual property practices will be slow to find acceptance. On the other hand, international political pressure may encourage progress in Canadian law.

4. Digital Technology and the New Significance of Intellectual Property

The new international framework for the protection of intellectual property rights is a direct response to technology. In particular, the growing importance of information and communications technology calls for radically new approaches to intellectual property. The primary function of intellectual property law seems to have become the goal of securing economic value in digital products and services. This project is a dangerous one. The attempt to secure value from intangible products faces clear practical limitations, while it also threatens to impoverish the conceptual framework behind the law.²⁷

Interestingly, technological change is directly relevant to our understanding of the place of Aboriginal culture in the world. The diversity and richness of Aboriginal cultural heritage has long been admired by those outside Aboriginal communities.

²⁷ Sundara Rajan, *supra* note 6.

However, wider changes in the world are now responsible for an entirely new level of awareness. Aboriginal peoples have long struggled against the perception of their cultural interests as remote from the needs and concerns of a Western mainstream. In a fascinating turnaround, the wealth and beauty of Aboriginal traditions have emerged in the Digital Age as a source of major interest. In one sense, this has been a highly positive development, and reflects a new interest in cultural diversity as technology brings into contact an unprecedented range of cultures and peoples from all around the globe.

However, the renewed interest in Aboriginal cultures comes at a price - in this case, an unprecedented new interest in their economic potential. The trend reflects a general shift towards the economics of culture.²⁸ As in the case of other important sources of cultural wealth - for example, the cultures of developing countries, and individual authors and artists everywhere - the new status of culture has mixed consequences for Aboriginal peoples.

The transformation of Western society through technology has brought about a fundamental shift in the way that culture, and the knowledge and information that it embodies, are valued. In particular, prosperity appears increasingly dependent on the growth of information and communications technology that have given a name to our "Digital" age.

Generating economic and social value from technology is an interesting process. Information technology, rather like human brains, needs to be fed: it requires "content" that can then be communicated, modified, sampled, and used in countless other ways, largely to generate new content, and through it, wealth. A significant proportion of this "content" is culturally-derived, either in the form of art and music - leading to the power and prestige of the "entertainment industries" - or knowledge about the environment developed and preserved by groups who maintain, in contrast to the mainstream in Western countries, a tradition of living close to the land. The

²⁸ Mira T. Sundara Rajan, "Strange Bedfellows - Law and Culture" in Yudishthir Raj Isar & Helmut Anheier, eds., *Cultures and Globalization: The Cultural Economy* (Sage Publications: Thousand Oaks, California, 2008) [*forthcoming*] (hereafter cited as "Strange Bedfellows").

need for “content” to feed the technological circuit has brought unprecedented prestige to culture. But the vision of culture that technology conjures is fundamentally driven by economics. In the Digital Age, to put it crudely, culture is all about money.

How do we transform culture into money? At first glance, this, too, presents an uncomfortable paradox. We live in times when technology can be used to manipulate culture with such ease and cost-effectiveness, that few practical restrictions on the spread of knowledge exist. And yet, if knowledge were to circulate freely by means of technology, little economic benefit could be derived directly from it. Economic gain is a product of scarcity, but through technology, information has effectively become the most plentiful of goods.

Culture can be thought of as a powerful river. In the past, technological limitations were an obstacle interrupting its flow. Technological advances always challenged this natural restraint on the communication of culture, but, with a few minor adjustments, the dam was reasonably able to cope with the increased volume of flow. In the case of current information technologies, however, the dam is near-bursting - if, indeed, it has not already burst. Once a work appears in digitized format, any individual with access to rudimentary information technology facilities - a personal computer and an Internet connection - is in a position to reproduce and transmit the work to others on a virtually limitless basis. There are few practical obstacles, and practically no costs, associated with these activities. In this technological environment, how can anyone hope to extract an economic benefit from a cultural work beyond the date of its first appearance in the public realm?²⁹

The answer, as the international community seems to have concluded, is to be found in intellectual property rights. Intellectual property law acts as an artificial barrier

²⁹ See “Strange Bedfellows,” *id.* It is worth noting that social attitudes towards knowledge were perhaps fundamentally different when it was more scarce. As Marshall McLuhan comments, “Probably any medieval person would be puzzled at our idea of looking through something. He would assume that the reality looked through at us, and that by contemplation we bathed in the divine light, rather than looked at it.” See *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962), 106.

that restricts the free circulation of information through technology. The purpose of the restriction is to impose, once again, conditions of relative “scarcity” - renewing the economic value of information. The connection between intellectual property restrictions and the economics of culture becomes clearly apparent when we consider the active lobbying of interested groups to increase intellectual property restrictions. The entertainment industries are a major copyright lobby.³⁰ Culture is also indirectly implicated in the activities of pharmaceutical firms, who may make use of traditional knowledge about plants in the development of new drugs, an extraordinarily expensive kind of innovation.³¹

In these circumstances, those who create “content” find that their interests are finely suspended in the balance between opportunity and vulnerability. For Aboriginal peoples, the availability of digital technology presents unprecedented opportunities to maintain, preserve, develop, and disseminate their cultural knowledge. For example, to name but a few of the most obvious possibilities, the preservation of languages, stories, and images might be facilitated by the easy dissemination of tools like online dictionaries, news broadcasts, and photographs. Communication to traditional lands with a minimum of technological intervention might become possible.

However, these opportunities are matched by grave threats to Aboriginal cultures. Once a story or image is released to the public, it can easily be altered, and with the perfection of digital technology, those who come into contact with it afterwards will probably have no way of knowing that it has been modified. By means of digital

³⁰ David Nimmer’s 1992 assessment of the US copyright lobby and its role in placing the United States in a position of practical leadership without an adequate moral foundation remains one of the most compelling analyses of copyright’s development in the world’s leading economy: see Nimmer, *supra* note 16.

³¹ For example, Joseph A. DiMasi of the Tufts Center for the Study of Drug Development estimates the costs of developing one new drug at \$802 million : see Diedtra Henderson, “FDA rules aim to speed drug tests and trim costs: Changes will boost scientists at colleges and small companies” *Boston Globe* (13 January 2006), <http://www.boston.com/business/globe/articles/2006/01/13/fda_rules_aim_to_speed_drug_tests_and_trim_costs/>. (accessed March 27, 2008). The role of traditional knowledge in facilitating the development of new drugs is examined by Daniel S. Fabricant and Norman R. Farnsworth, “The Value of Plants Used in Traditional Medicine for Drug Discovery,” *Environmental Health Perspectives* online: <<http://www.ehponline.org/members/2001/suppl-1/69-75fabricant/fabricant-full.html>>. (accessed March 27, 2008)

reproduction technologies like CDs and, of course, the Internet, knowledge can be communicated to audiences on a scale that has so far been unimaginable. The concept of sacred knowledge, or culture that is protected as a matter of tradition, seems alien.

The world of technology creates a hunger for culture that has never existed in quite the same form - culture as one of the primary raw materials to feed the growth of technology. This brings the strong support of economic value to the world of culture. Yet, it is a curiously dissatisfying understanding of culture. Many societies of the world see culture in a different light, even rejecting an economic basis for valuing it. The current technological drive threatens the loss of these alternative views which, like most human considerations beyond material, are likely to be overpowered by the sheer force of economic compulsion.

5. Intellectual Property and Traditional Knowledge

The current cultural climate is one where cultural goods are valued in a new way because of their economic contribution to technology, which, in turn, is made possible by intellectual property laws. In this environment, what is the impact of intellectual property rights on the interests of Aboriginal peoples?

It is increasingly apparent that intellectual property rights have an impact on the traditional culture of Aboriginal peoples. It should be emphasized that this trend is not purely negative: the increasing recognition of what is now known as "traditional knowledge" is in part due to growing global education, communication, and interest. There is an entirely new awareness of the wealth of knowledge contributed to the world's heritage by Aboriginal cultures, made possible through technology and globalization. However, as a result of intellectual property rights, the value of this knowledge is increasingly understood in economic terms, leading to two potential dangers: misunderstanding and misappropriation.

a. Traditional Knowledge: A Cornerstone of Aboriginal Culture

When we speak of traditional knowledge, we are referring to a vast range of phenomena across diverse areas of human activity - cultural, historical, artistic, and, for lack of a better term, quasi-scientific - which has developed over the centuries as part of the Aboriginal way of life. The term replaces an earlier expression from the Sixties, "folklore," which, through extensive exploration of the issue led by developing countries, has come to be seen as excessively narrow and somewhat pejorative.³² Traditional knowledge may include folk tales, songs, myths, crafts, medicine, spiritual beliefs, and knowledge of plants and seasons. It is by no means unique to native peoples; on the contrary, the accumulation of traditional wealth is readily apparent in ancient cultures around the world, including those of both Aboriginal peoples and developing countries. Indeed, a truly accurate picture of traditional knowledge would portray its existence in practically every culture in the world, even embedded in the modern Western cultures where it tends to be undervalued.

Notwithstanding the diversity of traditional knowledge, there can be no doubt that it has a special importance for Aboriginal peoples. This is a result of two factors: the richness of traditional wealth in Aboriginal cultures, and the fact that a relatively important proportion of Aboriginal cultural heritage, in a great number of Aboriginal cultures around the world, has developed in the form of traditional knowledge. In other words, a significant part of the world's Aboriginal heritage is preserved in forms that may be oral rather than written, developed over historic periods of time, and controlled through elaborate, "traditional" mechanisms of communication and dissemination, such as training or initiation rituals.³³

In the context of a modern society that has become increasingly global and technology-driven, traditional knowledge has become a formidable presence. Ironically, the problems involving traditional knowledge are not so much to do with incompatibility between tradition and technology. Indeed, the characteristics of

³² Ricketson, *supra* note 24, c. 11.

³³ For example, see the discussion of knowledge surrounding the portrayal of the Morning Star Pole in *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481.

traditional knowledge often sit well with technology; the patterns by which it is valued, developed, preserved and communicated often seem to suggest that they approach knowledge with a fundamental recognition of both its importance and its free-flowing nature.³⁴ The incompatibility of traditional ways of life with information technology should probably not be an unquestioned assumption.

Rather, the problems confronting traditional knowledge have to do with the collisions between traditional knowledge and a prevailing Western concept of knowledge that is, itself, rapidly becoming outdated. In particular, the confrontation occurs between traditional knowledge and the cultural concepts promoted by intellectual property rights.

b. Traditional Knowledge and IP: At Least *Two* Perspectives on the World

By an interesting paradox, intellectual property law, which is understood by most lawyers as “purely statutory” law, is in fact among the areas of law that is most heavily informed by inherited concepts. Intellectual property rights are built on concepts that reflect the historical and cultural origins of the law. Accordingly, when we consider the interest of intellectual property rights for Aboriginal peoples, it is inevitable that the relationship between inherited concepts of information, knowledge, and culture in the Aboriginal and Western traditions will arise. In particular, this issue deserves closer examination in relation to some of the key concepts on which intellectual property rights depend.

i. Economic Incentives and Misappropriation

At first glance, the purpose of intellectual property rights is very simple: they seek to protect and reward creative effort. The products of creative effort are called intellectual property - a kind of “property” that is created through “intellectual” effort. The purpose of the rights is, therefore, to recognize and reward the practical achievements of creators.

³⁴ James Tunney, “E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?” (1998) 20 *European Intellectual Property Review* 335.

In practice, intellectual property rights are more complex. Two kinds of issues are especially relevant to Aboriginal peoples. In the first place, intellectual property rights claim to protect creators. However, intellectual property rules often operate to take away the creator's right, giving it, instead, to the person who employed the creator, or with whom the creator may have entered into an agreement to give away all or part of his rights.³⁵ The rationale for doing so is that this person has made an economic investment into the creator's work, and therefore deserves to reap the benefits of it. In both cases, it is quite common that the creator may be in a situation of unequal bargaining power with a large corporation, leading to circumstances in which he may sell rights to use his work at some eventual disadvantage to himself. A right that is said to protect creators therefore becomes, in practice, primarily a right that protects corporate interests.

Secondly, intellectual property rights convert knowledge into property. Proprietary ownership of knowledge is, of course, one of the ways in which societies relate to knowledge. However, there are also many other bases for the recognition of knowledge - folk or communal knowledge, knowledge in the public domain, or sacred knowledge, to name but a few. A system that recognizes one type of knowledge, but not others, creates a disparity. In particular, proprietary knowledge may come to be valued more highly than other types of knowledge, and indeed, it may even act as an incentive to seek to transform non-proprietary knowledge into intellectual "property." Given the power of property rights in the common-law legal system, it becomes very difficult for non-property interests to assert themselves against property rights. This is exactly what happens in the case of appropriation of Aboriginal knowledge by outsiders for the purpose of commercial gain.

In fact, the experience of Canadian Aboriginal peoples with intellectual property often falls into this category. A number of examples can be drawn from Inuit culture. The copying of Inuit styles of soapstone carving to make souvenir items became common

³⁵ *Copyright Act, supra* note 6, s. 13.3 describes the "employment rule," a standard feature of common-law copyright rules which makes the employer the rightful holder of the first copyright in a work that is "made in the course of employment." Copyright contracts can make specific provision for intellectual property rights in creative work. Their terms usually reflect the unequal bargaining power of the parties concerned.

during the 1960s, where the failure to identify original and authentic works led to a situation akin to art forgery.³⁶ Products like “Igloo coolers” and “Inuit jackets” are made by international companies like Adidas.³⁷ Words like the Inuit-derived “kayak” are common, and one wonders how widely the origins of these inventions and innovations are known.

ii. Property

Intellectual property is a term that defines intellectual creation as a kind of “property.” The purpose of doing so is to bring the attributes of property to intellectual creation. Crucial to property is ownership: the idea that intellectual property can be alienated, the consequence that the owner of the creation gains an extremely powerful right over the work that generally allows him to control its use and dissemination “exclusively,” and the result that anyone else who wants to use the work must gain his permission to do so.³⁸

Applying the concept of property to many kinds of Aboriginal knowledge may be inappropriate. In the case of traditional knowledge, it is often not considered to be “owned” by anyone, including the group responsible for its creation or development. Imposing the concept of ownership on traditional knowledge can lead to practical difficulties. Who is entitled to own the knowledge and restrict its future use? On what basis? If the knowledge is restricted by traditional practices – for example, sacred knowledge that requires initiation into a tradition – how can this relationship to the knowledge be reflected in its intellectual property status? This very question came before the Federal Court of Australia in the case of *Yumbulul*,³⁹ where a member of

³⁶ See Mira T. Sundara Rajan, “Moral Rights and Forgery,” in G. Reichelt, ed., *Original und Fälschung* (Manz: Vienna, 2007). (hereafter cited as “Moral Rights and Forgery”).

³⁷ For example, see <<http://www.igloocoolers.com/home/>>; (accessed March 27, 2008). <<http://www.shopadidas.ca/catalogservlet?categoryId=2308353&productId=226609>>. (accessed March 27, 2008).

³⁸ The idea of “fair use” – or “fair dealing” as it is known in Canadian law, places implicit limits on this right. Historically, copyright law has not interfered with private or non-commercial uses of work, although the debate on music downloading seems to be changing this tradition: see the comments of the United States Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005).

³⁹ *Supra* note 33.

the Galpu clan who was initiated into the knowledge required for making a work known as the Morning Star Pole inadvertently contravened current regulations when he allowed the Australian government to use a picture of the Pole on a banknote. In its reasoning, the Court was sympathetic to the complaint of the clan that sacred knowledge had been made public without its authorization. However, it felt unable to void a contract for the transfer of intellectual property rights between Yumbulul and the Australian government on the basis of the clan's complaint.

The *Yumbulul* case illustrates three problems. The first is a concern about values. The concept of transforming knowledge into property emphasizes certain aspects of our relationship with that knowledge: we think in terms of our rights to do certain things with it, and to exclude others from it. We may also come to think about it in primarily economic terms, which might eclipse the other kinds of values associated with it. By imposing the concept of ownership on knowledge, do we change its very nature?

The second concern emphasizes the reality of Aboriginal ways of dealing with knowledge. In the Western tradition, much discussion about intellectual property in the international community seems to be built on the unspoken assumption that traditional societies have never had intellectual property systems. However, this belief depends on how we define such systems, and how broadly we define law as a whole. Does law include custom? How much law is written and what is oral, and is the distinction between the two a meaningful one? The Laws of Manu, one of the oldest legal texts in the world, define "the usages of good men" as an appropriate source of law. The common-law system seems to place great value on judicial opinion, yet civil law systems do not consider judges to be law-makers.

In commenting that traditional societies do not have intellectual property systems, Western lawyers are in danger of a fatal oversight. On the contrary, indigenous legal systems often have complex systems for controlling knowledge that, for them, played a comparable role to what intellectual property rights accomplish in today's industrial societies. In the *Yumbulul* case, we see a potential conflict between a person who earned and then enjoyed a community-given right to exercise his art. But the

community clearly saw a limit to his rights as an artist. This limit was not something that the Australian court felt it could recognize, and it arguably reduced the status of indigenous mechanisms for controlling knowledge when it failed to do so.⁴⁰

The third issue is a practical one. We may not want to think about traditional knowledge as a form of property. However, if we refuse to do so, there is a possibility that someone else might. In this case, not only is traditional knowledge converted into property, but it may also become the property of outsiders who do not have the same attachment to it as the group with which it originated. If the community truly associated with the tradition wants to re-assert its connection with it, how can this goal be accomplished?

Anyone who wants to make a claim against appropriated traditional knowledge is in an awkward legal position. The relationship between cultures and their own traditional knowledge is difficult to express, as there is no vocabulary, either legal or conceptual, that can serve to bridge these worlds. In other words, the true but indeterminate connections of tradition must confront the hard and precise near-absolutes of property rights. This equation is not one that is likely to lead to successful legal claims to one's own traditional culture, however strong the moral basis for them.

iii. Authorship

Western intellectual property law is based upon the concept that an individual creates work that is of value to society. The underlying stereotype is of an author or inventor

⁴⁰*Yumbulul*, *supra* note 33. The Court comments: "...[I]t may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin. But to say this is not to say that there has been established in the case any cause of action." Interestingly, it goes on to assert, "...[T]he question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators. For what it is worth, I would add that it would be most unfortunate if Mr Yumbulul were to be the subject of continued criticism within the Aboriginal community for allowing the reproduction of the Morning Star Pole design on the commemorative banknote. The reproduction was, and should be seen, as a mark of the high respect that has all too slowly developed in Australian society for the beauty and richness of Aboriginal culture."

who creates work more or less independently, and is therefore entitled to reap the benefits of his own labour.

In the twenty-first century, intellectual property laws have accumulated a great deal of conceptual dust since their origins, and we now tend to see the author or inventor through the film of a Romantic lens. The work is the product of a creator's individual genius, and the author's entitlement to its fruits also reflects his special gifts and social status.⁴¹ The Romantic view increasingly dominates intellectual property discourse, with two consequences. First, it becomes difficult to confer intellectual property rights based on any kind of authorship beyond individual, or at best, joint creation. The issue of who shall benefit from works created in a group or community context raises practical difficulties. In the case of corporate creation or ownership of works, the corporation is treated more or less on par with an individual creator, arguably leading to excessive and inappropriate protection for corporations.⁴²

In contrast, Aboriginal cultures enjoy creativity in diverse circumstances, of which "individual authorship" represents only one variant. In particular, traditional knowledge is usually a form of culture that has been generated by large numbers of people over generations. How can we talk about authorship? How will we designate an author? What rights will he or she enjoy, and against whom?

Moreover, even in relation to an individual author, the meaning of authorship may be different for Aboriginal communities. An interesting example may be found in Bill Reid, an eminent Haida sculptor who has created some of the best-known artworks representing Canadian Aboriginal culture in the world. When Reid died in 1998, a controversy arose concerning Reid's working relationship with artists in his own studio.

⁴¹ See, for example, Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) 17(4) *Eighteenth-Century Studies* 425: she traces the idea of moral rights to this historical view of the author's role in society.

⁴² See Woodmansee, *id.*, and Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 *Cardozo Arts and Entertainment Law Journal* 293. It should be duly noted that this particular version of the author's story is not the only way of looking at modern intellectual property rights; its value is that of one well-researched theory that may help to describe a more complex reality. It is interesting to note that the Latin etymology of the term "author," simultaneously traces it to ideas of original genius and craftsmanship embodied in *auctor* and *augere*.

There was no question that Reid was an inspired artist whose conception of his work was unique and original. However, a significant portion of the physical work involved in creating the objects - for example, the famed sculpture of a Haida creation myth "Raven and the First Men" - was actually carried out by artists in his *atelier*.⁴³ For commentators in the Canadian media, there was something uncomfortable about these arrangements. The idea was perhaps not so different from earlier practices in Western Europe - for example, in the time of Michelangelo - but this model of creation has certainly been out of fashion since the Romantic era. The status of the artist therefore becomes questionable, and the perception of his role is likely to have both a specific impact on his ability to protect his work and his reputation, and, more generally, on the overall prestige of Aboriginal cultural practices.

iv. Fixation and Originality

Not every work qualifies for an intellectual property right: copyright law has certain basic requirements that a work must satisfy before it becomes eligible for protection. These requirements are referred to as fixation and originality, and both present difficulties for traditional knowledge.

Fixation means that, in order to qualify for protection through intellectual property laws, a work must be recorded in a tangible medium. In general, a short story will qualify for protection, but an oral narrative will not. This threshold requirement presents a stark illustration of the incompatibility between intellectual property rights and traditional knowledge. The knowledge and culture that is preserved through tradition is often unwritten, and tends to be passed down through generations by techniques of memory, storytelling, and song. Oral traditions continue to exist, not only among Aboriginal peoples, but among many cultures of the developing world.

Oral traditions that are not fixed will not qualify for protection through intellectual property rights. What is problematic, however, is that oral traditions can become fixed. This has happened throughout history - poets have collected traditional

⁴³ "Moral Rights and Forgery," *supra* note 36.

knowledge into epics in cultures as diverse as India and ancient Greece⁴⁴ - but in a modern context, this raises peculiar difficulties. In particular, if an individual author writes down knowledge or stories from an oral tradition, he or she qualifies for copyright protection in the written work, and enjoys all of the benefits of authorship and ownership over the work. The author can control who sees it, how it is published or disseminated, and to a great extent, how the material is used. In this way, a fixation requirement can become a means by which traditional knowledge may be misappropriated.

Interestingly, though it is somewhat difficult to believe, Canadian law does not officially contain a fixation requirement - it has never been incorporated into the Canadian Copyright Act. Judges have chosen to read it into the Act, interpreting Canadian copyright law as if it does require fixation.⁴⁵ From the perspective of traditional knowledge, this now seems like an unfortunate choice, as Canadian law is potentially flexible in relation to a key conflict between intellectual property and traditional knowledge. David Vaver argues that, notwithstanding scattered precedents on the issue, fixation does not need to be read into the Canadian Act.⁴⁶

Unfortunately, the adoption of the TRIPs Agreement has brought practical limitations to Canadian flexibility in this regard. Article 9.2 of the TRIPs Agreement contains the proviso that only works that have been fixed will qualify for protection.⁴⁷ The terms appear to have been directly inspired by s 102 of the US Copyright Act, which specifies

⁴⁴ India's *Mahabharata* and *Ramayana* are famous examples: both are ascribed to authors, Vyasa and Valmiki respectively. However, the story of the Mahabharata's authorship is that Vyasa dictated the epic to Ganesh, the Hindu representation of God with an elephant's head. Vyasa was so fluent, the tradition holds, that Ganesh, who was caught without a writing implement, had to break off his tusk and use it as a pen. In the Classical European context, Homer's *Odyssey* <<http://classics.mit.edu/Homer/odyssey.html>> (accessed March 27, 2008) and *Iliad* <<http://classics.mit.edu/Homer/iliad.html>> are perhaps comparable phenomena. See RK Narayan's English re-tellings of the two epics: *Mahabharata*, Penguin Classics, 2001), and *The Ramayana: A Shortened Modern Prose Version of the Indian Epic*, (London: Penguin Twentieth-Century Classics, New Ed., 1998).

⁴⁵ For example, *Canadian Admiral Corporation Ltd. v. Rediffusion Inc.*, [1954] Ex. CR 382, 20 CPR 75.

⁴⁶ David Vaver, *Copyright Law* (Irwin Law: Toronto, 2001), Chapter 3.

⁴⁷ Article 9.2 states "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

a fixation requirement as part of American law.⁴⁸ Interestingly, the provision is in conformity with the broader principle set out in the US Constitution, that intellectual property rights must find suitable limitations.⁴⁹

v. Innovation and Prior Art

If fixation is a major stumbling-block to building an understanding between copyright and traditional knowledge, the idea of “prior art” presents a parallel problem in relation to patents. In contrast to the automatic protection for works enjoyed under copyright law, the requirements for patent protection can be difficult to satisfy. Among the basic requirements to qualify for a patent, the inventor must be able to show that his or her work is innovative, and is not in any way a product of prior art. The greater stringency of patent law would seem to be favourable for traditional knowledge, since knowledge of the environment that has developed among indigenous peoples should prevent that knowledge from being patented as an innovation.

Unfortunately, this is not how prior knowledge of an invention or its application and traditional societies is typically dealt with by patent agencies. In particular, the United States Patent Office, which handles most of the world’s patent applications, only recognize prior art if evidence of it is presented in a certain form. In particular, the prior knowledge must be disclosed in a written document.

This aspect of patent law presents an interesting lesson on how the world intellectual property rights is changing. Recent attempts to patent traditional knowledge in the United States generated international outrage, and a sense that some strategy must be found to discourage the USPTO from awarding these patents. Two of the most notorious cases have involved traditional knowledge from India, and one of them, involving a patent on certain uses of the spice, turmeric, led to a decision on the part of the Indian government to lodge a complaint with the USPTO. India hoped to make a

⁴⁸ S 102 (a) states: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device...”

⁴⁹ U.S. Constitution, Art. I, § 8, clause 8: online, <<http://www.usconstitution.net/const.html#A1Sec8>>. (accessed March 27, 2008).

test case of the matter, and the USPTO obliged by overturning the contested patent. However, because patents can be filed for precise and incremental knowledge, including new uses of existing knowledge, and number of outstanding patents for turmeric continue to be under consideration by the USPTO. The Indian government has finally adopted the strategy of filing for some of these patents itself, in the hope of being able to restrict companies and inventors in the United States from asserting control over a celebrated traditional remedy.⁵⁰

vi. Time Limits

Time limits are considered by many to be the essence of intellectual property rights. In effect, statutes confer a monopoly right on the creators or owners of intellectual property, but this right is limited to a fixed period of time. Among international legal instruments, the American Constitution defines intellectual property as a “time-limited monopoly” conferred upon authors and inventors “[t]o promote the progress of science and useful arts.”⁵¹

The idea of time limits upon intellectual property rights is a simple and straightforward way of limiting their scope. From the perspective of traditional knowledge, however, time limits are more or less senseless. Traditional knowledge represents cultural heritage that is very ancient, often dating from time immemorial, and the protection of this heritage is something that needs to continue indefinitely into the future, as into the past.

Interestingly, trademark protection is somewhat different from other intellectual property rights in the sense that it deals with time limits differently. Registration of a trademark will allow the exclusive use of the mark for the registered products or services for a limited time, but the use of the mark can be renewed indefinitely.⁵² At

⁵⁰ See Vandana Shiva’s ZNet HomePage <<http://www.zmag.org/bios/homepage.cfm?authorID=90>>. (accessed March 27, 2008). The patents and applications themselves may be found online, by searching the website of the United States Patent and Trademark Office: <<http://www.uspto.gov>>. (accessed March 27, 2008)

⁵¹ *Supra* note 50.

⁵² *Trade-marks Act*, *supra* note 5, s. 46.

the same time, a mark that becomes well-known will continue to be protected indefinitely, even without the formalities of registration. These features of trademark suggest that it may be helpful for the protection of traditional knowledge, particularly in its application to commercial uses. Not surprisingly, Native American groups have chosen to associate certain trademarks with products of traditional culture. Similarly, a geographical indication mark can help to verify the authenticity of a given traditional remedy or substance.

vii. Science versus Art

It seems fitting to conclude this discussion with a brief consideration of one of the most basic characteristics of intellectual property rights, the broad division into artistic and scientific rights through copyright and patent law. This perspective on the categories of knowledge is fundamentally at odds with much traditional knowledge, where art, science, medicine, stories, and religion may all be intertwined. An example from India illustrates this idea: the neem tree, which has been the object of patent controversy in Europe and the United States as American companies have tried to patent certain traditional uses of this plant.⁵³ Neem is at once a sacred plant that appears in folktales and religious stories, and an indispensable component of medical treatment for a variety of health conditions. Traditionally, Indians have used twigs from the neem tree as toothbrushes, and currently, neem products from toothpaste to soap may be found in any Indian grocery.

The separation of artistic and scientific knowledge represents the very essence of a modern, Western world-view. Accordingly, the intellectual property rights dealing with these different branches of human knowledge are self-contained. A work could generally not qualify as both a copyright work and a patentable invention.

⁵³See "India wins neem patent case," March 9, 2005, *The Hindu*, <<http://www.hinduonnet.com/2005/03/09/stories/2005030902381300.htm>>; (accessed March 27, 2008) see also Chakravarthi Raghavan, "Neem Patent Revoked by European Patent Office," 11 May 2000, Third World Network online: <http://www.twinside.org.sg/title/revoked.htm> (accessed March 27, 2008).

Interestingly, this concept has come to be severely tested by technological change. While it seems an unlikely area to explore, the dissolution of intellectual property categories offers solid hope for a better understanding of traditional knowledge. In particular, the breakdown of boundaries between traditional intellectual property categories has occurred through new technologies that have proven to be difficult to classify. For example, software is considered a “literary work” from the perspective of copyright law, but, since the landmark *State Street Bank* case of 1998,⁵⁴ the practice of granting patent protection for software as a form of “business method” has become increasingly common.

viii. Jurisdiction and the “Public Domain”

It is disturbing to consider a Canadian court’s response to issues such as those in the Australian cases. In 1996, the Supreme Court of British Columbia rejected the idea of an Aboriginal claim to the word “Queneesh,” because “Aboriginal rights are outside the scope of trademark law.” In a striking parallel with *Yumbulul*, the court refused to uphold the claim of a First Nations band against an individual artist from another group.⁵⁵

If, in fact, Aboriginal knowledge falls “outside the scope” of intellectual property rights, the assumption made by many is that this knowledge then falls into the so-called “public domain.” This occurs because Western societies increasingly think of knowledge in dichotomous terms, either as being legally restricted through intellectual property law, or freely available to the public. The possibility of alternative or other concepts that might restrict the flow of knowledge is not as

⁵⁴ *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368, 47 U.S.P.Q.2d 1596. (Fed. Cir.1998).

⁵⁵ See *Queneesh Studios Inc. v. Queneesh Developments Inc.*, [1996] 67 C.P.R. (3d) 452 (BCSC). In 1996, the Comox First Nation and an Aboriginal artist from another Aboriginal community went to court in British Columbia over use of the trade-mark “Queneesh” to describe the artist’s art business. For the Comox First Nation, “Queneesh” referred to a culturally significant legend and was also the name of its development corporation. The judge turned down the band’s effort to have its Aboriginal right to the term “Queneesh” reviewed as part of a trade-mark case because Aboriginal rights are outside the scope of trade-mark law. The case is also discussed in Gordon Christie, “Aboriginal Rights, Aboriginal Culture, and Protection” (1998) 36(3) *Osgoode Hall Law Journal* 447, 455-446, (note 11).

widely acknowledged as it should be. The danger for traditional cultures lies in the following scenario: if we fail to place this knowledge within the scope of intellectual property rights, even though it may be culturally and legally satisfying to do so, that knowledge may then fall, by default, into the public domain. In the absence of a protective framework, it will become freely available without legal restrictions.

Fortunately, this situation has been actively combated by Aboriginal groups who have sought to identify their products by registering “certification marks” for them, or who have registered trademarks through Aboriginal companies representing their communities.⁵⁶ However, the current Canadian system for trademark protection, as in every other area of intellectual property rights, does not allow any special protection for Aboriginal terms or symbols. It is disheartening to note that Aboriginal peoples in Canada cannot lay claim to any special treatment where their “intellectual property” is concerned. They can only succeed in registering marks if these marks are not already registered by someone else, even if that person may be a non-Aboriginal individual, company, business, or organization, and they cannot oppose a mark on the sheer grounds that it misappropriates Aboriginal culture. As the Canadian Ministry of Indian and Northern Affairs comments:

So many existing trade-marks use Aboriginal names and designs that Aboriginal people and companies may have difficulty establishing distinct trade-marks of their own in the future. Any confusion created by these non-Aboriginal trademarks is likely to affect potential licencing and endorsement opportunities for Aboriginal people... If Aboriginal people seek to file trade-marks with distinctive Aboriginal designs, they might be successfully opposed by non-Aboriginal firms that have already trade-marked similar designs.⁵⁷

c. Conclusions

In many ways, Aboriginal cultures and intellectual property represent different ways of seeing the world. It is hardly surprising, therefore, that the encounter between traditional knowledge and intellectual property is experienced by both groups as a

⁵⁶ See the website of Indian and Northern Affairs Canada, which identifies trademarks registered by Aboriginal business and organizations in Canada: <http://www.ainc-inac.gc.ca/pr/ra/intpro/tms_e.html>. (accessed March 27, 2008).

⁵⁷ *Id.*

collision between two worlds. However, Aboriginal peoples bear the brunt of the impact. Traditional knowledge is by nature a vast, diffuse, and fluid approach to culture, and from a legal point of view, these characteristics represent a distinct disadvantage in comparison with the precision and specificity of intellectual property rights.

Nevertheless, the picture is not entirely gloomy. On the contrary, a closer examination of intellectual property rights reveals a wealth of concepts and approaches in the history and practice surrounding this area of the law.⁵⁸ Political lobbying has led to an emphasis on economic rationales at the expense of other conceptual arguments for intellectual property protection, but, in truth, there is little about intellectual property concepts that need be set in stone.⁵⁹

The shortcomings in our current understanding of intellectual property are largely due to the ways in which we choose to interpret the concepts we have received from the past. In some cases, these concepts have become outdated; in others, they have become misunderstood when viewed through a contemporary lens. In the final analysis, the rights are ultimately instruments of policy that are malleable in the service of the public interest. In this light, it is worth exploring the adaptability of intellectual property rights to the needs of traditional knowledge, as this approach to intellectual property rights can play a significant role in helping Aboriginal peoples to overcome legal and historical disadvantages.

6. Intellectual Property Strategies

How should Aboriginal peoples deal with intellectual property rights? There are three obvious strategies: ignore them, use them, or resist them.

The discussion in this paper has sought to show that ignoring intellectual property is a dangerous option, and should be rejected: it would leave Aboriginal culture and traditions open to unfair exploitation. Clearly, the latter two strategies are most

⁵⁸ See Sundara Rajan, *supra* note 6, Chapter 9.

⁵⁹ *Id.*

desirable, and although they may appear contradictory at first glance, they can actually be made to work together in support of Aboriginal interests.

a. Using Intellectual Property Rights to Prevent Misappropriation

Aboriginal peoples may want to use intellectual property rights to assert their ownership over their own culture. The purpose of doing so, in contrast to traditional intellectual property rationales, would be to prevent misappropriation of their culture. From an Aboriginal perspective, the paradox of ownership need not be overly troublesome. Ownership can be used as a construct to explain to outsiders that Aboriginal knowledge is protected from trespass, in rather the same way that the Copyleft movement asks its members to contract out of copyright protection, but implicitly allows them to continue to rely on copyright to protect the works of its advocates from misuse.⁶⁰

This strategy might also allow them to develop test cases in Canada, like the Indian government's approach to turmeric patents. However, the decision to patent or trademark traditional knowledge can be expensive and require considerable legal expertise. This approach should probably be used selectively to assist in improving the general awareness of traditional knowledge in the scientific community, and among patent-based industries.

b. Using Intellectual Property Rights for Economic Benefit

In the traditional knowledge community, it sometimes seems that there is an implicit bias against the idea that Aboriginal peoples may want to assert intellectual property rights in their culture for economic gain. However, it seems possible and even natural that some aspects of Aboriginal cultures may be suitable for intellectual property

⁶⁰ Copyleft advocates would probably prefer to see their movement characterized as relying on breach of contract, but the possibility of a copyright infringement suit clearly remains available. For an interesting discussion of the problems generated by multiple versions of the Creative Commons licence, see Michael Fitzgerald, "Copyleft Hits a Snag: Incompatibilities among "copyleft" licenses meant to promote the sharing of creative work could end up preventing it, says cyber-law expert Lawrence Lessig" Dec 21, 2005, Technology Review (MIT) <http://www.technologyreview.com/InfoTech-Software/wtr_16073,300,p1.html?a=f&a=f>.

protection, and that the economic value of this knowledge may bring real benefits to Aboriginal communities. For example, the development of the Inukshuk “logo” for the Whistler Olympics was done without the input of Aboriginal communities, either on the West coast or in the far North.⁶¹ The Olympic committee, or the Canadian or British Columbia governments, could easily have approached Inuit communities and sought their help in developing a suitable Olympic logo. Olympic involvement, in turn, could have brought commercial and other benefits. Only Aboriginal peoples can decide on the proper response to these kinds of opportunities, but there is no real justification for depriving them of this choice.

c. Resisting Intellectual Property Rights

Aboriginal peoples will clearly want to resist the misappropriation of their traditional knowledge. However, resistance can also take another form: lobbying in favor of law reform that will favor adjustments to intellectual property laws, and help to adapt intellectual property concepts to the needs of traditional knowledge. Law reform can be affected at the federal level, but it can also be achieved by persuading Canadian courts to accept Aboriginal traditions. Traditional knowledge issues have not yet found their way to the Canadian Supreme Court, but Australian courts have grappled with the issue and taken the opportunity to urge legislative reform because of the complexity of the problem.⁶²

For example, Aboriginal peoples are likely to be interested in promoting the non-commercial aspects of intellectual property rights, including moral rights, which are widely used in the developing world to protect the integrity of cultural heritage.⁶³ Traditional knowledge could benefit from rights that are held jointly by Aboriginal communities, or in trust for their benefit by Aboriginal leaders. Special protection for

⁶¹ Peter Irniq, former Commissioner of Nunavut and advocate for Inuit rights, in conversation, February 2008. The Olympic symbol that claims to represent an “Inukshuk,” as well as three Olympic “mascots,” all appear to misrepresent Inuit culture: see, especially, where the press release emphasizes that each figure is inspired by mythological creatures of Aboriginal origin, but does not provide any precise references.

⁶² For e.g., see *Yumbulul*, *supra* note 33.

⁶³ See Mira T. Sundara Rajan, “Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal v. Union of India*” (2001) 10(1) *International Journal of Cultural Property* 79 and *Amar Nath Sehgal v. Union of India* (2005), 30 P.T.C. 253 (2005). (Delhi).

folklore could be included in copyright laws as a type of “anonymous” work.⁶⁴ Special rules and practices could govern patenting of traditional knowledge. Geographical indications could be applied to Aboriginal knowledge and culture.

It is important to remember that change must be effected at the international level to be meaningful in the long term. Aboriginal peoples can rely on their past experience of appeals to the international community to make changes in the international framework that will accommodate their interests. They can also join with other Aboriginal cultures throughout the world to pursue a larger community of interests, as a number of Aboriginal groups have done in order to protect traditional music from unfair exploitation. Interestingly, Aboriginal peoples may also find support for their needs in public interest advocates, who generally oppose the excessive extension of intellectual property rights into new areas of knowledge. Many of the so-called “new” challenges brought to intellectual property by technology are not new at all: as this paper has sought to show, concepts such as fixation, originality, and authorship, were all challenged by the realities of traditional knowledge long before the first computer was built.⁶⁵

7. Conclusion

Intellectual property rights represent a major challenge for Canada’s Aboriginal peoples. By educating themselves, they have every hope of navigating this challenge successfully, while turning the sword of intellectual property law into a shield that can guard their precious traditional heritage. The entire world stands to benefit from the protection of Aboriginal culture, which represents that rarest of ideals in the twenty-first century - a truly different perspective.

⁶⁴ Tunisia provides an interesting example of copyright protection for folklore it allows copyright in works borrowed or derived from Tunisia’s “cultural traditional patrimony,” but no assignment or exclusive license is possible without the approval of the Tunisian Ministry for cultural affairs. Tunisia also has a special requirement that anyone wishing to record works of folklore for commercial purposes must first secure a licence. Article 7 of the current Copyright Law, available through WIPO’s Collection of Laws for Electronic Access (CLEA), <http://www.wipo.int/clea/docs_new/en/tn/tn022en.html#P68_6685>. (accessed March 27, 2008). The history of the provision may be traced through Ploman & Clark Hamilton, *supra* note 23.

⁶⁵ Tunney, *supra* note 34.