

# GENERAL ARTICLES

Karolina Prażmowska\*

---

karolina.prazmowska@us.edu.pl

orcid.org/0000-0002-3080-6924

Faculty of Law and Administration, University of Silesia

Bankowa 11B

40-007 Katowice, Poland

## Misappropriation of Indigenous Cultural Heritage – Intellectual Property Rights in the Digital Era

**Abstract:** The digitization of cultural heritage has become a common practice among cultural and educational institutions. The Internet and the widespread of new technologies have made the heritage more accessible and facilitates cultural exchange. However, digitization both raises challenges and creates opportunities for the sustainable and appropriate treatment of Indigenous digital cultural heritage collections, as the use of new technologies may render such heritage more vulnerable to misappropriation and misuse. It is therefore vital to investigate the possibilities of Intellectual Property tools to protect, preserve, and promote such heritage. This article addresses the following questions with respect the Indigenous heritage: What is the nature of the relationship between IP protection and the safeguarding of intangible heritage?; What are the consequences of misappropriation and misuse of traditional cultural expressions for Indigenous Peoples?; and What is the impact of digitization on Indigenous cultural heritage?

---

---

\* **Karolina Prażmowska** is a Ph.D. student at the Faculty of Law and Administration, University of Silesia (Poland). She holds a Bachelor's degree in History of Art and a Master's degree in Law from the University of Silesia and a Master's degree in Human Rights, Democracy and International Justice from the University of Valencia (Spain). Her research focuses on the rights of Indigenous Peoples, with a special emphasis on cultural rights.

**Keywords:** digitization, Indigenous heritage, cultural appropriation, Intellectual Property

---

## Introduction

As Indigenous Peoples' cultural heritage is constantly endangered and threatened by extinction due to various factors, such as climate change, the discrimination and forced assimilation of Indigenous Peoples, aboriginal tourism, and misappropriation, the international community is undertaking steps aimed at preserving the vast range of their cultural heritage. However, safeguarding efforts that document Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE), particularly in digitized form, can make them more accessible and thus more vulnerable to uses that are against the wishes of their holders, namely through misappropriation and misuse, which can cause different types of harm to their holders. Digitizing intangible cultural heritage may strengthen the already existing tensions between Indigenous communities and dominant societies, which to some extent represent conflicting values, such as the principle of artistic freedom versus respect for Indigenous heritage, or marketing the traditional cultural expressions at the expense of TCE traditional owners. As many new and challenging questions arise when digitizing intangible cultural heritage, the use of Intellectual Property (IP) tools to protect, preserve, and promote such heritage becomes vital, especially considering a common belief that TCE of Indigenous Peoples are placed in the public domain and are therefore devoid of the protection granted by the IP system. As such it is important to investigate whether the cultural heritage of Indigenous Peoples can be effectively protected against misappropriation through IP rights in the digital era. This article highlights a few salient issues concerning the digitization of Indigenous intangible heritage, with reference to the work taking place at the World Intellectual Property Organization (WIPO), the United Nations specialized agency that deals with the issue of IP. In 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which has the mandate to reach an agreement on the legal instrument covering the protection of TCE, and since 2011 is holding text-based negotiations which offer a valuable insight into the different approaches to the issue of protection of TCE. This article, making its focal point the cultural expressions embedded in handicrafts, argues that although digitizing the TCE of Indigenous Peoples serves a legitimate aim and may be desirable, it should be done with great care as new technologies may further increase threats to TCE, especially by providing access to images and information from places never visited, and thus significantly increase opportunities for cultural appropriation and commodification of the cultural heritage of Indigenous Peoples.

## Cultural Heritage of Indigenous Peoples

The total population of Indigenous Peoples is estimated to be over 370 million people living in over 70 countries worldwide, such as Canada, Australia, New Zealand, the United States, Finland, and Peru.<sup>1</sup> Although at the international level there is no agreed-upon definition due to the principle of self-identification, scholars point out that the term 'Indigenous' refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others, and that they share some crucial commonalities such as their relation to the land and environment and the importance of cultural practices and traditional ways of life.<sup>2</sup> Similarly to the definition of Indigenous Peoples, so too the definition of culture or cultural heritage may raise difficulties. However, it can be noted that according to the Mexico City Declaration on Cultural Policies from 1982 culture *sensu largo* is "the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs",<sup>3</sup> while heritage may be understood as some portion of culture worth preserving for future generations and "is based on an active choice as to which elements of this broader 'culture' are deemed worthy of preservation".<sup>4</sup> For Indigenous Peoples, the importance of cultural heritage, understood broadly, usually goes much beyond the Western concept,<sup>5</sup> playing an essential role in ensuring the preservation of Indigenous communities' cultural identity and their very cultural and physical survival, as "material culture as heritage is assumed to provide a physical representation and reality to the ephemeral and slippery concept of identity".<sup>6</sup> Indigenous Peoples' cultural heritage represents a complex reality, where all the elements – including tangible properties and intangible heritage – are holistically connected.<sup>7</sup> Because of this special relationship to their cultural heritage, instances of borrowing culturally-significant elements belonging to Indigenous communities by non-Indigenous people and placing them in a different context might be deeply offensive and harmful to

<sup>1</sup> International Labour Organization (ILO), *Indigenous Peoples and Climate Change. From Victims to Change Agents Through Decent Work*, International Labour Office, Gender, Equality and Diversity Branch, Geneva 2017, p. 9.

<sup>2</sup> J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, Oxford 2004, p. 3.

<sup>3</sup> UNESCO, *Mexico City Declaration on Cultural Policies*, World Conference on Cultural Policies, Mexico City, 26 July – 6 August 1982, p. 41.

<sup>4</sup> J. Blake, *On Defining the Cultural Heritage*, "The International and Comparative Law Quarterly" 2000, Vol. 49(1), p. 68.

<sup>5</sup> See L. Smith, *Uses of Heritage*, Routledge, London–New York 2006.

<sup>6</sup> *Ibidem*, p. 48.

<sup>7</sup> F. Lenzerini, *Reparations for Wrongs against Indigenous Peoples' Cultural Heritage*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017, p. 328.

the holders of such heritage, beyond the economic value usually connected with IP protection.

At the international level, the legal approach towards Indigenous Peoples' heritage is threefold: from the perspective of human rights law; the law of the United Nations Educational, Scientific and Cultural Organization (UNESCO), and Intellectual Property Rights.<sup>8</sup> The recognition of Indigenous Peoples' right to cultural heritage has been a slow process, as until recently cultural rights were commonly considered as a neglected category of human rights.<sup>9</sup> Although the only binding treaty concerning Indigenous rights – the 1989 International Labour Organization (ILO) Indigenous and Tribal Peoples Convention<sup>10</sup> – does acknowledge that “handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the Peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures”,<sup>11</sup> the importance of cultural heritage for Indigenous Peoples is first and foremost developed in soft law documents. In 1993 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed the study of the protection of the cultural and intellectual property of Indigenous Peoples prepared by the Special Rapporteur Mrs. Erica-Irene Daes, and requested that she expand her study with a view to elaborating draft principles and guidelines for the protection of Indigenous Peoples' heritage. As a result, in 1995 the Special Rapporteur submitted Principles and Guidelines Concerning the Protection of Cultural Heritage of Indigenous Peoples,<sup>12</sup> which has constituted an important point of reference for further works on the issue of Indigenous Peoples' heritage. While Principle 9 underlines the significance of the free and informed consent of the traditional owners, which should be an essential precondition of any agreements concluded for the recording, study, use, or display of Indigenous Peoples' heritage, Principle 10 envisages the idea that “any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable, and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application”.<sup>13</sup> Subsequently, in the Guideline 46 the Special Rapporteur indicated that “artists, writers and performers should refrain from incorporating elements derived from

---

<sup>8</sup> See A. Xanthaki, *International Instruments on Cultural Heritage: Tales of Fragmentation*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017.

<sup>9</sup> J. Symonides, *Cultural Rights: A Neglected Category of Human Rights*, “International Social Science Journal” 1998, Vol. 50(158).

<sup>10</sup> International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989.

<sup>11</sup> *Ibidem*, Article 23.

<sup>12</sup> UN Commission on Human Rights, *Protection of the Heritage of Indigenous Peoples. Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes*, 21 June 1995, E/CN.4/Sub.2/1995/26.

<sup>13</sup> *Ibidem*, p. 10.

indigenous heritage into their works without the informed consent of the traditional owners”,<sup>14</sup> which is consistent with the calls of Indigenous Peoples in their still on-going fight against the misappropriation of their heritage.

In 2007 the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>15</sup> which is considered as a landmark achievement for Indigenous Peoples and advocates of their rights. As noted by Alexandra Xanthaki, although lacking binding force, UNDRIP is a standard-setting document and should be regarded as an “interpretative tool of article 15 [of the International Covenant on Economic, Social and Cultural Rights] on the right to culture specifically for Indigenous Peoples”.<sup>16</sup> Various provisions of the Declaration refer to culture and the cultural heritage of Indigenous Peoples, such as for example Article 12 or Article 11, which recognizes the right of Indigenous Peoples “to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature”<sup>17</sup> and moreover stipulates that States shall provide redress through effective mechanisms, with respect to cultural, intellectual, religious, and spiritual property of Indigenous Peoples, taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs.<sup>18</sup> Moreover, Article 31 explicitly recognizes the right of Indigenous Peoples 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”.

Although international cultural heritage law is itself fragmented,<sup>19</sup> in the second type of the approach, i.e. that of UNESCO, it undergoes further fragmentation as the UNESCO Conventions<sup>20</sup> not only make a distinction between tangible and intangible heritage, but they also introduce a dichotomy between the heritage belonging to the State or to the individual. While Indigenous Peoples’ heritage can be regarded as intangible cultural heritage<sup>21</sup> and as such falls within the scope of the 2003 UNESCO Convention for the Safeguarding of the Intangible

---

<sup>14</sup> Ibidem, p. 14.

<sup>15</sup> 2 October 2007, A/RES/61/295.

<sup>16</sup> A. Xanthaki, op. cit., p. 17.

<sup>17</sup> UNDRIP, Article 11(1).

<sup>18</sup> Ibidem, Article 11(2).

<sup>19</sup> See A. Xanthaki, op. cit.

<sup>20</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151; Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.

<sup>21</sup> C. Antons, L. Rogers, *Cultural and Intellectual Property in Cross-border Disputes over Intangible Cultural Heritage*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018, p. 70.

Cultural Heritage (“the 2003 UNESCO Convention”), the Convention refers to Indigenous Peoples only in the preamble,<sup>22</sup> “most likely as a consequence of the political sensitivity of the subject itself for certain States”.<sup>23</sup> Article 2(1) of the Convention defines intangible cultural heritage as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”. Inscription on one of the international lists created by the Convention, namely the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding,<sup>24</sup> aims to promote safeguarding of intangible heritage by recognizing the value of the element to the *communities, groups, and individuals* who practice and transmit their heritage, and Indigenous communities can be easily included in these terms, which are used in several provisions of the Convention.<sup>25</sup> However, such a promotion might be closely linked with the commercialization and commodification of intangible heritage<sup>26</sup> – when intangible heritage is being used in tourism promotion campaigns, the traditional crafts and performances are often perceived as an added value to touristic attractions. Nevertheless as noted by Christoph Antons and Lisa Rogers, local communities which create, maintain, and transmit their intangible heritage often remain outside the discussions over commercialization of their intangible cultural heritage.<sup>27</sup>

As the 2003 UNESCO Convention covers skills and knowledge it overlaps with the work of the WIPO,<sup>28</sup> the United Nations specialized agency that deals with the issue of IP. The IP system divides such heritage into three different categories: TCE, TK, and genetic resources. As such, for the purpose of IP rights, TCE may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. TCE may be either tangible or intangible, but most usually its forms constitute a combination of the two and the symbolic or religious element cannot be separated from the material form. An example would be a woven rug,

---

<sup>22</sup> A.F. Vrdoljak, *Indigenous Peoples, Intangible Cultural Heritage and Participation in the United Nations*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018, p. 54.

<sup>23</sup> T. Scovazzi, L. Westra, *The Safeguarding of the Intangible Cultural Heritage According to the 2003 Unesco Convention: The Case of The First Nations of Canada*, “*Inter Gentes*” 2017, Vol. 1(2), p. 35.

<sup>24</sup> 2003 UNESCO Convention, Articles 16 and 17.

<sup>25</sup> T. Scovazzi, L. Westra, *op. cit.*, p. 36.

<sup>26</sup> C. Bortolotto, B. Ubertazzi, *Editorial: Foodways as Intangible Cultural Heritage*, “*International Journal of Cultural Property*” 2018, Vol. 25(4), p. 412.

<sup>27</sup> C. Antons, L. Rogers, *op. cit.*, p. 69.

<sup>28</sup> *Ibidem*, p. 71.

which is a tangible expression that conveys elements of a traditional story, which in turn represents an intangible expression.<sup>29</sup> The word *traditional* does not imply that TCE are static, but rather qualifies a form of knowledge or an expression which has a traditional link with a community in such a way that it is developed, sustained, and passed on within a community, sometimes through specific customary systems of transmission, and it is the relationship with the community that makes knowledge or expressions traditional.<sup>30</sup> It is therefore coherent with the approach that culture is not fixed, but rather dynamic, growing, and changing.

These three systems of protection of cultural heritage are not disjointed, but rather influence one another and the issue of the protection of expressions of intangible Indigenous heritage, although in those times denominated *folklore*, was observed by UNESCO and the WIPO, already in the 1970s.<sup>31</sup> It may be noted in particular that WIPO and UNESCO have cooperated on several projects in this regard over the years, most notably the joint convening of expert groups which, in 1982, adopted *sui generis Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*.<sup>32</sup> The Model Provisions define expressions of folklore as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.<sup>33</sup> The very first paragraphs of the Model Provisions already mention the threats that globalization and digitization pose to the expressions of folklore, stating that expressions of folklore are being commercialized by means of sound and audiovisual recordings, broadcasting, and cinematography on a world-wide scale without due respect for the cultural or economic interests of the communities in which they originated and without conceding any share in the returns from such exploitations.<sup>34</sup> Although the Model Provisions were adopted almost 40 years ago, it seems that the threats related to new technologies and misappropriation of Indigenous heritage are more omnipresent than ever, as the growing intersection between cultural heritage, digital technologies, and archival practices raises some important challenges for the sustainable and appropriate treatment of Indigenous digital cultural heritage collections.

---

<sup>29</sup> WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, World Intellectual Property Organization, Geneva 2020, p. 15.

<sup>30</sup> *Ibidem*, p. 17.

<sup>31</sup> J. Blake, L. Lixinski, *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020, p. 121.

<sup>32</sup> WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, World Intellectual Property Organization, Geneva 1985.

<sup>33</sup> *Ibidem*, p. 9.

<sup>34</sup> *Ibidem*, p. 3.

## The Digital Era

New technologies have created unprecedented possibilities for the dissemination and viewing of cultural content in a very accessible and comprehensive way, mostly through digitization, which may be defined as the process of representing an object, image, text, or a recorded signal in the form of a single 0-1 binary code, using a device such as a scanner, a camera, or any other electronic device.<sup>35</sup> Such content can be easily published on the Internet or stored in a database and nowadays most of the cultural institutions offer at least portions of their collections online in the form of virtual tours, like for example the Louvre Museum,<sup>36</sup> or online catalogues of their collections, like the State Hermitage Museum in St. Petersburg,<sup>37</sup> which for many people proved to be beneficial and uplifting during the recent events surrounding the COVID-19 pandemic and lockdown. The reasons for displaying collections online range from fulfilling the mission of public education, prompting research and cultural exchange, to self-promotion, as the Internet may increase the number of tourists visiting cultural institutions.<sup>38</sup> Digitizing cultural objects may also serve preservation purposes, to ensure their maintenance and viability.

However, while digitizing their collections museums have to take into account that some of the elements may carry particular values for certain communities. Many of the items displayed online can be classified as traditional cultural heritage, including both items from communities indigenous to the country where the institution itself is located as well as items from Indigenous communities overseas, such as the ones in the collection of the Museum Volkenkunde – National Museum of Ethnology in Leiden, the Netherlands.<sup>39</sup> Since in earlier times there was little if any adherence to culturally-sensitive procedures by collectors and researchers when acquiring cultural property, many of the Indigenous cultural objects were taken during colonization and/or acquired during military and private expeditions, usually without consent of the holders of the objects, or as an exchange for weapons and less valuable objects.<sup>40</sup> The collections built thereupon often contain secret,

---

<sup>35</sup> M. Burri, *Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship*, "International Journal of Cultural Property" 2010, Vol. 17(1), pp. 35-36.

<sup>36</sup> Louvre Museum, *Online Tours*, <https://www.louvre.fr/en/visites-en-ligne> [accessed: 27.07.2020].

<sup>37</sup> The State Hermitage Museum in St. Petersburg, <https://www.hermitagemuseum.org/wps/portal/hermitage> [accessed: 27.04.2020].

<sup>38</sup> M. Torsen, J. Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures. Legal Issues and Practical Options for Museums, Libraries and Archives*, World Intellectual Property Organization, Geneva 2010, p. 52.

<sup>39</sup> Nationaal Museum van Wereldculturen (Tropenmuseum, Afrika Museum en Museum Volkenkunde), <https://collectie.wereldculturen.nl/> [accessed: 27.07.2020].

<sup>40</sup> See J. van Beurden, *Treasures in Trusted Hands. Negotiating the Future of Colonial Cultural Objects*, Sidestone Press, Leiden 2017.



sacred, or confidential material that may be subject to restricted use under customary laws and practices. These objects, now being part of museum collections, can be digitized and placed online, without taking into account the perspective of the original holders in this matter. This constitutes one of the most common ways in which the Indigenous cultural heritage enters into the realm of digital technologies without the explicit agreement of the bearers of such heritage.

Secondly, the vast majority of materials documenting the culture of Indigenous Peoples have been provided by anthropologists and currently form part of the archives of cultural and educational institutions. There were also, however, instances where Indigenous communities had permitted researchers to film or record their ceremonies, dances, and other performances, in exchange for minimal compensation and without any real understanding of either the objectives of the researchers or the relevant IP laws. Such was the case of ethnographer Heinrich (Henry) R. Voth who – while living among Hopis, a Native American tribe – published hundreds of photographs depicting Hopis' religious practices and was even hired to produce facsimiles of Hopi altars for museums and tourist sites, disclosing secret and sacred information.<sup>41</sup>

According to the IP system, most of the rights in the TCE-derived materials are not legally owned by the traditional owners, but rather by the persons who created the film, sound recording, photographs, and manuscripts embodying these TCE.<sup>42</sup> This is well illustrated by the story of the recording of The Djalambu Ceremony,<sup>43</sup> which represents one of the final acts in the Yirritja mourning rites of the Daygurrurr Gupapuyngu people in the small island community of Milingimbi in Arnhem Land, Australia. In 1963, a couple of researchers recorded in both film and sound the ceremony which was led by Djäwa, the head of the Daygurrurr Gupapuyngu people. Thirty years later, one of Djäwa's sons, Joe Neparrnga Gumbula, composed for his band a song called *Djiliwirri*, which made reference to the sacred ceremony performed by his father. In creating the video clip to accompany the song, Joe decided to show images of his father from the 1963 Djalambu recording. As he explained:

That Djalambu ceremony was filmed in 1963 with my father [Djäwa] who, during that time, was the leader of the Daygurrurr Gupapuyngu people. I called the [Australian Institute of Aboriginal and Torres Strait Islander Studies] archives in Canberra where they dubbed it for me from 16-mm to beta cam and then sent it over to Darwin where

---

<sup>41</sup> See M. F. Brown, *Who Owns Native Culture?*, Harvard University Press, Cambridge–London 2003, pp. 11-42.

<sup>42</sup> M. Torsen, J. Anderson, *op. cit.*, p. 11.

<sup>43</sup> This example was first published in J. Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, "Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena", American Library Association and The MacArthur Foundation Columbia University, New York 2005, pp. 25-26.

I was editing my video clip. I've got footage of the Djalambu from this old film, and added it to new technologies to show that that was the old time of Djalambu and that this is the new time of Djalambu. All the people who were in the film from 1963 are all gone. They're all dead. So we, the people of this generation, have made another Djalambu film, which is also in the video.<sup>44</sup>

Even though the recordings from 1963 portrayed the sacred ceremony of the Daygurrurr Gupapuyngu people, they were not the owners of the rights in these works and objects of related rights, and reusing the material without the permission of the researchers constituted an infringement of copyright. However, when Djäwa allowed the recording to take place, it was understood that it could be used as a learning lesson for future generations and the community perceives the film as theirs. This demonstrates that on many occasions the needs and expectations of Indigenous Peoples may not always be satisfied by the third-parties documenting Indigenous heritage.

Creating a database which includes Indigenous heritage may, depending on its funding and management, allow access to the very TCE for which protection is sought and allow for its commercialization by non-Indigenous and non-traditional persons. There is also the possibility of breaches of confidentiality between ethnographers<sup>45</sup> and the possibility of misrepresentation of Indigenous and traditional cultures. Moreover, the databases created by non-Indigenous people may not be as accurate as those created by Indigenous Peoples, as was the case of Moriori cultural database, which involves re-recording of archaeological evidence in a way that combines elder knowledge and experience, oral traditions, and recollections of past land use and events.<sup>46</sup> The database incorporates the use of software gifted from its Indigenous developers in Australia, called "Traditional Knowledge Revival Pathways".<sup>47</sup> Many of the places recorded by Moriori are not in the official New Zealand Archaeological Association system, which did not include the voices and views of Indigenous Peoples. As a result many places

---

<sup>44</sup> A. Corn, N. Gumbula, *Nurturing the Sacred through Yolngu Popular Song*, "Cultural Survival" 2002, Vol. 2(69), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/nurturing-sacred-through-yolngu-popular-song> [accessed: 27.07.2020].

<sup>45</sup> See Assembly of First Nations, *Ethics in First Nations Research*, AFN Environmental Stewardship Unit, Ottawa 2009; M. Marker, *Indigenous Voice, Community, and Epistemic Violence: The Ethnographer's "Interests" and What "Interests" the Ethnographer*, "International Journal of Qualitative Studies in Education" 2003, Vol. 16(3), pp. 361-375; C.R. Menzies, *Reflections on Research with, for, and among Indigenous Peoples*, "Canadian Journal of Native Education" 2001, Vol. 25(1).

<sup>46</sup> Intellectual Property Issues in Cultural Heritage, *Moriori Cultural Database*, <https://www.sfu.ca/ipinch/project-components/community-based-initiatives/moriori-cultural-database/> [accessed: 27.07.2020].

<sup>47</sup> T. Lanauze, S. Forbes, M. Solomon, *A Practical Approach to Traditional Knowledge and Indigenous Heritage Management: A Case Study of Moriori Heritage Management Practice*, in: S. Subramanian, B. Pisupati (eds.), *Traditional Knowledge in Policy and Practice*, United Nations University Press, Tokyo–New York–Paris 2010, p. 330.

have been misinterpreted in the official records, as the traditional knowledge did not inform the interpretations and many signs of settlement had been illegible to the archaeologists.<sup>48</sup>

The notion of documenting intangible cultural heritage is embedded in the 2003 UNESCO Convention and serves the legitimate purpose of safeguarding the intangible form of heritage. The Convention defines *safeguarding* as “measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage”.<sup>49</sup> As such, digitizing may be regarded as a form of *safeguarding* of intangible heritage in the meaning of the 2003 UNESCO Convention, as long as it is undertaken with the objective of protecting intangible heritage and ensuring its viability.

Section III of the Convention imposes on the State Parties certain obligations in order to ensure the safeguarding of the intangible cultural heritage present in their territories. The States are obliged, *inter alia*, to identify and define the various elements of the intangible cultural heritage,<sup>50</sup> draw up one or more inventories of such heritage,<sup>51</sup> and establish documentation institutions for the intangible cultural heritage.<sup>52</sup> But most importantly, the States shall endeavour to ensure the widest possible participation of communities, groups, and, where appropriate, individuals that create, maintain, and transmit such heritage and to involve them actively in its management.<sup>53</sup>

However, it is vital to distinguish the *safeguarding* within the meaning of the 2003 UNESCO Convention and the *protection* in the IP sense.<sup>54</sup> The objective in the former case is to ensure that intangible cultural heritage does not disappear and that its expressions are maintained and promoted, while the latter case refers to the use of IP laws, values, and principles to prevent unauthorized or inappropriate uses of TCE by third parties. It may however be necessary to combine both approaches in a comprehensive strategy, as for instance in projects for the preservation of traditional cultures, that may involve scanning or digitizing graphic or written works, there may be sensitive issues relating to the ownership

---

<sup>48</sup> Ibidem, p. 334.

<sup>49</sup> 2003 UNESCO Convention, Article 2(3).

<sup>50</sup> Ibidem, Article 11(b).

<sup>51</sup> Ibidem, Article 12(1).

<sup>52</sup> Ibidem, Article 13.

<sup>53</sup> Ibidem, Article 15.

<sup>54</sup> WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, 6 July 2018, WIPO/GRTKF/IC/37/6, pp. 6-7 (“WIPO, *Draft Gap Analysis*”).

and exercise of copyrights ensuing from these activities.<sup>55</sup> Implementing these two forms of protection together may be mutually supportive, but could also be in conflict, as preservation efforts that document TCE in digitized form can make them more accessible and vulnerable to uses that are against the wishes of their holders.<sup>56</sup> The usage of new technologies and placing the digitized heritage on the Internet may facilitate the practice of misappropriation. As the next section will demonstrate, the exploitation of TCE in the fashion industry happens regularly, and the new technologies increase threats to TCE, especially by providing access to images and information from places never visited, thus significantly increasing the opportunities for cultural appropriation and commodification of the cultural heritage of Indigenous Peoples.

### Misappropriation of Traditional Cultural Expressions (TCE)

People and cultures have always exchanged and borrowed ideas from each other to create new forms of art and symbolic expressions, and most of the human creations reflect different sources of inspiration. Apart from colonizing, expropriating, murdering, and exploiting Indigenous Peoples and their lands, Western society has also used the cultural heritage of Indigenous Peoples as a source of inspiration for literature, art, medicine, cuisine, or fashion. Even though nowadays more consideration is being given to Indigenous rights and voices, the complicated relationship with the dominant societies in which Indigenous tangible and intangible heritage is being exploited is still a distressing reality, creating a need to balance two *prima facie* contradictory principles: that of artistic freedom and that of respect for Indigenous Peoples' values. Examples of cultural borrowings are omnipresent – tribal names for sports teams, cultural elements used in amusement theme parks, traditional medicine merchandised by big pharmaceutical companies, or even whole languages used in computer games and toy lines as in the famous case of Maori TCE and Lego Bionicles.<sup>57</sup> In the United States alone it is estimated that more than 2,600 high school, college, or professional teams have used Native American names and images as mascots, logos, and team names.<sup>58</sup> While these

---

<sup>55</sup> WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore. Background Paper n.1*, World Intellectual Property Organization, Geneva 2004, p. 12.

<sup>56</sup> D. Zografos Johnsson, H.Y. Tualima, *Cultural Heritage, Traditional Knowledge and Intellectual Property*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017, p. 221.

<sup>57</sup> See B. Fitzgerald, S. Hedge, *Traditional Cultural Expression and Internet World*, in: C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Wolters Kluwer, Alphen aan den Rijn 2009, pp. 245-272.

<sup>58</sup> D. Zografos Johnsson, *The Branding of Traditional Cultural Expressions: To Whose Benefit?*, in: P. Drahos, S. Frankel (eds.), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development*, ANU Press, Canberra 2012, p. 149.

borrowings are often justified as an appreciation of Indigenous Peoples' culture, however for Indigenous Peoples the unauthorized use of items and expressions that are still important within their communities amounts to appropriation of their heritage. The following paragraphs provide examples of different types of harm, namely social, cultural, and economic, that such unauthorized usages of TCE in the fashion industry cause to Indigenous Peoples.

Following the principle of artistic freedom, fashion designers derive inspiration from all corners of the world and the diversity of cultural inspirations makes the industry evolve. Inside the fashion business there is also a common practice of copying or borrowing from designers themselves. One of the best examples is the Spanish brand Zara, which constantly copies the designs from high fashion brands and in 2008 was even sued by Christian Louboutin for counterfeiting and unfair competition for selling a red-soled shoe.<sup>59</sup> From the perspective of fashion designers the TCE of Indigenous communities constitute a rich source of inspiration and innovation, if not a template, for reproduction or superficial adaptation.<sup>60</sup> For a majority of Indigenous Peoples, however, the consequences of the unauthorized use of TCE are more far-reaching, because as was noted above, for them handcrafts constitute an important part of their identity. The ornaments and decorations used can, for example, tell the observer the age, the status of the individual, his or her nation, and highlight their achievements, as in the case of feather head-dresses of First Nations or Zulu community beadwork.<sup>61</sup>

In the case of Indigenous Peoples' heritage such borrowing and copying of cultural elements is denominated as *misuse*, *misappropriation*, or *cultural appropriation*. The WIPO defines first two terms as a use which changes, distorts, reduces, or inaccurately reflects the customary meaning, values, and protocols associated with TCE.<sup>62</sup> Cultural appropriation, in turn, can be defined as the act by a member of a dominant culture of taking TCE whose holders belong to a minority culture or a group that suffered a history of discrimination, colonization, or exploitation, and repurposing it in a different context, without the authorization, acknowledgement, and/or compensation of the TCE holders.<sup>63</sup> Looking at the elements of the definition, three characteristics emerge: 1) a change of cultural context;

---

<sup>59</sup> K. Grzybczyk, *Ikony popkultury a prawo własności intelektualnej. Jak znani i sławni chronią swoje prawa* [Pop Culture Icons and Intellectual Property Rights. How Famous People Protect Their Rights], Wolters Kluwer, Warszawa 2018, p. 201.

<sup>60</sup> D. Zografos Johnsson, H.Y. Tualima, op. cit., p. 219.

<sup>61</sup> W. Wickler, U. Seibt, *Syntax and Semantics in a Zulu Bead Colour Communication System*, "Anthropos" 1995, Vol. 90(4/6), pp. 391-405.

<sup>62</sup> WIPO IGC, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, 27 April 2012, WIPO/GRTKF/IC/22/INF/8, pp. 27-28.

<sup>63</sup> B. Vézina, *Curbing Cultural Appropriation in the Fashion Industry*, CIGI Papers No. 213, April 2019, p. 6.

2) a power imbalance between the taker and the holder and often a context of colonization; and 3) the absence of the holder's involvement – the holders are not attributed, there is no authorization and no compensation.<sup>64</sup>

In 2015 the Canadian design duo, DSquared2, presented a collection called *Dsquaw*. On their webpage they described it as follows: “The enchantment of Canadian Indian tribes. The confident attitude of the British aristocracy. In a captivating play on contrasts: an ode to America’s native tribes meets the noble spirit of Old Europe. Magic and mysterious tribal influences meld with royal references”.<sup>65</sup> This collection illustrates well the notion of cultural appropriation, as it is harmful on several levels. Firstly, the designers assembled all the Indigenous Peoples of Canada in one group, although they are by no means a homogeneous group. This perpetuates a stereotypical image and the problematic narrative wherein Indigenous Peoples are always *others* – distant people living outside the modern world, *mystical and spiritual* – able to talk to animals, conjure spirits, and perform magic. This deprives First Nations, Inuit, and Metis of their actual identity and their place in the society, as they are contemporary people living in the modern world.

Secondly, the designers appropriated items such as headdresses and blankets, as well as the patterns and designs that have a major cultural significance to the Canadian Indigenous Peoples. As one commentator stated: “We designed these images. We have the knowledge and understanding of what they mean and how they can be appropriately used. We evolved and developed and maintained our cultures for thousands of years...”.<sup>66</sup> Such acts can cause humiliation and discrimination by propagating insensitive stereotypes and perpetuate the histories of brutality to which Indigenous Peoples were subjected. Having lost their land and much of their way of life, Indigenous Peoples see their art as one of the few things they have left. As Suzan Harjo, former head of the National Congress of American Indians, observed: “They have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There’s little left that’s tangible. Now they’re taking what’s intangible”.<sup>67</sup>

Thirdly, the designers showed an astonishing level of cultural insensitivity, taking into account the colonial past of Canada and, more recently, the residential schools era, when *the noble spirit of Old Europe* was anything but noble. On top of all that, the designers decided to call their collection *DSquaw*. *Squaw* comes from

---

<sup>64</sup> Ibidem.

<sup>65</sup> S. Hartford, *On DSquared2’s Racist and Extraordinarily Offensive FW15 Line “DSquaw”*, 5 March 2015, <https://themuse.jezebel.com/on-dsquared2-s-racist-and-extraordinarily-offensive-fw1-1689649757> [accessed: 27.04.2020].

<sup>66</sup> Ibidem.

<sup>67</sup> C. Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer*, “Connecticut Law Review” 1997, Vol. 30(1), p. 12.

the Algonquin words for woman, including *ikwe* and *skew*, and its pronunciation was corrupted to *squaw* and used by English-speakers to disgrace Native women.<sup>68</sup>

The collection of DSquared2 illustrates the social, political, and cultural consequences of cultural appropriation, as on a socio-political level TCE are inherent to the identity, dignity, and self-determination of Indigenous communities. Cultural appropriation may hinder Indigenous Peoples' efforts to define themselves and establish their own identity, which is especially important in the aftermath of colonization.<sup>69</sup>

Although in the above case it could turn out to be impossible to implement the principle of compensation for an unauthorized use of TCE as there may not be any specific and identifiable community from which the TCE had been directly appropriated, there are instances when designers copy very particular items of TCE regardless of their provenance and underlying story. In 2015, KTZ, a UK design label, issued a collection that included a number of garments based on traditional Inuit designs, including a sweater that has a pattern almost identical to that on a shaman's parka that dates back to the early 1900s. According to Salome Awa, the great-granddaughter of the shaman, the original design was envisioned by her great-grandfather in a dream. Awa said her great-grandfather had a vision of being drowned and created the garment with the help of his family to protect him – because of that he decided to include the image of hands.<sup>70</sup> She contacted the designer and as a result the sweater was pulled from stores and removed from KTZ's website. However the sweater, which retailed at around CDN \$900, had been on shelves for a full five months. Nevertheless, KTZ did not offer any monetary compensation or sharing of the proceeds from the sale of the sweater before it was discontinued.<sup>71</sup>

As such, the misuse of TCE causes not only social or cultural harm, but can also translate into economic harm, as for many Indigenous Peoples the handicrafts are an important source of income. The outsiders appropriating TCE without proper compensation are gaining profit at the expense of their holders, who are unable to participate in the profits made on the sale of the products incorporating their handicrafts. Although the economic argument should not be the only one in defending Indigenous Peoples' rights against misappropriation – as it may not apply to com-

---

<sup>68</sup> Wiktionary, *Squaw*, <https://en.wiktionary.org/wiki/squaw> [accessed: 27.07.2020].

<sup>69</sup> B. Vézina, op. cit., pp. 9-10.

<sup>70</sup> S.S. Zerehi, *KTZ Fashion under Fire for Using Inuit Design Without Family's Consent*, "CBC", 25 November 2015, <https://www.cbc.ca/news/canada/north/ktz-fashion-inuit-design-1.3337047> [accessed: 27.04.2020].

<sup>71</sup> S.S. Zerehi, *Inuit Shaman Parka 'Copied' by KTZ Design Well-studied by Anthropologists*, "CBC", 2 December 2015, <https://www.cbc.ca/news/canada/north/inuit-shaman-parka-design-history-1.3345968> [accessed: 27.07.2020]; The Fashion Law, *KTZ Issues Interesting Apology for Copied Garment*, 30 November 2015, <https://www.thefashionlaw.com/home/ktz-issues-interesting-apology-for-copied-garment> [accessed: 27.07.2020].

munities that are well-off economically due to, for example, incomes generated by casinos or the extraction of natural resources on Indigenous-owned lands<sup>72</sup> – it is still an important argument as Indigenous Peoples are largely regarded to be the *poorest of the poor*<sup>73</sup> and the source of income generated by TCE could allow them to gain autonomy from reliance on state aid programs.

As Brigitte Vézina points out, the fashion products that appropriate TCE are also, for some consumers, substitution goods for authentic products and might heighten competition and potentially deprive the communities of the sales of their own authentic TCE-based fashion items, as consumers might prefer a more affordable, poorly-made imitation, or conversely a product stamped with the brand of a Western fashion designer, over its original source.<sup>74</sup> That was the case of Ralph Lauren, who in 2015 launched in his stores a cardigan called Cowichan Full-Zip Cardigan with a price of almost \$600.<sup>75</sup> The Cowichan sweater is a sweater with a particular design that originated during the late 19th century among the Cowichan, a Coast Salish people in British Columbia, Canada.<sup>76</sup> In 2011, the Canadian government recognized Cowichan knitters and sweaters as nationally and historically significant.<sup>77</sup> An authentic Cowichan sweater is unique in its manner of production and styling; one of the key features that distinguishes a genuine sweater from an imitation is that it is made of unprocessed wool. The designs of Cowichan sweaters come from a variety of sources: some are copies of traditional blankets and baskets, while others are taken from everyday items, from linoleum floor coverings and product labels to wallpapers.<sup>78</sup> Some designs are only for Indigenous use and are not put on sweaters that are sold to the public. The communities around Vancouver Island and the mainland of British Columbia continue to create and sell authentic sweaters for a price of around \$300,<sup>79</sup> which is half the price of a Ralph Lauren cardigan.

---

<sup>72</sup> D.S. Karjala, R.K. Paterson, *The Failed Case for Property Rights in Intangible Indigenous Cultural Property*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018, p. 94.

<sup>73</sup> ILO, *Indigenous Peoples...*, p. 7.

<sup>74</sup> B. Vézina, op. cit., p. 10.

<sup>75</sup> The Fashion Law, *Ralph Lauren Has Offended a Canadian Tribe with This Sweater*, 20 February 2015, <https://www.thefashionlaw.com/home/ralph-lauren-has-offended-a-canadian-tribe-with-this-sweater> [accessed: 27.07.2020].

<sup>76</sup> See M.P. Stopp, *The Coast Salish Knitters and the Cowichan Sweater: An Event of National Historic Significance*, "Material Culture Review" 2012, Vol. 76.

<sup>77</sup> R. Shrumm, *Cowichan Sweater*, "The Canadian Encyclopedia", 22 October 2018, <https://www.thecanadianencyclopedia.ca/en/article/cowichan-sweater> [accessed: 27.07.2020].

<sup>78</sup> M.P. Stopp, op. cit., p. 24.

<sup>79</sup> Hill's Native Art, <http://www.hills.ca/Genuine-Handmade-Cowichan-Sweater-p888.html> [accessed: 27.07.2020].



As the above examples demonstrate, TCE of Indigenous Peoples constitute a rich and easily accessible source of inspiration for designers, especially considering the new fashion trends of folkloric esthetic. Because of new technologies, while looking for an inspiration designers and artists no longer have to travel to remote locations, but can simply type correct words in a search engine and the results shown will be deprived of any cultural context and preclude any contact with the source community. As such, the ability to reproduce objects that Indigenous Peoples still consider their property or otherwise important to them significantly increases opportunities for cultural appropriation and commodification.<sup>80</sup> It is therefore necessary to investigate whether and how TCE could be protected by IP rights.

## Intellectual Property Rights

Intellectual property, very broadly, encompasses the legal rights which result from intellectual activity in the industrial, scientific, literary, and artistic fields. The reasons to protect IP are threefold: to protect the moral and economic rights of creators in their creations, to protect the rights of the public in access to those creations, and to promote creativity and the dissemination and application of its results and encourage fair trading which would contribute to economic and social development.<sup>81</sup>

Different types of TCE can be protected by different IP tools, and a particular type of TCE may be protected by several different IP tools. Such is the case of handicrafts, which can be produced by artisans, completely by hand or with the help of hand-tools or even using machinery, provided the artisan's direct manual contribution remains the most significant element of the finished product. In addition, they can be at one and the same time utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, or religiously and socially symbolic and significant.<sup>82</sup> Handicrafts exemplify the benefits of combining tradition with creativity, as they are viewed as both traditional and contemporary. From the IP perspective handicrafts are comprised of three distinct elements: reputation, which is derived from their style, origin, or quality; external appearance; and know-how – the skills and knowledge used to create and produce them.<sup>83</sup>

---

<sup>80</sup> R. Coombe, D. Wershler, M. Zeilinger, *Dynamic Fair Dealing: Creating Canadian Culture Online*, University of Toronto Press, Toronto 2014, p. 217.

<sup>81</sup> WIPO, *Intellectual Property Handbook*, World Intellectual Property Organization, Geneva 2004, p. 3.

<sup>82</sup> WIPO IGC, *Intellectual Property and Traditional Handicrafts. Background Brief – No. 5*, World Intellectual Property Organization, Geneva 2016.

<sup>83</sup> *Ibidem*.

Each component can potentially be protected by a distinct form of IP. Know-how, for example, could be protected by patents or as a trade secret, while external appearance could be protected by copyright or industrial designs, and reputation could be protected by trademarks,<sup>84</sup> collective or certification marks, geographical indications,<sup>85</sup> or unfair competition law.<sup>86</sup>

However, due to their characteristics each IP tool possesses some shortcomings that may hinder the effective protection of TCE. First of all, IP rights are territorial and provide protection only in the country for which they are registered and most of the instances of misappropriation are of a transnational nature.<sup>87</sup> Furthermore, copyright for instance requires the work to be original, a criterion that is hard to meet for TCE that have been transmitted from one generation to another, which indeed is a distinctive feature of TCE. Moreover, one of the claims most frequently raised by Indigenous Peoples is that the style of a TCE has been imitated or misappropriated. Copyright and designs laws, however, permit the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is developed and inspired by other works. Therefore, even if copyright were to vest in a new tradition-based expression, copyright protection would not per se prevent the traditional style of the protected work from being appropriated.<sup>88</sup>

The other problematic concept in the context of Indigenous heritage is the legal notion of authorship and ownership. As international IP law was born in a very specific cultural context, it does not recognize Indigenous or traditional customary laws relating to the ownership and management of cultural knowledge and property.<sup>89</sup> Usually, the TCE are productions which have been collectively developed over time by unknown authors and they are collectively owned by one or more groups or communities. And even where an individual has developed a tradition-based creation within his or her customary context, the creation is not owned by the individual but falls within a shared sense of communal responsibility, identity, and custodianship.<sup>90</sup> For instance, according to the laws of the Gitanyow of British Columbia:

---

<sup>84</sup> See D.S. Karjala, R.K. Paterson, op. cit., p. 91.

<sup>85</sup> See B. Ubertazzi, *EU Geographical Indications and Intangible Cultural Heritage*, "IIC – International Review of Intellectual Property and Competition Law" 2017, Vol. 48.

<sup>86</sup> D.E. Long, *Trade Secrets and Traditional Knowledge: Strengthening International Protection of Indigenous Innovation*, in: R.C. Dreyfuss, K.J. Strandburg (eds.), *The Law and Theory of Trade Secrecy*, Edgar Elgar Publishing, Cheltenham–Northampton 2011.

<sup>87</sup> See B. Ubertazzi, *Territorial and Universal Protection of Intangible Cultural Heritage from Misappropriation*, "New Zealand Yearbook of International Law" 2010, Vol. 8.

<sup>88</sup> WIPO, *Draft Gap Analysis*, p. 18.

<sup>89</sup> M. Torsen, J. Anderson, op. cit., p. 14.

<sup>90</sup> WIPO, *Draft Gap Analysis*, p. 4.

[E]ach House holds its unique set of crest images on blankets, rattles, poles and other regalia, and that it also holds chief names, songs and other intangible possessions. In a less fundamental way, the House also holds the actual objects themselves [...] [A] chief's holding of these possessions is not a personal property right; rather, the intangible images, music and words, as well as their tangible depictions on regalia and poles, are held in trust by the chief and the House members for future generations.<sup>91</sup>

Another problem with regard to IP rights and TCE is the problem of fixation. Some of the TCE exist separately from their material expression, which struggles to find accordance with the fixation requirement under copyright law. Although the problem of material expression might not be the case for handicrafts, there is another obstacle within the fixation requirement – as TCE are part of living heritage, they are constantly recreated by communities and groups in response to their environment and their interactions with other social groups.<sup>92</sup>

Another feature of IP rights is the limited period of protection. Most of the categories of IP afford protection for limited periods of time. The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods.<sup>93</sup> The limited term is contrary to Indigenous Peoples' understanding of their role in relation to their cultural heritage, which is one of perpetual guardianship and not ownership and which has been transmitted for generations. Many Indigenous rights advocates argue that perpetual protection should be granted to intangible heritage because the protection of TCE is not for the benefit of individual creators, but for a community whose existence is not limited in time.<sup>94</sup>

Perhaps the most suitable IP tool to which an Indigenous community can resort in order to prevent cultural appropriation and to exercise control over the use of its TCE by others and promote its own TCE commercially, are trademarks.<sup>95</sup> A trademark is a sign used to identify and distinguish the goods or services of a particular firm or undertaking, in the course of trade. Trademarks may be composed of distinctive words, letters, numerals, drawings, pictures, shapes, colours, or advertising slogans, among others. They serve to indicate the origin of goods or services, so as to distinguish them from identical or similar products produced by competitors.<sup>96</sup>

---

<sup>91</sup> R.G. Howell, R. Ripley, *The Interconnection of Intellectual Property and Cultural Property*, in: C.E. Bell, R.K. Paterson (eds.), *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, UBC Press, Vancouver 2008, p. 227.

<sup>92</sup> WIPO, *Draft Gap Analysis*, p. 4.

<sup>93</sup> WIPO, *Consolidated Analysis...*, p. 42.

<sup>94</sup> C. Farley, *op. cit.*, p. 17.

<sup>95</sup> B. Vézina, *op. cit.*, p. 5.

<sup>96</sup> WIPO IGC, *Intellectual Property... Background Brief*.

Indigenous communities in several countries, such as Australia, New Zealand, Canada, the United States of America, Japan, Panama, and Fiji, have registered certification and/or collective trademarks or authenticity labels.<sup>97</sup> For example, the Navajo Nation, a Native American group living in the territories of Arizona, Utah, and New Mexico in the USA owns several registered trademarks on the Navajo name, covering clothing, footwear, online retail sales, household products, and textiles, and they consider their trademarks as some of their most valuable assets, which are licensed to other businesses. In 2011 an American company, Urban Outfitters, launched a line of Navajo-themed clothing and accessories, including a *staring at stars skull native headdress* T-shirt and a *Navajo hipster panty*.<sup>98</sup> In 2012 the Navajo Nation filed a federal lawsuit against Urban Outfitters, alleging violation of federal and state trademark laws. In their response, Urban Outfitters argued that *Navajo* was a generic term for a style or design and that the Native American-inspired trend had been cycling through fashion for at least a decade. In September 2016, the Navajo Nation and Urban Outfitters reached an undisclosed settlement and the parties entered into a supply and license agreement on a line of Native American jewelry.<sup>99</sup>

In Canada, Indigenous Peoples' organizations own several authenticity labels, such as for example the Igloo Tag, first introduced in 1958 and since 2017 belonging to the InuitArt Foundation. It was created to distinguish works handmade by Canadian artists of Inuit origin from mass-produced works made by non-Inuit by their use of Arctic imagery and can be applied to sculptures, textile art, crafts, ceramics, jewellery, and fashion goods, such as shoes, boots, hats, scarves, socks, gloves, mittens.<sup>100</sup> Having noted the risks likely to result from the aboriginal tourism in British Columbia, the Aboriginal Tourism BC created an initiative "The Authentic Indigenous Arts Resurgence Campaign", which introduced Authenticity Labelling to ensure that Indigenous artists maintained control over their artwork, and that its sale benefits them as artists, as well as their respective communities.<sup>101</sup> Another First Nation band, the Snuneymuxw people, has registered a series of petroglyphs as official marks to prevent their improper use by third parties. According to Daphne Zografos Johnsson, by doing so they wanted to protect the petroglyphs from unauthorized reproduction on commercial items such as T-shirts, jewellery, and postcards. Once the petroglyphs were registered

---

<sup>97</sup> WIPO, *Draft Gap Analysis*, pp. 28-29.

<sup>98</sup> B. Vézina, op. cit., pp. 3-4.

<sup>99</sup> Ibidem.

<sup>100</sup> InuitArt Foundation, *About Igloo Tag*, <https://www.inuitartfoundation.org/igloo-tag-trademark/about-igloo-tag> [accessed: 27.07.2020].

<sup>101</sup> Authentic Indigenous, *The Authentic Indigenous Arts Resurgence Campaign*, <http://www.authenticindigenous.com/?u=1> [accessed: 27.07.2020].

as official marks, the Snuneymuxw were able to ask local shops to cease selling items that reproduced the registered images without permission.<sup>102</sup>

These examples show that trademarks can be useful in the protection of Indigenous cultural heritage and TCE. However, trademark law is also not free from shortcomings. First of all, trademarks will not prevent the offensive or deceptive use of Indigenous names, signs, and symbols where the traditional owners do not seek to register them as a trademark. Moreover, trademarks protect the names and serve to distinguish the origins of the products, but they do not protect the style or design. The Coast Salish people, the traditional creators of the Cowichan sweater described in the previous section, learned this the hard way during the 2010 Vancouver Winter Olympics, when the Hudson Bay Company was selling a mass-produced Cowichan-style sweater.<sup>103</sup> In 1993 the Cowichan Band Council started registering in Canada trademarks for the names “Cowichan”, “Genuine Cowichan”, and “Genuine Cowichan Approved”<sup>104</sup> and although in the case of Ralph Lauren’s cardigan the band could not commence a legal action against the designer based in the United States due to the principle of territoriality of IP rights, the band was planning to sue the Hudson Bay Company. However, the parties arrived at an agreement and the original Cowichan sweaters were sold in the Vancouver Hudson Bay Company store together with signage explaining the history of the Cowichan and their sweaters.<sup>105</sup> However, it is difficult to regard this compromise as satisfactory considering that in the end the original, hand-made sweaters were sold alongside the mass-produced imitations.<sup>106</sup>

Moreover, trademark law may require that signs be used in the course of trade in order to be valid, and that may be problematic for sacred and secret TCE, whose holders do not wish to commodify their TCE. For example, the Saami Council has cited the Saami traditional dress as an example of a cultural expression misused by the tourism industry in an inappropriate way. The Saami people, however, have no interest in engaging in trade with this part of their cultural heritage and their sole interest is to ensure that the dress is not used in inappropriate ways by unauthorized persons.<sup>107</sup>

---

<sup>102</sup> D. Zografos Johnsson, op. cit., p. 153.

<sup>103</sup> See R. Shrumm, *Knitting for Our Lives: The Appropriation of Cowichan Sweaters by the Hudson’s Bay During the 2010 Vancouver Olympics*, “ARTiculate” 2017, Vol. 2.

<sup>104</sup> Government of Canada, Canadian Trademark Database, *Genuine Cowichan*, Application No. 0906290, <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/viewTrademark?id=0906290&lang=eng&tab=reg> [accessed: 27.07.2020].

<sup>105</sup> S. McCulloch, *Bay, Band Settle Sweater Dispute*, “Times Colonist”, 29 October 2009, <https://www.times-colonist.com/bay-band-settle-sweater-dispute-1.8861> [accessed: 27.07.2020].

<sup>106</sup> R. Shrumm, *Knitting...*, p. 143.

<sup>107</sup> WIPO, *Consolidated Analysis...*, p. 15.

## GENERAL ARTICLES

Karolina Prażmowska

---

Considering that most of the existing IP tools possess some shortcomings in the context of TCE, there are calls for establishing new, specific, sui generis measures, either to complement existing IP rights or substitute them.<sup>108</sup> As a response to such calls, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is currently working on drafting a legal instrument on the protection of TCE and the latest version of its Draft Articles was published in June 2019.<sup>109</sup>

One of the main objectives of the treaty would be to provide effective, balanced, and adequate protection relating to the IP of Indigenous Peoples and to prevent the misappropriation, misuse, and unauthorized use of their traditional cultural expressions and the erroneous grant of intellectual property rights over TCE.<sup>110</sup> The protection under the new treaty would be granted to TCE, which are:

- (a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and
- (c) transmitted between or from generation to generation, whether consecutively or not.<sup>111</sup>

However, as the process of negotiations is still on-going, most of the articles are presented with some alternatives and, depending on the alternative opted for, the draft articles provide different degrees of protection of TCE. This is clearly visible in the probably most important provision of the draft articles – Article 5 – concerning the scope of the protection. The first alternative offers a moderate level of protection as it provides that the future contracting parties “should/shall safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner”. However, Article 5(2) excludes from the protection TCE that are widely known or used outside the community of the beneficiaries, *for a reasonable period of time*, in the public domain, or protected by an IP right. Probably the highest level of protection is envisaged in the second alternative of Article 5, which applies to two types of TCE: 1) where access to traditional cultural expressions is restricted, including where the TCE are secret or sacred; 2) where

---

<sup>108</sup> Ibidem, pp. 6-7.

<sup>109</sup> WIPO IGC, *The Protection of Traditional Cultural Expressions: Draft Articles*, 19 June 2019, WIPO/GRTKF/IC/40/19, Article 2 (“WIPO, Draft Articles”).

<sup>110</sup> Ibidem.

<sup>111</sup> Ibidem, Article 3(1).

TCE that are no longer under the exclusive control of beneficiaries, but are still distinctively associated with the beneficiaries' cultural identity. In the first case beneficiaries will have the exclusive and collective right to maintain, control, use, develop, authorize, or prevent access to and utilization of their TCE and receive a fair and equitable share of benefits arising from their use. In the second case, beneficiaries will receive a fair and equitable share of benefits arising from their use. In any event, beneficiaries will have the moral right of attribution and the moral right to the use of their TCE in a manner that respects the integrity of such TCE.<sup>112</sup> This proposal could potentially provide an effective protection in cases concerning cultural appropriation and unauthorized use of TCE.

Nevertheless, the level of protection afforded by the future international legal instrument to a large extent depends also on the chosen alternative between various exceptions and limitations. One of the alternatives includes the possibility of an exception for the creation of literary, artistic, or creative works inspired by, based on, or borrowed from TCE, which could in turn hinder the efforts to protect Indigenous cultural expressions. Another factor that could diminish the rights of Indigenous Peoples is the possibility of including States into the group of future beneficiaries of the instrument,<sup>113</sup> which could further aggravate the problem. Additionally, some of the Indigenous delegations working with WIPO raised the question of competitive claims from two or more Indigenous groups living on the same territory and who share similar TCE.<sup>114</sup> However, these issues have not yet been addressed in the draft articles.

## Best Practices and Codes of Ethics

Inasmuch as the international negotiations will surely take some time to be concluded, and that after their completion the success of the new international legal instrument that is being prepared by WIPO will depend on the willingness of the States to accede to such an instrument, there is an urgent need to protect the TCE-related rights of Indigenous Peoples against the potential harms that arise from the digitization of TCE, as new technologies generate unprecedented ways for cultural products to be created and replicated.

Although some of the States have already enacted legislation aimed at protecting the cultural expressions of Indigenous communities,<sup>115</sup> there is still much room for improvement. The States should be encouraged to enact laws prohibiting

---

<sup>112</sup> Ibidem, Article 5, alternative 2.

<sup>113</sup> Ibidem, Article 4.

<sup>114</sup> WIPO, *Draft Gap Analysis*, p. 11.

<sup>115</sup> See A.F. Busch, *Protection of Traditional Cultural Expressions in Latin America. A Legal and Anthropological Study*, Munich Studies on Innovation and Competition, Springer, Berlin 2015.

non-traditional uses of sacred TCE and forms of commercial exploitation which distort the intangible cultural heritage.<sup>116</sup> Meanwhile however, researchers, cultural and educational institutions, and artists should take the responsibility to develop and adhere to the ethical principles for documenting TCE and for dealing with secret and sacred knowledge. The following paragraphs suggest what can be done in the area of public collections, databases including Indigenous heritage, and inside the fashion industry, taking into account not only the responsibilities of designers but consumers as well. With regard to the collections that already exist and are held by third parties, the institutions will have to make decisions that balance the public interest goals of such institutions with the needs of holders of TCE, whose perspectives should be respected and who should be involved in decisions concerning the display of images on the webpages of the institutions, as “even the display of *taonga* in museums and other public displays, without the consent or involvement of the tribal group from whom they originated, may be viewed as a form of misappropriation of IPR”.<sup>117</sup>

Such an approach is consistent with the principle of free, prior, and informed consent embedded in the 2007 UNDRIP and the 1995 Principles and Guidelines Concerning the Protection of Cultural Heritage of Indigenous Peoples.<sup>118</sup> An example of good practices in this matter is the Museum of Anthropology in Vancouver, BC. The Museum of Anthropology places a high priority on ensuring that access to collections is provided for originating community members and recognizes that “the collections housed at the museum contain items that are important to originating communities and that these objects may have a non-material side embodying cultural rights, values, knowledge, and ideas that are not owned or possessed by the museum, but are retained by the originating communities”.<sup>119</sup> The museum works closely with Indigenous Peoples and offers grants to help cover the costs of Indigenous individuals or community groups to travel to the museum to visit and study the collections and archives.

Documenting also plays an important role in the strategies for the safeguarding of cultural heritage and traditional practices as it may prevent the loss of Indigenous heritage, but it should be undertaken with great care as it could also make TCE more accessible to outsiders and undermine the efforts of communities to protect their heritage. As such, Indigenous communities should take the lead in documenting their own heritage, as it may be a useful strategy for both the positive protection (establishing IP in their TCE) and for defensive protection (prevent-

---

<sup>116</sup> J. Blake, L. Lixinski, op. cit., p. 121.

<sup>117</sup> T. Lanauze, S. Forbes, M. Solomon, op. cit., p. 337.

<sup>118</sup> UN Commission on Human Rights, *Protection of the Heritage...*

<sup>119</sup> Museum of Anthropology, Vancouver, Canada, <https://moa.ubc.ca/indigenous-access-and-engagement/> [accessed: 27.07.2020].



ing the acquisition of IP by third parties).<sup>120</sup> In order for Indigenous communities to hold rights in such databases, they must be regarded as the creators or makers of the databases, or at least acquire the rights from the creators,<sup>121</sup> as in the case of Moriori cultural database mentioned in the third section of this article. The databases could be developed in a way which allows access only for the authorized members, who can define and control the rights, accessibility, and reuse of their digital resources. For example, the First Peoples' Cultural Council in Canada, which assists First Nations in their efforts to revitalize their languages, arts, and cultures, every year provides funding for documenting projects, which are later published on a webpage. However, the database and all materials on the site are protected by copyright laws and are owned by the individual Indigenous language communities who created the archival content.<sup>122</sup>

Also the fashion industry should develop its own codes of good practices, as has already been done in the case of the rights of workers or eco-friendly business. Particular emphasis should be placed on the principle of authorization, involvement, participation, and collaboration. Outsiders wanting to use TCE in their fashion creations should ask for the prior and informed consent of the relevant members of the source community as to whether they wish to share this aspect of their culture and how they want it shared.<sup>123</sup> The involvement and participation of the source community can take place in many ways. Some designers enter into expansive collaboration agreements and involve the community in the production process, and some of these agreements also address compensation and IP ownership. One example of such collaboration is the Canadian Goose company, which in January 2019 launched a collection of exclusive parkas as a part of its Project Atigi collection (*atigi* is an Inuktitut word for parka). The collection featured the designs of traditional parkas from fourteen Inuit seamstresses from nine communities in Nunavut, Northwest Territories, Quebec, and Newfoundland and Labrador. The collection was such a success that in 2020 Canada Goose launched its second edition, Atigi 2.0. Fabric and other materials were provided to the designers and seamstresses, who were paid for their work, and they maintain all ownership of the rights to their designs.<sup>124</sup> Each design will not be recreated and the original parkas will be sold for \$2,500 each. The money from these sales will go to Inuit Tapiriit Kanatami (ITK), a national organization that advocates for the rights and interests

---

<sup>120</sup> WIPO, *Consolidated Analysis...*, p. 67.

<sup>121</sup> *Ibidem*, p. 69.

<sup>122</sup> First Voices, *Conditions of Use*, <https://www.firstvoices.com/content/conditions/> [accessed: 27.07.2020].

<sup>123</sup> B. Vézina, *op. cit.*, p. 12.

<sup>124</sup> Nunatsiaq News, *Canada Goose, Inuit Tapiriit Kanatami Collaborate Again on Parka Designs*, 19 August 2019, <https://nunatsiaq.com/stories/article/canada-goose-inuit-tapiriit-kanatami-collaborate-again-on-parka-designs/> [accessed: 27.07.2020].

of about 60,000 Inuit in Canada. From the sales of last year's Atigi parkas Canada Goose donated nearly \$80,000 to ITK.<sup>125</sup> However, it is not only about economic benefits. As Kristy King, a seamstress from Arviat, Nunavut, said: "I'm feeling pretty honoured to take part in this, especially because it's something that's going to be put out to different parts of the world".<sup>126</sup>

Meanwhile, Indigenous Peoples are also taking initiatives to be in control of their heritage. These initiatives vary from establishing their own authenticity labels to their own fashion brands or fashion events, such as the Global Indigenous Management, which organizes Indigenous Fashion Runway events in Australia and New Zealand,<sup>127</sup> or MIROMODA, which aims at advancing the quality status of Māori fashion design.<sup>128</sup> All over the globe Indigenous designers are using fashion to reclaim their culture and their projects vary from everyday fashion to haute couture. In their designs they are combining elements of their TCE and modernity, as Bethany Yellowtail, from the Crow (Apsaalooke) and Northern Cheyenne (Tsetsehestahese & So'taeo'o) Nations in southeastern Montana, who created pieces specifically for participants of the 2017 Indigenous Women Rise: Women's March. She designed a limited-edition silk scarf named Women Warrior, which was printed with a scene of her Crow culture's war bonnet dance.<sup>129</sup> She also funded a platform – The Collective – which features handmade goods created by Native American and Canadian First Nations artists and entrepreneurs. Another American clothing company – the NTVS – is an example of streetwear mixed with Indigenous culture.<sup>130</sup> The mission of these Indigenous designers is to teach youth the importance of embracing culture and history, and they do so by crafting often humorous designs like the T-shirt "Sage Against the Machine". In this way they show that Indigenous Peoples are contemporary people, not some imaginary and distinct *others* as portrayed in the 2015 DSquared2 collection mentioned in previous section.

Finally, consumers also have an important role to play in the fight against the misappropriation of Indigenous Peoples' heritage. The use of authenticity labels, Indigenous trademarks and designs allows consumers to make an educated

---

<sup>125</sup> J. McKay, *Inuit Designers Launch New Line of Parkas for Canada Goose*, "CBC", 19 January 2020, <https://www.cbc.ca/news/canada/north/canada-goose-inuit-parkas-atigi-1.5431377> [accessed: 27.07.2020].

<sup>126</sup> J. McKay, *Canada Goose Unveils Parkas Designed by Inuit Designers*, "CBC", 4 February 2019, <https://www.cbc.ca/news/canada/north/canada-goose-unveils-parkas-from-inuit-nunangat-1.5003266> [accessed: 27.07.2020].

<sup>127</sup> Global Indigenous Management, <https://globalindigenousmanagement.com/about-global-indigenous-management/> [accessed: 27.07.2020].

<sup>128</sup> Miromoda, <https://www.miromoda.co.nz/about> [accessed: 27.07.2020].

<sup>129</sup> B.Yellowtail, *Women Warrior Scarf*, <https://byellowtail.com/collections/all/products/women-warrior-ledger-scarf> [accessed: 27.07.2020].

<sup>130</sup> The NTVS, <https://www.thentvs.com/> [accessed: 27.07.2020].

decision when purchasing goods, based on the premise that while the use of certification marks or authenticity labels will not in and of itself prevent the sale of imitation products in the marketplace,<sup>131</sup> if the consumers are educated to look for the label as a symbol of authenticity then it will be more difficult to market and sell imitation products.

## Conclusions

New technologies offer unique possibilities for the safeguarding of Indigenous heritage and may become part of a solution to the on-going loss of such heritage, as they generate unprecedented ways for cultural products to be created, replicated, exchanged, and used. Protecting traditional knowledge, including Indigenous languages and worldviews and traditional cultural expressions, is now one of the biggest concerns for Indigenous Peoples, and new media play an important role in ensuring the survival of their heritage. The digitization of Indigenous cultural heritage is increasing as a result of the efforts of language preservation programs, museums and archives, NGOs and cultural organizations, professional researchers, and the Indigenous communities themselves, as they perceive the Internet and related technologies as a suite of new tools and opportunities for the protection and dissemination of their cultural resources.<sup>132</sup> However, due to the very nature of their heritage which represents a complex reality, where the tangible properties and intangible heritage are holistically connected and in many instances consist of sacred and secret elements, and due to the significance of these elements for the identity of Indigenous Peoples the digitization of such heritage should be undertaken with great caution, as the preservation efforts can make it more accessible and vulnerable to uses that are against the wishes of their holders. Misuse and misappropriation of TCE are common practices, especially in the fashion industry, and the further digitization of Indigenous heritage may deepen the vulnerability of the Indigenous heritage.

Although some of the existing IP tools, namely copyright and trademarks, can offer a certain level of protection of TCE, establishing new, specific, *sui generis* measures may be the most desirable path. The negotiation process of a new legal instrument for the protection of TCE is currently taking place at WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. However, as the alternative draft articles of the new treaty present very different levels of protection, the outcome of these negotiations is uncertain and as a consequence it may not provide adequate protection to the traditional cultural heritage of Indigenous Peoples.

---

<sup>131</sup> D. Zografos Johnsson, *op. cit.*, p. 163.

<sup>132</sup> K. Deer, *Media as a Means to Transmit Indigenous Knowledge*, "Cultural Survival" 2019, Vol. 43(3), pp. 18-19.

For this reason, cultural and educational institutions must strike a balance between their mission to provide educational experiences and the protection of the interests of TCE holders. The principle of free, prior, and informed consent of Indigenous communities should dominate the relations between public and business entities and Indigenous Peoples.

### References

- Anaya J., *Indigenous Peoples in International Law*, Oxford University Press, Oxford 2004.
- Anderson J., *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, "Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena", American Library Association and The MacArthur Foundation Columbia University, New York 2005.
- Antons C., Rogers L., *Cultural and Intellectual Property in Cross-border Disputes over Intangible Cultural Heritage*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018.
- Assembly of First Nations, *Ethics in First Nations Research*, AFN Environmental Stewardship Unit, Ottawa 2009.
- Authentic Indigenous, *The Authentic Indigenous Arts Resurgence Campaign*, <http://www.authenticindigenous.com/?u=1> [accessed: 27.07.2020].
- van Beurden J., *Treasures in Trusted Hands. Negotiating the Future of Colonial Cultural Objects*, Sidestone Press, Leiden 2017.
- Blake J., *On Defining the Cultural Heritage*, "The International and Comparative Law Quarterly" 2000, Vol. 49(1).
- Blake J., Lixinski L., *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020.
- Bortolotto C., Ubertazzi B., *Editorial: Foodways as Intangible Cultural Heritage*, "International Journal of Cultural Property" 2018, Vol. 25(4).
- Brown M. F., *Who Owns Native Culture?*, Harvard University Press, Cambridge–London 2003.
- Burri M., *Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship*, "International Journal of Cultural Property" 2010, Vol. 17(1).
- Busch A.F., *Protection of Traditional Cultural Expressions in Latin America. A Legal and Anthropological Study*, Munich Studies on Innovation and Competition, Springer, Berlin 2015.
- B.Yellowtail, *Women Warrior Scarf*, <https://byellowtail.com/collections/all/products/women-warrior-ledger-scarf> [accessed: 27.07.2020].
- Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.
- Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231.
- Coombe R., Wershler D., Zeilinger M., *Dynamic Fair Dealing: Creating Canadian Culture Online*, University of Toronto Press, Toronto 2014.

- Corn A., Gumbula N., *Nurturing the Sacred through Yolngu Popular Song*, “Cultural Survival” 2002, Vol. 2(69), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/nurturing-sacred-through-yolngu-popular-song> [accessed: 27.07.2020].
- Deer K., *Media as a Means to Transmit Indigenous Knowledge*, “Cultural Survival” 2019, Vol. 43(3).
- Farley C., *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer*, “Connecticut Law Review” 1997, Vol. 30(1).
- The Fashion Law, *KTZ Issues Interesting Apology for Copied Garment*, 30 November 2015, <https://www.thefashionlaw.com/home/ktz-issues-interesting-apology-for-copied-garment> [accessed: 27.07.2020].
- The Fashion Law, *Ralph Lauren Has Offended a Canadian Tribe with This Sweater*, 20 February 2015, <https://www.thefashionlaw.com/home/ralph-lauren-has-offended-a-canadian-tribe-with-this-sweater> [accessed: 27.07.2020].
- First Voices, *Conditions of Use*, <https://www.firstvoices.com/content/conditions/> [accessed: 27.07.2020].
- Fitzgerald B., Hedge S., *Traditional Cultural Expression and Internet World*, in: C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Wolters Kluwer, Alphen aan den Rijn 2009.
- Global Indigenous Management, <https://globalindigenoumanagement.com/about-global-indigenous-management/> [accessed: 27.07.2020].
- Government of Canada, Canadian Trademark Database, *Genuine Cowichan*, Application No. 0906290, <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/viewTrademark?id=0906290&lang=eng&tab=reg> [accessed: 27.07.2020].
- Grzybczyk K., *Ikony popkultury a prawo własności intelektualnej. Jak znani i sławni chronią swoje prawa* [Pop Culture Icons and Intellectual Property Rights. How Famous People Protect Their Rights], Wolters Kluwer, Warszawa 2018.
- Hartford S., *On DSquared2’s Racist and Extraordinarily Offensive FW15 Line “DSquaw”*, 5 March 2015, <https://themuse.jezebel.com/on-dsquared2-s-racist-and-extraordinarily-offensive-fw1-1689649757> [accessed: 27.04.2020].
- Hill’s Native Art, <http://www.hills.ca/Genuine-Handmade-Cowichan-Sweater-p888.html> [accessed: 27.07.2020].
- Howell R.G., Ripley R., *The Interconnection of Intellectual Property and Cultural Property*, in: C.E. Bell, R.K. Paterson (eds.), *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, UBC Press, Vancouver 2008.
- Intellectual Property Issues in Cultural Heritage, *Moriori Cultural Database*, <https://www.sfu.ca/ipinch/project-components/community-based-initiatives/moriori-cultural-database/> [accessed: 27.07.2020].
- International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989.
- International Labour Organization (ILO), *Indigenous Peoples and Climate Change. From Victims to Change Agents Through Decent Work*, International Labour Office, Gender, Equality and Diversity Branch, Geneva 2017.
- InuitArt Foundation, *About Igloo Tag*, <https://www.inuitartfoundation.org/igloo-tag-trade-mark/about-igloo-tag> [accessed: 27.07.2020].

## GENERAL ARTICLES

Karolina Prażmowska

---

- Karjala D.S., Paterson R.K., *The Failed Case for Property Rights in Intangible Indigenous Cultural Property*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018.
- Lanauze T., Forbes S., Solomon M., *A Practical Approach to Traditional Knowledge and Indigenous Heritage Management: A Case Study of Moriori Heritage Management Practice*, in: S. Subramanian, B. Pisupati (eds.), *Traditional Knowledge in Policy and Practice*, United Nations University Press, Tokyo–New York–Paris 2010.
- Lenzerini F., *Reparations for Wrongs against Indigenous Peoples' Cultural Heritage*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017.
- Long D.E., *Trade Secrets and Traditional Knowledge: Strengthening International Protection of Indigenous Innovation*, in: R.C. Dreyfuss, K.J. Strandburg (eds.), *The Law and Theory of Trade Secrecy*, Edgar Elgar Publishing, Cheltenham–Northampton 2011.
- Louvre Museum, *Online Tours*, <https://www.louvre.fr/en/visites-en-ligne> [accessed: 27.07.2020].
- Marker M., *Indigenous Voice, Community, and Epistemic Violence: The Ethnographer's "Interests" and What "Interests" the Ethnographer*, "International Journal of Qualitative Studies in Education" 2003, Vol. 16(3).
- McCulloch S., *Bay, Band Settle Sweater Dispute*, "Times Colonist", 29 October 2009, <https://www.timescolonist.com/bay-band-settle-sweater-dispute-1.8861> [accessed: 27.07.2020].
- McKay J., *Canada Goose Unveils Parkas Designed by Inuit Designers*, "CBC", 4 February 2019, <https://www.cbc.ca/news/canada/north/canada-goose-unveils-parkas-from-inuit-nunangat-1.5003266> [accessed: 27.07.2020].
- McKay J., *Inuit Designers Launch New Line of Parkas for Canada Goose*, "CBC", 19 January 2020, <https://www.cbc.ca/news/canada/north/canada-goose-inuit-parkas-atigi-1.5431377> [accessed: 27.07.2020].
- Menzies C.R., *Reflections on Research with, for, and among Indigenous Peoples*, "Canadian Journal of Native Education" 2001, Vol. 25(1).
- Miromoda, <https://www.miromoda.co.nz/about> [accessed: 27.07.2020].
- Museum of Anthropology, Vancouver, Canada, <https://moa.ubc.ca/indigenous-access-and-engagement/> [accessed: 27.07.2020].
- Nationaal Museum van Wereldculturen (Tropenmuseum, Afrika Museum en Museum Volkenkunde), <https://collectie.wereldculturen.nl> [accessed: 27.07.2020].
- The NTVS, <https://www.thentvs.com/> [accessed: 27.07.2020].
- Nunatsiaq News, *Canada Goose, Inuit Tapiriit Kanatami Collaborate Again on Parka Designs*, 19 August 2019, <https://nunatsiaq.com/stories/article/canada-goose-inuit-tapiriit-kanatami-collaborate-again-on-parka-designs/> [accessed: 27.07.2020].
- Scovazzi T., Westra L., *The Safeguarding of the Intangible Cultural Heritage According to the 2003 Unesco Convention: The Case of The First Nations of Canada*, "Inter Gentes" 2017, Vol. 1(2).
- Shrumm R., *Cowichan Sweater*, "The Canadian Encyclopedia", 22 October 2018, <https://www.thecanadianencyclopedia.ca/en/article/cowichan-sweater> [accessed: 27.07.2020].
- Shrumm R., *Knitting for Our Lives: The Appropriation of Cowichan Sweaters by the Hudson's Bay During the 2010 Vancouver Olympics*, "ARTiculate" 2017, Vol. 2.

- Smith L., *Uses of Heritage*, Routledge, London–New York 2006.
- The State Hermitage Museum in St. Petersburg, <https://www.hermitagemuseum.org/wps/portal/hermitage> [accessed: 27.04.2020].
- Stopp M.P., *The Coast Salish Knitters and the Cowichan Sweater: An Event of National Historic Significance*, “Material Culture Review” 2012, Vol. 76.
- Symonides J., *Cultural Rights: A Neglected Category of Human Rights*, “International Social Science Journal” 1998, Vol. 50(158).
- Torsen M., Anderson J., *Intellectual Property and the Safeguarding of Traditional Cultures. Legal Issues and Practical Options for Museums, Libraries and Archives*, World Intellectual Property Organization, Geneva 2010.
- Ubertazzi B., *EU Geographical Indications and Intangible Cultural Heritage*, “IIC – International Review of Intellectual Property and Competition Law” 2017, Vol. 48.
- Ubertazzi B., *Territorial and Universal Protection of Intangible Cultural Heritage from Misappropriation*, “New Zealand Yearbook of International Law” 2010, Vol. 8.
- UN Commission on Human Rights, *Protection of the Heritage of Indigenous Peoples. Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes*, 21 June 1995, E/CN.4/Sub.2/1995/26.
- UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.
- UNESCO, *Mexico City Declaration on Cultural Policies*, World Conference on Cultural Policies, Mexico City, 26 July – 6 August 1982.
- Vézina B., *Curbing Cultural Appropriation in the Fashion Industry*, CIGI Papers No. 213, April 2019.
- Vrdoljak A.F., *Indigenous Peoples, Intangible Cultural Heritage and Participation in the United Nations*, in: C. Antons, W. Logan (eds.), *Intellectual Property, Cultural Property and Intangible Cultural Heritage*, Routledge, London–New York 2018.
- Wickler W., Seibt U., *Syntax and Semantics in a Zulu Bead Colour Communication System*, “Anthropos” 1995, Vol. 90(4/6).
- Wiktionary, *Squaw*, <https://en.wiktionary.org/wiki/squaw> [accessed: 27.07.2020].
- WIPO, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore. Background Paper n.1*, World Intellectual Property Organization, Geneva 2004.
- WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, World Intellectual Property Organization, Geneva 2015.
- WIPO, *Intellectual Property Handbook*, World Intellectual Property Organization, Geneva 2004.
- WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, World Intellectual Property Organization, Geneva 1985.
- WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, 6 July 2018, WIPO/GRTKF/IC/37/6.
- WIPO IGC, *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, 27 April 2012, WIPO/GRTKF/IC/22/INF/8.
- WIPO IGC, *Intellectual Property and Traditional Handicrafts. Background Brief – No. 5*, World Intellectual Property Organization, Geneva 2016.

## GENERAL ARTICLES

Karolina Prażmowska

---

- WIPO IGC, *The Protection of Traditional Cultural Expressions: Draft Articles*, 19 June 2019, WIPO/GRTKF/IC/40/19.
- Xanthaki A., *International Instruments on Cultural Heritage: Tales of Fragmentation*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017.
- Zerehi S.S., *Inuit Shaman Parka 'Copied' by KTZ Design Well-studied by Anthropologists*, "CBC", 2 December 2015, <https://www.cbc.ca/news/canada/north/inuit-shaman-parka-design-history-1.3345968> [accessed: 27.07.2020].
- Zerehi S.S., *KTZ Fashion under Fire for Using Inuit Design Without Family's Consent*, "CBC", 25 November 2015, <https://www.cbc.ca/news/canada/north/ktz-fashion-inuit-design-1.3337047> [accessed: 27.04.2020].
- Zografos Johnsson D., *The Branding of Traditional Cultural Expressions: To Whose Benefit?*, in: P. Drahos, S. Frankel (eds.), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development*, ANU Press, Canberra 2012.
- Zografos Johnsson D., Tualima H.Y., *Cultural Heritage, Traditional Knowledge and Intellectual Property*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill Nijhoff, Leiden 2017.