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Introduction

This paper is an inventory of studies and reports prepared over the last fifteen years that address the protection of traditional cultural expressions of Aboriginal communities in Canada against misappropriation and/or misuse from an intellectual property policy perspective. The report surveys studies and reports that identify specific strategies that have been pursued by various Aboriginal communities in Canada to ensure greater protection of traditional cultural expressions from misappropriation and/or misuse.

To this end, a comprehensive bibliography of 138 published academic articles and books, and reports and other documents prepared by First Nations organization, NGOs, and government agencies has been prepared. Academic, legal, and First Nations experts and practitioners have been contacted for direction on additional information that may be helpful (such as MoUs and other agreements that may have not been reported on in the literature), and a news media archive has been consulted to point to local cases that may be illustrative. The contents of these reports has been reviewed and screened for Canadian content, and then within the Canadian examples for further commentary on the use and adequacy of the conventional intellectual property toolkit for the protection of traditional cultural expressions against misappropriation and misuse.

Methodology

The basic methodology of this study was a literature review of published reports, studies and analyses prepared during the last fifteen years that relate to the protection of traditional cultural expressions (TCEs) of Aboriginal communities in Canada from misappropriation and/or misuse. In order to locate these sources, we employed a number of different strategies: Comprehensive internet and database searches were used to locate regional examples measures and/or tools developed by Aboriginal communities to address some of the challenges related to misappropriation and/or misuse of their traditional cultural expressions within an Intellectual Property (IP) framework. For example, searching the terms ‘Inuit Intellectual Property’ resulted in a number of documents that were incorporated into the inventory. Advanced searching specifically for pdf files through ‘filetype:pdf’, resulted in narrower search results and an increased production of whole documents relevant to the inventory. Through these specific
searches, memorandums of understanding (MOUs), consultation protocols, and agreements that feature IP could be accessed expediently. Other examples of keyword searches include: “Indigenous”/“Aboriginal”/“First Nation” + “Intellectual Property”/“copyright (use)”, “trademark(s)”, “patent(s)” or “Indigenous”/“Aboriginal”/“First Nation” “Traditional Cultural Expression” & “Intellectual Property”. Newspaper articles were also searched using these these key word searches through the database, Canada Newsstand Complete. Searches were done in French and English.

Relevant academic sources were identified by searching past and ongoing research projects regarding issues of IP and the protection of TCEs. These included The University of Alberta, Faculty of Law’s Project for the Protection and Repatriation of First Nation Cultural Heritage in Canada, as well as Simon Fraser University’s project, Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics (IPinCH). This database provided a preliminary inventory of references, project papers and (web) resources, as well as a platform from which specific instances of IP mobilization by First Nations communities and/or organizations could be further researched. Articles and project discussions from the IPinCH site were included if they showed relevance to a Canadian context; examples from these initial documents could then be searched for specifically and the resulting documentation appropriately inventoried.

We also employed comprehensive searches at numerous levels of government. At the international level, relevant reports and analyses produced by the World Intellectual Property Organizations (WIPO) were located. Federal government sources such as Indian and Northern Affairs Canada (INAC), the Canadian Intellectual Property Office (CIPO), and the Royal Commission on Aboriginal People (RCAP), as well as reports produced by relevant departments, such as the Department of Canadian Heritage, were evaluated. The websites of larger First Nations organizations, the Assembly of First Nations, the First Nations Summit and the Union of BC Indian Chiefs, for example, were accessed to find documentation related to their respective projects and statements on IP. Other websites accessed include the Inuit Circumpolar Council and the First Nations Summit. In addition, individual band and tribal government web resources were consulted when, through previous searching, it appeared that the band or organization had a
specific case related to IP or had issued a document (consultation protocol, MOU, agreement-in-principle) that mobilized IP. Specific tribal band councils contacted include The Seton Lake Indian Band and Council, Shuswap Tribal Council and the Yale First Nation Band Office. Inquiries were made to specific Aboriginal cultural organizations, including The First Peoples’ Heritage, Language and Culture Council (FPHLCC) and The U’mista Cultural Society, Alert Bay, BC.

A number of key scholars and researchers directly involved in the area of TCEs and IP in Canada were contacted. These individuals included Stephen Augustine (Curator of Ethnology, Eastern Maritime, The Museum of Civilization), Don Bain (Lheidli T’enneh First Nation, BA), Rosemary Coombe (Professor of Law and Canada Research Chair, Division of Social Science, York University and IPinCH Project Director), Bonnie Devine (Ontario College of Art and Design), Heather Igloliorte (Aboriginal Curatorial Collective), Jennifer Kramer (Curator Pacific Northwest, Museum of Anthropology, University of British Columbia, Department of Anthropology), Nadine Méthot (Administrative Coordinator, CIHR-TAAM Team in Aboriginal Antidiabetic Medicines), Val Napoleon (University of Alberta, Faculty of Law), George Nicholas (Simon Fraser University, Department of Archaeology and IPinCH Project Director), Brian Noble (Dalhousie University, Department of Sociology and Social Anthropology), Corrine Porter (Executive Director, Dena Kayeh Institute) Amber Ridington (Independent consultant specializing in heritage management and multimedia presentation), Colin Scott (McGill University, Department of Anthropology), and Greg Younging (UBC Okanagan, Indigenous Studies).

The terms of reference for the report indicated that the definition of traditional cultural expressions include artistic, literary, dramatic and musical works, performances, and symbols. When reviewing the literature, it became immediately apparent that in much of the discussion of ‘traditional knowledge’ included these kinds of expressions of traditional culture. For instance in a traditional knowledge protocol, the members of the Dehcho First Nations have defined “Stories, Customs, Experiences, Knowledge, Practices, Belief and Spiritual Teaching passed on to our children and future generation” as their collective intellectual property (Dehcho First
Nation 2005). This critique was also found in the literature, where these categories have been debated at some length (see for instance Howell and Ripley 2009:224). Such a broad definition makes it difficult to arbitrarily draw a line between ‘traditional knowledge’ and ‘traditional cultural expressions’ in terms of mechanisms employed by aboriginal people of Canada, and thus our survey was more expansive than restrictive in including a review of efforts to protect traditional knowledge, noting how artistic, literary, dramatic and musical works, performances and symbols, were being treated.

Below is a review of the major findings of the inventory of studies and reports. It is organized along a number of themes, which reflect the focus of the literature as we found it, including issues of assigning ownership, intellectual property in publications, intellectual property in marketing of traditional cultural expressions, ethics guidelines, the OCAP (Ownership, Control, Access and Possession) policy concept, TCEs and the *Canadian Environmental Assessment Act*, aboriginal jurisdictions, aboriginal rights, and some summary findings with respect to copyright, trademarks, patents, public domain, creative commons, secrecy and non-divulgence, and some observed shortcomings of the conventional IP system. This is followed by a summary of our policy recommendations to address the issue of mis-appropriation of TCEs, based on our review of the inventory.

**Assigning Ownership**

Many reports have pointed out that the default criteria for intellectual property protection of individual ‘authorship’ is a problem which must be addressed as traditional cultural expressions are often viewed as in a property relation with a community or other local, culturally specific collective owners (family, regional, clan, etc)(AFN 2009, AFNQL 2005, Emery 2000, Howell and Ripley 2009, Murray *et al* 2007, Rights and Democracy 2006). Indeed in one case it was suggested that because of the collective nature of the relationship with traditional cultural expressions, they were not susceptible to ownership at all (Crowshoe 2005).

To address this concern, there is a widespread practice to set out protocols, contracts and other formal arrangements that identify aboriginal community organizations (such as Indian Bands,
regional or national aboriginal organizations or cultural centres, aboriginal corporations) as the ‘legal entity’ to be recognized as the owner of the expressions documented in a particular project, and to which any intellectual property rights created out of processes where information is shared are reserved in favour of that aboriginal organization (AFN 2007b, ANSMC 2007, Van Bibber et al 2008, Dena Kayeh Institute 2008, Ermine et al 2004, Lewis 2004, Tail Feathers 2010, Thom 2006). Whereas in most of these cases, researchers or other collaborators who are documenting the traditional cultural expressions are given licence to use the recordings under defined terms, collaborators in Saskatchewan have agreed to share intellectual property right emerging from the research project between the University of Saskatchewan and the Lac La Rouge and English River First Nations (Goerzen 2004). The UBC Museum of Anthropology and the Musqueam Band have made similar arrangements to share intellectual property rights created through collaboration in a way that reflects the relative contributions of their partnership (UBC MOA and Musqueam 2006).

In one case involving the documentation of traditional knowledge (which includes the documentation of oral traditions, particularly those related to sacred or spiritual sites, which are traditional cultural expressions) for a major pipeline project, a protocol between the pipeline company and individual First Nations ensured that intellectual property in this information was assigned to both the individual study participants (those who shared the traditional cultural expressions) and the First Nation (Enbridge Northern Gateway Pipelines 2010). The protocol further sets out issues relating to the control and use of materials once they have been collected. A parallel approach was taken by the Hul’qumi’num Treaty Group in its research arrangement with the University of Victoria department of linguistics, where disposition of materials is accounted for in researcher contracts to provide maximum long-term control to the First Nation (Thom 2006).

This approach is common online, where First Nations organizations are making explicit their claims to copyright of the materials published on the web or hosted in online databases. The Doig River First Nation, for instance, has asserted copyright over the design, images and writings relating to their traditional cultural expressions (including stories and songs) on the their
One comprehensive approach taken drawing on these principles has been with respect to traditional knowledge research project undertaken between a number of James Bay Cree First Nations and a CIHR-funded academic research team (CIHR-TAAM 2003, Morin 2010). Though the project is not dealing with traditional cultural expressions per se, we believe that many of the principles adopted in this approach could be used in other collaborative projects where more artistic, performative, or symbolic work is being documented. The collaboration is centred around an agreement that clarifies that the parties agree that all intellectual property rests with participating James Bay Cree communities who give a non-exclusive, time-limited licence to the researchers to use the information shared (traditional knowledge in this case) for the purposes of publication. The agreement then specifies that any new intellectual property rights – copyright, patents and so on, will be jointly owned (undivided co-owners) by the participating communities and the researchers through a joint intellectual property corporation to which the Cree Board of Health and Social Services of James Bay (a local self-government institutions) is 51% owner.

The potential problem with these approaches is with respect to internal community questions of if the aboriginal institutions identified to be assigned beneficial ownership of intellectual property rights are entirely appropriate within the community vis-à-vis customary laws and protocols. In some cases perhaps only certain institutions (ie: Indian Bands) within an wider area that collectively asserts intellectual property right are assigned those rights, leaving others who are not participating, for whatever reason, out. These internal issues are important for aboriginal communities to consider in developing these approaches.

**Intellectual Property in Publication of Traditional Cultural Expressions**

The publication of traditional cultural expressions has been a common theme of concern, and aboriginal people in Canada have taken a variety of approaches (successful and unsuccessful) to use copyright to protect their interests while promoting and circulating their traditional cultural expressions in print. One key strategy has been through making deliberate arrangements with a publisher of traditional cultural expressions to reserve copyright in favour of the aboriginal
community, or to leave claims of copyright silent. Examples from several recent publications illustrate these strategies:


- copyright in this edited volume is assigned to individual authors. In several cases the chapters or images used in the chapters are “© Mowchaht-Muchalat First Nation and Huu-ay-aht First Nations”.

Bell, Catherine and Val Napoleon (eds) 2008 First Nations Cultural Heritage Law: Case Studies, Voices, and Perspectives. UBC Press, Vancouver

- copyright in this edited volume is assigned to individual authors. In four of the 11 chapters, copyright is held jointly between the First Nations collaborators and the academic researchers.


- copyright in this book is held by the Lake Babine Nation, not UBC Press or the authors


- copyright notice reads “© In trust, Snk’y’peplxw (Coyote House) Language and Culture Society and Mamie Henry”


- copyright is reserved for the authors, “recognizing and respecting the intellectual and cultural property rights of those individuals who have contributed their stories and knowledge to this book”.

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- though not a Canadian case, this is very interesting example from a book of Coast Salish oral histories published from the oral traditions of Lushootseed-speaking communities in Washington State. The copyright notice uses a technique akin to dedication to public use: “The texts of the Lushootseed stories are understood to be part of native cultural tradition, and therefore no claim of copyright is here made upon them.” The authors and press go on to make declare copyright in the annotations, translations and scholarly apparatus are copyright the author and the press.

While these strategies have sought to balance the interests of presses, authors/editors and aboriginal communities, there have been a number of concerns around appropriation. The most well known Canadian example of an expansive set of traditional cultural expressions being published by a non-aboriginal author who retained copyright is the series of Haida stories published by Robert Bringhurst in his books *A Story as Sharp as a Knife* (1999), *Nine Visits to the Mythworld* (2000), and *Being in Being* (2001). This is an extensive set of oral histories, originally told by elderly Haida men to a 19th century anthropologist, published by the Bureau of American Ethnology, and then a century later re-translated and published by Bringhurst. Haida cultural critics have critiqued Bringhurst for extensive cultural appropriation (Murray et al 2007). Unphased by the criticism, the first book in the series was in 2011 been released by Douglas and McIntyre in second edition. A similar confrontation was left unresolved 10 years earlier, when Anne Cameron’s stories based on Northwest Coast traditional stories were objected to by aboriginal community members, but the books continued to be reprinted and new works based on these traditions continued to emerge (Younging 2006, 2010).

Another example of the appropriation of intellectual property rights to traditional cultural expressions is the case of the by-law passed by the city of Duncan (British Columbia) requiring a copyright licence for any image of totem poles found in the city (Spratley 2007). The local media reported the objections of the aboriginal community and artists about the inappropriateness of the City of Duncan generating revenues off of aboriginal creativity in this
way, and the city provided a rationale in having commissioned many of these works to encourage tourism and generate revenue for the community.

Treaty 7 First Nations have expressed the desire to repatriate copyright from curriculum materials that contain traditional cultural expressions published prior to 2000 when they became more active in maintaining and managing their intellectual property (Treaty 7 First Nations Education Systems 2000). They report that this has been a challenging goal to achieve.

Academics have engaged this issue as well, with Hollowell and Nicholas (2008) providing a discussion and summary of recommendations for how researchers may respect aboriginal traditional cultural expressions through intellectual property measures taken in publications.

**Intellectual Property in the Marketing of Traditional Cultural Expressions**

Where aboriginal communities intend to engage in the marketing of traditional cultural expressions, such as traditional art works and designs, several reports have given advice on developing protocols (Anderson and Younging 2010) and contracts (Rights and Democracy n.d.) to clarify expectations and interests with respect to the protection community knowledge and interests (Neel and Biin 2000). It is hoped that these strategies can help deal with misappropriation of traditional designs, particularly with respect to tourist art (Scott 1997).

The most widely documented case of this issue is the Amauti Project. Existing domestic legislation was seen by as inadequate for protecting unauthorized use of traditional designs of these Inuit women’s jackets (Comacchia 2007, Rideout 2003). An aboriginal women’s organization, the Pauktuutit Women’s Collective, created the Amauti Project to assess and make recommendations. The Amauti Project suggested that a national inventory or registry be hosted to document regional variations in designs, and then securing trademark over the designs to ensure authenticity of amauti that come to market, or in the alternate to develop a Cultural Property mark, applied in a similar way to trademarks (Bird 2002, Les Femmes Autochtones 2006, Nicholas and Bannister 2004, WIPO 2002, WIPO 2003). It also suggested that within such revisions, a system be developed to recognize rights to regional and inherited designs.
This project identified the need to educate knowledge holders about intellectual property law so that they may have more control over how knowledge associated with the design of traditional clothing is shared or documented (Anderson 2010, Arctic Athapascan Council 2005, Bird 2002, Blackduck 2001, Friede 2002, Indian and Northern Affairs 2004, Inuit Art Foundation 2008, Nunavut 2007, Okpik 2001, Pauktuutit Inuit Women’s Assn 2002). These recommendations have been echoed in other forums (Department of Canadian Heritage 2006, Industry Canada 2003). A novel example of a comic book (published in English and Inuktitut) has been produced to promote knowledge of the Canadian copyright system and issues of misappropriation of traditional designs (Ring 1994).

In another example a teepee manufacturing company, located on Squamish Reserve lands in West Vancouver but not clearly aboriginal, markets high-end “authentic Anishinabe teepees”, claiming that they are “retaining our Cultural Traditions that were handed down to us. Our teepees comply with the Native Intellectual and Cultural Property Rights Acts now being developed” (Mukwa Teepees 2011). Such ambiguously informed examples suggest why education on intellectual property is needed (as there are so such acts), and why a registry for aboriginal traditional design may be a useful way to protect collective property interests if communities are uncomfortable with such private marketing of community design.

**Ethics Guidelines in Research**

One of the key ways that Canada has responded to aboriginal concerns about protecting intellectual property interests in respect of traditional cultural expressions (and other forms of intangible property) has been through developing articles in the guidelines for government funded-research (through CIHR, SSHRC, NSRC) that direct researchers working in aboriginal contexts to clearly delineate all intellectual property issues prior to starting the research project, being attentive to the limits of the eligibility criteria with respect to those intellectual property rights (AFN 2007a, CIHR 2007, CIRH-NSERC-SSHRC 2010, CURA-CBT and UVic 2001, Fletcher 2003, Government of Manitoba 1998, Grenier 1998, O’Neil et al 2005, Six Nations Council n.d., Stevenson 201, FNIGC 2010, WIPO 2003, Young 2008).
An impressive review of codes of ethics and conduct of museums, professional associations, indigenous organizations, in respect of the recording and digitizing indigenous intangible cultural heritage has been compiled by Skrydstrup (2006), who makes recommendations for implementing institutional policies and legislative solutions for addressing issues around misappropriation and dissemination of documented traditional cultural expressions, focussing particularly on developing partnership models between indigenous organizations and institutions which hold the recordings of traditional cultural expressions.

Some have suggested that Research Ethics Boards reviewing research for publically funded research which touches on matters that aboriginal communities may have intellectual property concerns about should make every effort to ensure researchers avoid appropriating cultural knowledge (Blue Quills FNC 2004, McNaughton and Rock 2003). Bannister (2009) provides examples of ethics guidelines and standards, research protocols and standards, agreements and memoranda of understanding which researchers and aboriginal people have developed to make clear intellectual property issues. An example of this is the Dehcho First Nation Traditional Knowledge Research Protocol whose scope includes dealing with intellectual property issues in the recording of traditional cultural expressions such as “Stories, Customs, Experiences, Knowledge, Practices, Belief and Spiritual Teaching” (Dehcho First Nation 2005) through assigning ownership to the First Nation, establishing a process for access to materials held outside the community by individuals or agencies other than those licenced to use the material, and the granting of limited use and distribution of those materials to the researchers.

**OCAP: Ownership, Control, Access and Protection**

A key policy concept that has been developed to direct the intellectual property rights that emerge from the recording or other documentation of aboriginal intangible properties is called OCAP (Ownership, Control, Access and Possession). Aboriginal communities who have developed self-government measures to implement the principles of OCAP through protocols, MoUs, contract and other arrangements (First Nations Centre 2007, Schnarch 2004, FNIGC 2010). Key points that OCAP principles call to be recognized include assigning collective ownership of group information, establishing formal mechanisms for aboriginal people to be in
control over processes in which information is collected, and providing for aboriginal management over physical access to and possession of fixed forms of information shared. (AFNQL 2005). Implementing these OCAP principles requires a good deal of governance capacity by the aboriginal organization involved with the documentation of the traditional cultural expressions.

**Traditional Cultural Expressions and the *Canadian Environmental Assessment Act***

Section 16.1 of the *Canadian Environmental Assessment Act* directs the responsible authorities to consider aboriginal traditional knowledge in conducting an environmental assessment. A great deal of traditional knowledge and traditional cultural expression documentation work has emerged in aboriginal communities since the adoption of this provision in 2003. Aboriginal communities, governments and industry have all been concerned with dealing with the intellectual property consequences of the engagement of the knowledge and cultural expressions that the Act directs (Landry et al 2009). The Government of Manitoba, for instance, has adopted policies which directs its agencies to “respect intellectual property rights... includ[ing] inventions, literary and artistic works, symbols, names, images and designs” when engaging aboriginal communities (Government of Manitoba 2011, see also a parallel example from the Northwest Territories GWNT 2005).

In the process of consultation discussions between government/industry and aboriginal people under the *Canadian Environmental Assessment Act* First Nations have identified a strategy of confidentiality contracts as a means of protecting information shared from unintended use or distribution (Anderson 2010, Government of Manitoba 2011, Jaksic 2009). Consultations over environmental impacts may include discussions of land-based knowledge that can include knowledge-keepers telling traditional stories associated with place names or other elements of the traditional oral canon. When the information shared take a fixed form in the documentation processes associated with the consultation, confidentiality contracts can hold the fixer of the knowledge accountable to not inappropriately circulating or reproducing the information. Another approach is the creation of a ‘cultural protection plan’ that deals with long-term issues around intellectual property in materials documented during resource management planning.
As a part of the Mackenzie Valley Environmental Impact Review Board, the Dehcho First Nations have adopted a protocol to guide any research by outside agencies, academics and industry in Dehcho communities. The protocol recommends that informed consent prior to documentation be sought from the First Nation, that the First Nation maintain management of information collected, and that confidentiality agreements be entered into to limit use and distribution of information collected. This is significant in terms of traditional cultural expressions, as a broad range of information was anticipated to be collected, including “Stories, Customs, Experiences, Knowledge, Practices, Belief and Spiritual Teachings” (Dehcho First Nation 2005, see also Gargan 2004, Landry et al 2009). Similar approaches have been taken with other First Nations sharing information which can include traditional cultural expressions in environmental assessment situations, including the Mikisew Cree and Fort McKay First Nations (FMA Heritage Resource Consultants 2007, 2008). Key elements of these agreements includes intellectual property being assigned to the community, the ultimate dispositions of collected materials of all forms (tapes, notes, photos, and so on) being with the First Nation and a one-time only use licence given for the use of the information.

**Aboriginal Jurisdictions**

Aboriginal communities in Canada have considered and in some cases developed their own governance approaches to protecting intellectual property rights in respect of their traditional cultural expressions and other claimed intangible properties. These jurisdictions range from developing protocols and best practices guidelines for researchers and others working to document these things within the communities (AFN 2009, Chiefs in Ontario 2010, Crowshoe 2005, Dehcho First Nation 2005, Dene Kayeh Institute 2008, FIA-FSP 2008, Hill 2003, Mi’kmaw Ethics Watch 2000, ‘Namgis First Nation n.d., Nicholas 2009), to the passing of their own bylaws like band council resolutions or other legislative measures (Callison 1999, Robertson 1998), or to push for the recognition of local customary laws in respect of traditional cultural expressions (Curley 2008, Howell and Ripley 2009, Littlechild 2005, Napoleon 2009, Yang 2010).
The Destinations: National Gathering on Aboriginal Cultural Tourism workshop in 2003 highlighted a suggestion that community mechanisms to authenticate and protect traditional cultural expressions be developed (Department of Canadian Heritage 2003). The Indigenous Peoples Council on Bio-colonialism has suggested that aboriginal groups in Canada follow a model such as the proposed in their template Indigenous Research Protection Act (Bill 2006).

Some aboriginal groups have argued that Canada’s intellectual property system fails to recognized the customary legal systems within aboriginal communities that guide issues related to the protection of traditional cultural expressions (and other intangible properties) (AFN 2003). First Nations in the Yukon have called for respect for their jurisdictions over intellectual property, particularly in the written, oral and visual documentation of traditional cultural expressions and other forms (Van Bibber et al 2008).

Not all aboriginal groups have sought to have their own jurisdictions protected in this matter. For instance, the First Nations who have signed Final Agreements in British Columbia (Nisga’a, Tsawwassen, Maa-nulth) have set out constitutionally-protected self-government arrangements and have excluded from their jurisdiction all matters relating to “intangible property right[s] resulting from intellectual activity in the industrial, scientific, literary or artistic fields, including any right relating to patents, copyrights, trademarks, industrial designs, or plant breeders’ rights.” (Tsawwassen Final Agreement 2009:9). These First Nations do have residual law-making authorities in respect of “the preservation, promotion and development of the culture of [First Nation] and the [First Nation’s] language on [treaty settlement] Lands”, where ‘culture’ is scoped out as including “history, feasts, ceremonies, symbols, songs, dances, stories and traditional naming practices” Tsawwassen Final Agreement 2009:125). The agreements have provided certainty, however, that these jurisdictions do not extend to matters in respect of intellectual property rights. Howell and Ripley (2009:238) have noted that the Nisga’a Final Agreement was similarly inadequate for giving Nisga’a Nation powers over control of intangible properties. These First Nations’ exclusion of intellectual property jurisdiction over these matters reflects a pragmatic approach to resolving larger land claims and self-government issues in the face of firm federal government policy approach (coming from the Inherent Right policy) to
ensure Canada maintains exclusive intellectual property jurisdiction.

We can see the implementation of this policy approach in the laws passed by the Tsawwassen First Nation in respect of this head of power. Section 3 of the Tsawwassen First Nation Culture and Heritage Act (2009) affirms that “(1) Tsawwassen members, individually and collectively are entitled to... c) preserve and protect Tsawwassen First Nation history, traditions, traditional beliefs and symbols” while stating that these rights “are limited only by the law of Canada, the law of BC and Tsawwassen law, and the oral and written traditions of Tsawwassen First Nation” (Tsawwassen First Nation 2009:68). Section 12 provides the Tsawwassen Executive Council authority to make regulations in respect of “the preservation, promotion, and development of the culture of Tsawwassen First Nation, including its history, laws, ceremonies, symbols, songs, dances, storytelling, and traditional naming practices.” Within the carve out of intellectual property jurisdiction in favour of Canada and the priority of laws (in the event of a conflict) in favour of Tsawwassen, it will be important to see how these individual and collective rights (section 3) and government regulations (section 12) will develop and play out on the ground.

Perhaps most innovative and comprehensive approaches are being developed by the Kaska Dena First Nations of northeastern British Columbia. The maintenance, control, protection and development of traditional cultural expressions are expressly recognized as a right of the First Nation in sustainable resource management plans negotiated with the Province of BC. Under this approach, the Province recognizes that the First Nation “has the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts” (BC ILMB 2010). The Province also agrees that the First Nation has the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. The Kaska Dena are pursuing parallel agreements with industry partners hoping to work in their territories (Hard Creek Nickel Corp 2009) in order to have the recognition of these principles implemented on the ground. This
remarkable document stands in contrast to Canada’s position in comprehensive land claims and self-government negotiations where these same rights are not recognized as being held by the First Nation. Such a position of recognition on the part of the province provides a model for other jurisdictions across Canada.

**Aboriginal Rights and Intellectual Property**

Another suggested approach to jurisdictional recognition would be to seek recognition in common law of a s.35 aboriginal right based on inherent self-government rights, where aboriginal jurisdictions over intangible property rights in traditional cultural expressions and traditional knowledge could be exercised (Thom and Bain 2004) concurrently with federal laws.

In British Columbia, it has been suggested that aboriginal rights may form the basis for limiting non-aboriginal (or non traditional rights holders) from utilizing trademark and other intellectual property claimed by aboriginal groups (Robbins 1999). This approach was not successful in the case of the Comox First Nation arguing that a non-aboriginal business’s registration of a trademark to *Queeneesh*, a term significant because of its association with a Comox origin legend, was an infringement on their aboriginal rights. The judge rejected the Comox First Nation’s argument that aboriginal rights would be infringed by the application of trademark law in the case (Janke 2003, Nicholas and Bannister 2004). The Katzie First Nation have similarly unsuccessfully objected to the trademark *Swaneset* (the First Ancestor of their community) by a result and country club (Thom and Bain 2004), and the Nisga’a were unable to prevent *Niska* (the namesake of their community) from being trademarked by a clothing company (Callison 1999).

**Copyright**

Explicit copyright assignment was observed as the most common and widespread way of handling aboriginal intellectual property interests to traditional cultural expressions. The websites of aboriginal cultural organizations frequently claim copyright to images and stories that they publish or host in online databases (Avataq 2011).
Suggestion for copyright reform includes “modifying the requirement of fixation... by allowing oral traditions as evidence of elements necessary to establish copyright or apply moral rights to expressions of TK” which, in these authors’ views, include many traditional cultural expressions (Howell and Ripley 2009:235).

**Trademarks**

One effective domestic intellectual property mechanism is trademark law. Aboriginal communities have used this to increase indigenous control over images with no limit on the time the registration of the trademark is in effect, subject to fees being paid (Bell 2011). Many commentators have observed how the Snuneymuxw First Nation have used trademark to protect the images of the ancient petroglyphs of Gabriola Island from being commercially exploited (Abler 2008, Brown 2003, Crean et al 2000, Howell and Ripley 2009, Associated Press 2000, Janke 2003, Kamloops Daily News 2000, Nicholas and Bannister 2004, Tanner 2000, WIPO 2003, Younging 2006, 2010). By in large, this effort has been seen to be an innovative and effective means to meet Snuneymuxw interests within the current system.

Capitalizing on symbolic resources of ‘authenticity’ has been a strategy of some aboriginal communities and individuals, some using certification marks to assist in providing consumers value in the association with aboriginal tradition holders (Aylwin *et al* 2008, Gupta n.d.). The Cree of Québec in their use of the trademark for Wachiya to cover their artistic productions, including “nommément mitaines, gants, mukluks, mocassins, sculptures, peintures, gravures” (from the CIPO TM database) (CNACA 2009-10). Cowichan Tribes use this strategy in the the “Genuine Cowichan” mark for traditional Cowichan knitting (Nicholas and Bannister 2004). Inuit artists use the “Igloo Tag” program to promote authenticity (Nunavut 2007, Saint-Fleur 1999). This, like for so many other commercial ventures, is a key to entrepreneurial success.

A suggestion for legislative reform in trademark law would be to include defensive trademark restrictions, as is done in New Zealand, so aboriginal people could preclude inappropriate or offensive trademarks.
**Patents**

Aboriginal leaders in the Northwest Territories in 2009 called for traditional aboriginal designs to be protected by patents to prevent ‘knock-offs’ of artistic works like baskets and beadwork from being produced overseas (CBC News 2009). Inuit design of the Igloolik Floe-edge boat has been proposed for patent protection (Mann 1997, Younging 2006, 2010) but the patent application failed because other patents were already registered for that type of design.

A suggestion for legislative change for patents includes traditional cultural expressions (and other traditional knowledge) as constituting prior art (Howell and Ripley 2009).

**Public Domain**

Long-time research collaborator with the Inuit George Wenzel (1999) has recommended that research agreements should provide that traditional knowledge not enter into the public domain without the consent of the aboriginal partner in research. There have been critiques from aboriginal communities about performances of Powwow music unintentionally entering into the public domain (Brascoupé 2002). Others have pointed out the difficulty in controlling the dissemination of traditional cultural expressions when placed on the web or other easily transferable digital media (Littlechild 2005, Mortensen and Nicholas 2010), opting instead for technological solutions that make it less difficult for the material to circulate (Corbett and Kulchyski 2009). Library and Archives Canada (2003) has recommended that workshops be held in aboriginal communities to educate people about copyright law so that traditional cultural expressions can be accessioned into the national collection in ways that aboriginal people whose communities these materials come are comfortable with. Younging has critiqued the notion of the public domain as being *gnaritas nullius*, a parallel legal fiction to *terra nullius* which has been a key colonial rationale for the dispossession of aboriginal lands (2006).

**Creative Commons**

A few aboriginal cultural organizations are distributing their traditional cultural expressions through the internet with Creative Commons licencing. In one Mi’kmaw collaboration with the Nova Scotia Department of Education for example, stories, songs, prayers, talking posters,
videos and vocabulary are all provided on a website with content licenced under Creative Commons (Jilaptoq Mi’kmaw Language Centre 2011, Mi’gmaq-Mi’kmaq Online Dictionary 2001).

**Secrecy & Non-divulgence**

Non-divulgence with outside organizations – leaving traditional cultural expressions largely secret, unwritten or unrecorded – has been suggested a strategy for protecting community interests in avoiding mis-appropriation of traditional cultural expressions (APCFNCS 2010, Corbett and Kulchyski 2009, Littlechild 2005).

**Shortcomings of the IP system and Reform**

The shortcomings of conventional intellectual property systems to protect traditional cultural expressions have been widely reported (Chiefs in Ontario 2010, Coombe 2009, Department of Canadian Heritage 2006, Logan 2003). Indeed, as recently as the 2008 G8 Summit meetings in Japan, aboriginal people from Canada have said that the existing intellectual property system was inadequate to protect their traditional cultural expressions, that it has enabled “the theft of our intellectual property rights over our cultural heritage, traditional cultural expressions and traditional knowledge” (Indigenous Peoples of Japan 2008). Such lobbying for legislative reform, though often thin on specific proposals, is a distinct trend (Inuit Circumpolar Council 2003, Legislative Assembly for Ontario 2006). For example Harrison (2002) has suggested that while Kwakw̱a’wakw dancers have articulated their concerns over intellectual property, the current legislation would need reform to adequately address those concerns.

The ‘fair dealings’ provisions of Canadian copyright allow for libraries to make copies to preserve or maintain their collections and for individuals to make copies for research or private study (Torsen and Anderson 2010). For traditional cultural expressions that may have had copyright assigned to an aboriginal organization or individual, these exceptions may exceed aboriginal expectations around restricted copying of their traditional cultural expressions. Words of significance to aboriginal people (from band names to names of mythically significant characters) have not been excluded from non-aboriginal registration as trademarks (Callison 1999).

Legal scholar Rosemary Coombe has suggested that many of the inadequacies of domestic legislation for the protection of traditional cultural expressions could be remedied following the approaches being developed by WIPO (Coombe 2009). Her study draws on examples from concerns expressed by Canadian aboriginal communities: the protection of the content of old Ktunaxa/Kinbasket audio recordings in museums from unintended reproduction or performance or from having their names and words used in commerce (such as that of the Creator’s name used for a mountain biking business); protection from unauthorized use of Kwakwaka’wakw songs, dances and masks in derogatory situations or the use of artistic styles employed in ancestral crests and emblems without consent; or the correct assignment of the property holding group within the Kainai community of the right to sing certain songs. The Inuit Circumpolar Council have issued the Nuuk Declaration (ICC 2010) which give direction to Inuit leadership to push for these protective measures to be passed in international fora such as WIPO.

There are also critiques that go further than suggesting that the existing intellectual property system needs to be reformed, drawing the conclusion that western law’s intellectual property protections are largely inconsistent with the normative goals of aboriginal people in respect of the protection and circulation of their traditional cultural expressions (Brackley 2008, Noble 2008, 2009, Marsden n.d., Shand 2000).

**Policy Recommendations to Address the Issue of Misappropriation of TCEs**

The most striking recommendation that comes from this review is that there continues to need to
be a very high importance given to education in aboriginal communities about the domestic intellectual property system. These education efforts need to inform aboriginal communities about the intellectual property implications of the recording and documentation of stories and artistic performances, the production of traditional designs and the long-term digitization of these traditional cultural expressions, which may end up within libraries, archives, or circulating more generally. The more broadly informed aboriginal communities are about the strengths and shortcomings of the intellectual property system to protect their rights, the more continued proactive work can be done by those communities to manage their interests in traditional cultural expressions. In this education, key examples should be provided of aboriginal successes (and limits) in using copyright, trademarks and patents to protect traditional cultural expressions from misappropriation.

Aboriginal communities should seek to explicitly set out what legal entity will be the owner of intellectual property created out of the documentation of traditional cultural expressions. This should be informed by a process accountable to the community member who collectively hold these property rights. These arrangements should be set out in legally binding agreements with collaborators, so that the assignment of copyright and other intellectual property is clear to all concerned.

Issues related to the long-term disposition of recordings of traditional cultural expressions should also be explicitly set out in a manner that is binding and clear to all persons. Careful consideration should be made with respect to traditional cultural expressions that are documented in easily copy-able and distributable digital media, so that expectations on any limits around distribution and ‘re-mixing’ are properly managed. Any claims of copyright to online material and intended limits on reproduction should be made explicit and easily available to viewers of those materials. Taking a pro-active approach can help avoid many cases of potential misappropriation.

In considering the publication of traditional cultural expressions in conventional printed media (books, journals, and so on) attention should be paid to copyright assignment and arrangements
made between researcher-authors, communities-knowledge holders, and publishers in terms of a mutually suitable arrangement. Often copyright can be reserved for aboriginal communities if their desire to have these rights is made explicit during the publication process.

Protocols and contracts are an essential mechanism to make all of these expectations clear when entering into a research or consultative arrangement. These should continue to be promoted as best ethical practice in collaborations between researchers, industry and aboriginal communities where traditional cultural expressions (and traditional knowledge) may be documented. These arrangements will vary greatly depending on the nature of the relationship from short-term MoUs and contracts to longer term partnership agreements. The OCAP principles are emerging as a standard by which to guide these formal arrangements.

For work done under the auspices of the Canadian Environmental Assessment Act or funded by federally funded research councils, the Canada can continue to play a key, proactive role in ensuring that responsible authorities and research ethics board provide adequate oversight and attention to Aboriginal interests and concerns. Policies and guidelines should be developed in consultation with aboriginal communities to implement these standards consistently, in ways appropriate to local circumstances.

For example, in British Columbia the Freedom of Information and Protection of Privacy Act (1996) sections 4, 16 and 18 provides aboriginal communities some assurances of non-disclosure of sensitive cultural information, including traditional cultural expressions, shared with government if such a disclosure will be potentially harmful to a heritage site or, for a period of 15 years, harmful to the conduct of negotiations relating to aboriginal self-government or treaties. Such protections could adopted by other provincial, territorial and federal governments, and be expanded, in consultation with aboriginal communities, to include other information sharing contexts under environmental assessment or other consultative legislation.

Aboriginal communities should continue to exercise their own jurisdictions in practical ways, obtaining community mandates with respect to the assignment of intellectual property rights in
collaborative and consultative arrangements, and passing by-laws that adopt these policies as part of accountable self-government. The limits of this jurisdiction may be frustrating, however, and Canada and First Nations should continue to develop common law approaches and negotiated arrangements to these jurisdictional questions, particularly as they relate to the potential scope and extent of concurrent aboriginal law-making in respect of ownership and control of traditional cultural expressions.

The solution of a registry for aboriginal traditional designs, which is sensitive to processes around identifying appropriate local or regional groups with which designs may be associated (perhaps with access to dispute resolution overseen by an aboriginal ‘expert’ committee (elders, culturally knowledgeable individuals)) may address concerns about misappropriation of certain traditional cultural expressions.

The inventory of aboriginal approaches to the protection of traditional cultural expressions from mis-appropriation has revealed that many of the key developments made in the last 15 years have been by dealing with the practical intellectual property consequences of the documentation of these cultural expressions. While some effort has been spent grappling with legal, conceptual and theoretical elements that emerge from the *sui generis* nature of indigenous intangible property rights in their traditional cultural expressions, much more groundwork to develop consensus approaches to this issue needs to be laid to make progress in Canadian contexts. Until then, we hope that the recommendations here can help aboriginal communities and federal and provincial governments in addressing key aboriginal interests within the Canadian intellectual property framework.
Appendix: Inventory of Reports and Analyses Relating to the Protection of Traditional Cultural Expressions of Aboriginal Communities in Canada


In this article Abler covers issues concerning the pressure for the federal government to develop policy to strengthen copyright acts, mentioning the 2004 report from the Standing Committee on Canadian Heritage that recommend copyright reforms. Abler also reports on the Intellectual Property Office and Snuneymuxw petroglyphs protection under Canadian intellectual property protection. Comments are also made on the limitations of copyright legislation including conceptions of ‘originality’ and ideas of ‘fixed’ objects (20).


This article includes extensive coverage of IP issues with examples from Canada; specific examples include the Amauti Project, which worked with the Pauktuutit Women’s Collective to develop a means for incorporating knowledge about intellectual property law to protect the traditional designs, knowledge and heritage in traditional clothing and the Tsilhqot’in National Government's confidentiality agreement with the Canadian Environment Assessment Agency to protect certain cultural/traditional information during environmental review panel hearings for a proposed mining development (22).


In this discussion paper prepared for Intellectual Property Issues in Cultural Heritage (ipinCH), authors Anderson and Younging explore the practical use of protocols. Protocols have emerged out of a lack within current national and international IP legislation which incorporate Indigenous needs and expectations around knowledge use, access and control. Protocols thus provide context driven policy and act as prescriptive documents, providing guidelines for behaviour. Over the last ten years there has been a great proliferation of intellectual property protocols intended for Indigenous knowledge protection. The paper discusses this current trend; considering what works, and what does not, and why protocols offer a practical possibility for protecting contextual and community generated knowledge and knowledge practice. Specific Canadian examples outlined: the
Creator’s Rights Alliance’s (CRA) Indigenous People's Caucus which has maintained an effort to hold ongoing discussions on IP related issues within the indigenous artists community and government departments and agencies in Canada; and Traditions: National Gatherings on Indigenous Knowledge (NGIK) the third in a series of national gatherings organized by the Department of Canadian Heritage (DCH) with the goal of continuing engagement with Aboriginal communities across Canada on areas of mutual interest.


This newsletter summarises the information session on the Convention on Biological Diversity (CBD), Access and Benefit Sharing Agreements (ABS), and Intellectual Property Rights (IPR) that took place on February 23rd and 24th, 2005, in Whitehorse and that was hosted by the Council of Yukon First Nations. The newsletter highlights the presentation of Pauktuuit representatives on the protection of the Amauti as the ‘Inuit women’s traditional parka’ with a ‘unique’ design. It mentions that Pauktuuit became concerned in the face of potential mass marketing of their design and tradition (p.2). Very generally, it mentions that Pauktuuit are in the process of educating themselves on their rights as creators as well as working towards having Canadian Intellectual Property Rights be more reflective of indigenous concepts of ownership and move towards adequate protection for indigenous creations (ibid.).


This document explores the mechanisms available to First Nations to protect their intellectual property and highlights the limited duration of IP laws as a significant issue preventing their effectiveness. The protection of First Nations intellectual property is outlined as central to establishing ethical research practice. Shortcomings of international and domestic IP laws to effectively protect indigenous knowledge are described in detail. These include issues relating to ‘authorship’ and individual ‘ownership’ which runs contrary to First Nations governance structures as well the lack of acknowledgment of collective ownership and the collective nature of a great deal of traditional knowledge. The principle of ownership, control, access, and possession (OCAP) are presented as a good starting place for establishing a First Nations-owner controlled property regime. Also outlined is model for a First Nation-owned intellectual property protocol which would draw on traditional laws and provide a framework for outsiders to follow when working with that Nation. Finally, individual First Nations are encouraged to develop their own positions as to whether or not they

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will share any of their knowledge with outsiders as well as to establish mechanisms to ensure the protection of all intellectual property in perpetuity.


This resolution affirms the existence of traditional knowledge endowed by the Creator and passed down from generation to generation from time immemorial. The existing protections for traditional knowledge including intellectual property protection are deemed not to recognize or respect the customary laws and cultural protection of First Nations people. These current protections furthermore do not recognize the fact that this traditional knowledge, and the people who hold it, is constantly evolving and adapting. The resolution states that the use of the existing intellectual property legal regime involves commodification and may reveal traditional knowledge and cultural property to those who would potentially misuse it. Therefore the Chiefs-in-Assembly support and affirm the work undertaken by First Nations to ensure respect for traditional knowledge domestically and internationally.


This document outlines the principles of OCAP (Ownership, Control, Access and Possession) as well as the history of OCAP as it has been mobilized within a Canadian context. Since its initial research-focussed inception OCAP has come to represent a far more broad spectrum of self-governance over information than originally envisioned and now directs First Nation processes over all First Nations data. One of the appendixes included is the CIHR Guidelines for Health Research Involving Aboriginal People. Article 8 of this document states that “community and individual concerns over, and claims to, intellectual property should be explicitly acknowledged and addressed in the negotiation with the community prior to starting the research project” (18:2007).


This document is a request for proposals to select a consultant or consulting team to conduct fundraising for a budget to plan and host the Assembly of First Nation Youth Summit. The Summit is intended to engage First Nation youth in discussions through holistic workshops within key areas and challenges that confront them. With regard to intellectual property it is stated that the AFN has
determined that any intellectual property arising from the performance of the work under this RFP shall remain the property of the Assembly of First Nations, based upon the OCAP research principles.


The development of proper research principles is aimed at guaranteeing good research practices in First Nation communities. This protocol is intended to be routinely applied to research, surveys, questionnaires and discussion groups carried out among First Nation individuals, communities or nations. Intellectual property rights with regard to research drawing on Aboriginal knowledge is highlighted. Also figuring prominently are the principles of ownership, control, access and possession (OCAP) which are described as expressing self-determination in the field of research. The main points of concern are the collective ownership of group information, First Nations’ control over research and information, First Nations’ management of access to their physical data and physical possession of this data. Significantly, the protocol states that legislation with regard to intellectual property of traditional knowledge seems deficient. In light of this legal instruments developed by Aboriginal peoples themselves must fill the void concerning the protection of Indigenous knowledge. Also listed as intellectual property and categorized under the principle of community ownership include land use data and indigenous environmental knowledge, which may be used under specific licencing arrangements with the Innu Nation.


The Mi’kmaq Ecological Knowledge Study Protocol (MEKS Protocol) is described as representing an important milestone for the Nova Scotia Mi’kmaq to manage the collection and distribution of Mi’kmaq Ecological Knowledge throughout Nova Scotia. The protection of Mi’kmaq Ecological Knowledge (MEK) has been highlighted as a key issue by the Assembly of Nova Scotia Mi’kmaq Chiefs. With regard to intellectual property within the context of the disclosure and reporting of MEK, any reports must account for the explicit reservation and protection of intellectual property rights that the Mi’kmaq individually and collectively enjoy in Nova Scotia.


This newspaper article states that ten petroglyphs have been registered as
trademarks by the Snuneymuxw, a Vancouver Island, Indian band which makes them off-limits for use on sweatshirts and jewelry and other commercial items.


Examining Partnership Arrangements Between Aboriginal and Non-Aboriginal Businesses is one of five research reports on Aboriginal economic development released by Atlantic Aboriginal Economic Development Integrated Program (AAEDIRP) in 2010. With regard to intellectual property, it is noted that partnerships between aboriginal and non-aboriginal business are a constructive way to out-source innovation and furthermore that intellectual property rights generally safeguard products and knowledge. However, a case study of the the construction of trails at Metepenagiag Heritage Park includes warning that one must be cautious about what traditional knowledge one shares in order to protect aboriginal intellectual property rights. It is also stated that there is a fear that intellectual property, such as the knowledge of traditional medicine held by the Elders, will be taken if it is recorded and potentially shared irresponsibly.


In this article the authors explore the capacity of intellectual property rights to serve development needs and in particular, the way in which this framework is mobilized in discourses of “rights-based development”. There is a very brief mention of a the Canadian example of First Nations certification marks. This is within the context of a discussion concerning minority and indigenous communities who have recently asserted affirmative IPRs and thereby insist that their traditions are important sources of symbolic value. The authors argue that these groups seek to capitalize upon the symbolic resource that “authenticity” holds in the global market.


The Avataq Cultural Institute is self-described as providing a strong foundation for the living culture of today’s Inuit. Since its inception in 1980, The Avataq
Cultural Institute has built a solid reputation as the cultural leader for Nunavik Inuit and as an important resource for Inuit culture in Canada. The site presents a significant collection of works of art and objects of material culture dating back to the late 1980s, when the Department of Indian and Northern Affairs Canada turned over to Avataq a large collection of sculptures produced in Nunavik between 1950 and 1980. This collection includes stone-cut prints and other works on paper from the 1960s and ‘70s, utilitarian objects bearing witness to Inuit culture from 1960 to 1975, and some reproductions of traditional objects. The collection currently numbers at over 1,400 artifacts of great importance to Nunavik. There is a photo of each of the artifacts, sculptures and works on paper that have copyright registered to the Avataq Cultural Institute.

http://www.polisproject.org/PDFs/BannisterHardison%202006.pdf

“The aim of the study was to undertake a preliminary scan of legal, non-legal and other practical tools that have been developed and used by Indigenous organisations, Indigenous communities and those working in collaboration with Indigenous peoples to facilitate the simultaneous protection and application of traditional knowledge and expertise in biodiversity conservation and management. Of particular interest were tools that facilitate links with scientific expertise and transfer of technology while supporting traditional resource rights and intellectual property protection mechanisms” (2006:2)


In this paper, the author explores the mechanisms found outside of the legal system that have proven effective in protecting intangible cultural heritage for indigenous peoples, specially in regard to the process of academic research. She looks at community-level initiatives, primarily protocols and guidelines made by certain groups, and that are increasingly being incorporated into higher-level policy. A guideline example included is that of the Canadian Institutes of Health Research (CIHR), which instructs researchers on how to appropriately manage issues related to the cultural properties of research participants. Other examples include ethics standards, indigenous statements or declarations, community research protocols, research standards, template agreements (which incorporates memorandum of understandings (MOUs)).
This is a resource management plan with contributions from the Kaska Dena First Nations; Tahltan First Nation; Ministry of Forests and Range, Skeena-Stikine Forest District; Ministry of Environment, Skeena Region; Ministry of Energy, Mines and Petroleum Resources, Skeena Region; Integrated Land Management Bureau, Skeena Region; and the Oil and Gas Commission. Section 4 of the document relates to intellectual property, stating, “The Dease River First Nation has the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports, and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions” (56) The use of Kaska traditional knowledge and its recognition as intellectual property is mentioned in Section 20 of the document, also incorporating a Traditional Knowledge protocol between First Nations and potential developers.


In the introduction to the paper Bell describes the goals of the work as to: “(a) discuss intellectual property (IP) issues as part of a broader concept of Indigenous cultural heritage; (b) reflect on what this means in terms of responding effectively to concerns of Aboriginal peoples in Canada through property law research and reform; and (c) introduce three interdisciplinary research collaborations. . . that are exploring the potential for increased protection and control of Indigenous cultural heritage through application and reform of national and international law, ethics and policy.” (2011:1). Specifically, Bell argues that the protection and recovery of traditional knowledge in its various forms must be considered an issue of human rights (including religious rights and respect for First Nations’ laws and practices). It is not simply a matter of reforming property law. However, intellectual property law may be of some assistance to respond to indigenous concerns where economic values and transferability of rights inherent in IP are consistent with indigenous understandings of rights and rationales for seeking greater control over traditional knowledge. Thus, Bell argues that while there are many tensions regarding the use of IP law to protect traditional knowledge, this
does not mean that IP law is an ineffective avenue for change. “Rather, it means we have to step outside the IP box and take an integrated approach across many areas of national and international law. For example, an area of IP law that has been manipulated successfully to increase indigenous control over images has been trademark law. Registration is maintained by fees and there is no limit on how long a trademark can be held” (2007:7).


In the glossary of terms of this document Intellectual Property Rights are defined as “Ownership rights over ideas and inventions. For Indigenous communities in Canada, these may include knowledge of medicinal properties of various fungus and plant species, and other traditional ecological knowledge of their territory.” (viii-ix) The author also includes further recommendations regarding the establishment of IP protection for First Nations and notes that researchers should incorporate a policy or protocol into their work, using an example of the Indigenous Research Protection Act which has come into practice in the United States (12).


This paper describes efforts by the Pauktuutit Inuit Women's Association of Canada to protect cultural knowledge, increase awareness regarding intellectual property rights at the community level and specifically to protect intellectual property rights connected to the production of the amauti parka. The Amauti Project consists of three inter-related phases or stages. The initial step has been to seek out the thoughts and opinions of the key stakeholders - Inuit clothing producers. This process was completed in May 2001 when a successful workshop was conducted in Rankin Inlet, Nunavut. The next stage involves developing a national inventory or registry to recognize all the seamstresses and designers and to document the regional variations in designs. This component is relevant to current discussions unfolding within the Convention on Biological Diversity with respect to Article 8(j) and within WIPO. The final stage envisions an association of manufacturers who will share a trademark or mark of authenticity that will guarantee the consumer that they are buying a true handcrafted product. This is
seen only as an interim solution since such a mark or tag cannot control others from exploiting Inuit intellectual property that is classified within the public domain. It is hoped that ultimately strategies will be developed that will challenge the fundamental basis of existing IPR regimes. One of the most innovative proposals to come out of the workshop was the idea of developing a new IP mark. It was suggested to introduce a CP mark be that stands for cultural property or culturally protected. This mark is described as applying in a similar ways copyright or trademark.


This news story reports on the first national consultation workshop, held in Rankin Inlet in 2001, on the protection of Inuit intellectual property and which was visited by more than 20 women from communities in Nunavut, Nunavik, Panama, and Peru who joined Pauktuutit representatives. It reports on the amauti as collective property of Inuit and innovative design that has yet to be appropriated and explains that part of the workshop was to become familiar with the differences between copyright, trademark, and industrial design protection, and the history of IP legislation.


Section 5.0 of this policy document is entitled 'Intellectual Property and Collective Rights' and subheadings state: “5.1 - Indigenous people hold knowledge in trust for future generations. The primary goal in research will be to align research projects with this policy, and the vision, mission, and philosophy statements of the College and any communities involved. 5.2 - Consideration must be given to the protection of collective traditional knowledge, even in the event that an individual is willing to share this knowledge in a research project. The Research Ethics Board, with the advice of Elders, will review each proposal to make every effort to avoid the appropriation or misrepresentation of collective cultural knowledge, and to honour the boundary that exists between the opportunity to learn traditional knowledge and the public distribution or commercialization of that knowledge. Special care must be taken in situations that involve ceremonial protocols. 5.3 - During the proposal stage, or at any of the regular reviews, or at the request of the Lead Researcher or a participant, a Researcher may be required to present the project to Elders, including representatives identified by the Researcher, to determine any requirements to protect the collective intellectual property rights of the People (for example: ceremonial or healing/ medicinal knowledge)” (2004:4).


Brackley’s article deals with the impact of present intellectual property laws on indigenous cultural representations while it proposes reforms to this regime. Furthermore, it also explores various alternatives to intellectual property protection which may be more consistent with indigenous peoples’ normative goals.


This article addresses the issue of the transmission of traditional songs and the entry of such songs into the public domain. Brascoupé notes Aboriginal peoples concern over the limitations of existing copyright law in protecting songs that are not recorded, published or performed publicly.

Brascoupé, Simon and Howard Mann. 2001. A Community Guide to Protecting Indigenous Knowledge. Published under the authority of the Minister of Indian Affairs and Northern Development. Ottawa, ON.

Annex 3 of this report covers the use of intellectual property rights and the strengths and weaknesses of the Copyright Act, Trademarks act, Industrial Designs Act, Patent Act, Trade secrets, Neighbouring Rights and Plant Breeders’ Rights. Some of the issues raised through the gaps in policy here include time restrictions, the reduction of specific works/ specific expressions, disclosure requirements, and complications regarding the emphasis’ on ‘individual’ knowledge.


“This paper outlines current Canadian intellectual property (IP) legislation as it relates to Aboriginal people in Canada, and provides a general review of the implications and limitations of this legislation for protecting the traditional knowledge of Aboriginal people”


In this publication Brown covers the USPTO counterpart in Canada and the Snuneymuxw First Nations struggle to obtain Trade mark over their petroglyphs

This scholarly article discusses the appropriation and distortion of oral traditions in Canada. It calls for a recognition of ‘living cultures rooted in the traditional heritage of intangible expressions’ relating to aboriginal control of expressions such as stories, dances and songs (p.166). It proposes the international legal framework to protect aboriginal culture. Moreover, it highlights the Canadian legal framework to protect aboriginal culture through copyright and highlights the court, social and political action aboriginal peoples (have) take(n) to protect there traditional cultural expressions.


This transcript is based on a verbatim description by Cynthia Callison, a member of the Tahltan First Nation, of her paper on the implementation of the Delgamuukw case. She notes that copyright law shows that contemporary First Nations artists and writers who publish and distribute works are protected but oral traditions are not. She provides examples of Nisga’a First Nation objecting to the registration of the word Niska as trademark for clothing by the Federal Opposition Board for the Registration of Trademarks (p.2).


This document outlines the final research agreement of an expansive multiparty CIHR funded project researching the anti-diabetic effect of plants used by individuals in participating Iiyiyiu communities. Intellectual property is significantly attended to in this agreement. Section 6 of the agreement is entirely devoted to clarifying intellectual property concerns. Here it is outlined the Iiyiyiu Nation and the Iiyiyiuch are the sole guardians of Iiyiyiu Traditional Knowledge which is held for the benefit and use of the Iiyiyiuch. Furthermore, Participating Cree First Nations grant to the research institutions a non-exclusive license to use their traditional knowledge for the duration of the of the research project solely for the purpose of non-commercial research relating to diabetes Prevention. Also significant is the section detailing the Joint Intellectual Property created, discovered or developed by using Iiyiyiu Traditional Knowledge. Through this
agreement the participating Cree First Nations, for the benefit of the Iiyiyiuch of
the respective communities, shall be undivided co-owners of the concerned Joint
Intellectual Property, Together with the contributing research institutions. The
Parties must not disclose the Joint Intellectual Property to any person, agency,
media or organization without the prior authorization in writing form the other
co-owners. One of the objectives of this sub-section is to ensure no disclosure
could preclude the filing of a patent application or the issuance of a valid patent in
Canada or other jurisdiction. Finally the creation of a joint Intellectual Property
Corporation is detailed. The participating Cree First Nations and the CBHSSJB
(Cree Board of Health and Social Services of James Bay) shall collectively own
51% of the shares of the same category in the Corporation, each share bearing a
voting right. The Participating Cree First Nations hold all such shares for the
benefit of their members. There are also French, English and Cree plain-language
versions of this document available.

Canadian Institutes of Health Research (CIHR). 2007. CIHR Guidelines for Health Research
hhttp://www.cihr-irsc.gc.ca/e/documents/ethics_aboriginal_guidelines_e.pdf

This document addresses the need for both researchers and communities to
include intellectual property as a means of protecting knowledge. These
guidelines however, recognize the limitations of IP and its “strict eligibility
criteria” (2007:23) in section 2.8 Intellectual Property Rights and Indigenous
Knowledge (Pp. 22-23).

Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of
Canada, and Social Sciences and Humanities Research Council of Canada (CIHR-NSERC-

Article 9.18 (Pp. 128-129) is entitled 'Intellectual Property Related to Research,'
and recommends that rights related to intellectual property be specified in a
research agreement prior to research, and that the qualifications of these defined
intellectual property rights be clearly communicated and understood by all
involved in the research process (i.e. what material collected will qualify as IP
from a legal perspective).

CBC News Online. 2009. N.W.T. Leaders Seek Help to Stop Knockoffs of Northern Art.

This article concerns the passing of a motion by Dene leaders to seek patents for
the protection of traditional aboriginal designs from being copied and potentially
mass produced by foreign companies. These measures are sought as a means to protect the livelihood of aboriginal artists working in traditional mediums.


The section of the document on Intellectual Property Rights (Pp.17) recommends the book ‘Traditional Knowledge and Intellectual Property: A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity (2003)’ and describes the need for First Nations peoples to understand the legalities surrounding intellectual property to be able to effectively utilize its laws. One recommendation states, “Existing Intellectual Property laws are not an exact fit for protecting TK. Therefore First Nations communities will need to develop their own local mechanisms that will protect TK and ensure the underlying cultural integrity of the nations is preserved”(17). The document describes “First Nations” Intellectual Property Rights as a mechanism for expanding the current limitations of IP towards protecting Traditional Knowledge and states, “In Canada, effective domestic legislation that clearly protects Indigenous Traditional Knowledge has not yet been adopted. It falls directly upon Aboriginal communities; therefore, to ensure necessary measures are taken to protect their traditional knowledge.”(18)

http://web.uvic.ca/~scishops/Library/PDF/R-CURA_WS1_SummaryNotes_secure.pdf

This document provides a summary of conference proceedings with a discussion of intellectual property in relation to conducting research with First Nations (8). There are recommendations that issues related to IP be raised prior to the initiation of research, and provides suggestions from community members.


This chapter outlines the place of traditional knowledge and traditional cultural expressions within Western intellectual property regimes, arguing that these systems have been ineffectively in the past at protecting the intellectual property of indigenous peoples. The author examines progress made in recent years to develop mechanisms for protection by indigenous groups, through processes that
have gained global attention and agreements made regarding principles and objectives. These agreements include the Declaration on the Rights of Indigenous Peoples, the Daes Report, the Convention on Biological Diversity (CBD) and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the work of the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore. Examples throughout this important review of the potential implications of international instruments to deal with TK and TCEs draw on examples from concerns Canadian aboriginal communities: the protection of the content of ol Ktunaxa/Kinbasket audio recordings in museums from unintended reproduction or performance or from having their names and words used in commerce (such as that of the Creator’s name used for a mountain biking business); protection from unauthorized use of Kwakwa’wakw songs, dances and masks in derogatory situations or the use of artistic styles employed in ancestral crests and emblems without consent; or the correct assignment of the property holding group within the Kainai community of the right to sing certain songs. Coombe suggests that the reforms proposed by WIPO may offer protections of these TCEs that are currently unavailable in domestic legislation.


This article discusses the use of Web 2.0 technologies in the documentation and revitalization of indigenous languages. The authors look at how Hul’q’umi’num’ speakers on Vancouver Island experimented with these technologies but subsequently decided to document and disseminate their information with alternative systems, those that offer greater control over and protection of materials. There is a statement of caution regarding the publication of knowledge associated with Intellectual Property Rights on the internet and an emphasizes on the difference between ‘information,’ as “data that is passive until we interpret and process it’ from ‘knowledge’ or “the sense that people make of information.”(57)


This article discusses concerns regarding the protection of cultural heritage raised in plenary session on international property rights at the Fifth Continental Meeting of Indigenous Women of the Americas. The amauti is highlighted as an example of the danger of the misappropriation of indigenous goods in Canada. Martha Greig, president of Pauktuutit Inuit Women of Canada, said it is unclear
how effectively modern laws can protect Inuit culture and prevent the unauthorized use of design motifs and styles. Although there is a need expressed for protection of amauti as a form of intellectual property, there are no specific ip mechanisms mentioned. Also discussed are the links being made between Inuit women and aboriginal women in Panama. Since 2000, Panama has had a law prohibiting the misappropriation of indigenous goods. The aim is to have the indigenous people who own the designs control them and profit from them, if they so wish.


This paper, created for the Canada Council in August 2000, covers issues concerning the new Intellectual Property regime in relation to the Internet and e-commerce. “The growth of IP-based industries world-wide has had an enormous and unequal effect on developing countries and traditional and aboriginal cultures... Aboriginal and tradition cultures have, on the contrary, had little protection from IP law” (2). She notes the Snuneymuwx First Nations establishment of the petroglyphs of Gabriola Island and references this move as innovative in terms of ‘collective ownership’.

pg. 26-2.1 Progressing in protecting our intellectual property

One major concern of CNACA since its incorporation was to find a way to protect Cree products and collective traditions of being copied on an industrial basis by non-Cree commercial entities. Since July of this year, the Executive Committee (EC) has tackled this issue. The EC decided to require the services of a lawyer specialized in Aboriginal intellectual property. Since then, the process is ongoing to renew the trademark for Wachiya and to find a way to certify the authenticity of Cree products. By the end of this fiscal year, CNACA should be better protected in terms of intellectual property.


In a section of this article entitled ‘Traditional Knowledge and the Law'
Intellectual Property Rights are discussed in terms of Traditional Knowledge and the problem of owning what may be considered collective knowledge or property. The author includes a list of examples of co-management projects in Canada and internationally that recognize TK and involve First Nations in decision making. (Pp. 3-5)
As a speaker, Tagak expresses the importance of establishing forms of protection for Inuit intellectual property. He makes recommendations that retailers and art galleries ensure the authenticity of the art or products they sell and display as a mechanism for protecting the intellectual property related to artistic expressions of traditional cultural.


This TK Research Protocol has been drafted under guidance of the Sambaa K’e Dene Band’s Policy Regarding the Gathering, Use and Distribution of Traditional Knowledge, the ACUNS Ethical Principles for the Conduct of Research in the North, the West Kitikmeot Slave Study, and the Gwich’in Tribal Council’s draft Traditional Knowledge Policy. Traditional Knowledge, in this protocol, is described as the “collective intellectual property of Dehcho First Nations’ members to Stories, Customs, Experiences, Knowledge, Practices, Belief and Spiritual Teaching passed on to our children and future generation.” The protocol is intended to provide regional guidelines for the use, documentation and distribution of TK by external agencies. The protocol is intended to assist Dehcho communities in facilitating discussion with outside agencies, researchers, and Industry regarding the use of TK. Specific mechanisms to protect TK include the requirement of informed consent prior to outside agencies, Industry, governments, researchers or other interested parties receiving access to any documented Decho TK. Furthermore as the primary guardians, protectors and interpreters of TK, Deh Cho First Nation(s) communities will retain primary management of research studies and projects involving TK. In addition, all requests granted by the First Nation(s) will be subject to written confidentiality agreements that contain limited use and distribution clauses.


The Dena Kayeh Institute provides a template for First Nations groups in BC to follow for establishing Traditional Knowledge (TK) protocols. The template includes notes of advice specific to sections of the protocol and addresses intellectual property in relation to an applicants’ (researcher, regulatory authority, commercial entity (corporation, partnership, other business or an individual) recognition of the First Nations’ traditional knowledge within the framework of intellectual property rights. It states that the applicant must
recognize that First Nations have a right to have their full ownership, control and protection of intellectual property acknowledged (E, p.2). Furthermore, the applicant shall acknowledge that First Nations have prior, proprietary rights, title and interest over lands, air, water and natural resource within their respective territories alongside with intellectual property and traditional resource rights (p.5, Section 2). The purpose of the protocol is to strengthen communities’ concerted innovation and informal knowledge systems that do not allow a claim for ‘private’ ownership and intellectual property rights or privileges as this is against the ethical and intellectual cultural values of the communities (p.7, Sect.3). Section 11 on ownership (p.14) states that First Nations must be the exclusive owners of TK and that the applicant must therefore waive any intellectual property rights s/he has to TK.

http://www.pch.gc.ca/eng/1288012608459/1288012608461

This report outlines the content of the National Gathering on Aboriginal Artistic Expression which took place from June 17-19, 2002. The Gathering was chaired by Minister Sheila Copps and brought together 250 delegates representing the main stakeholders from Canada's Aboriginal and non Aboriginal artistic and cultural communities and government officials from Canadian Heritage and its Portfolio. The body of this report summarizes the panel and workshop discussions as well as identifying key recommendations. Issues around the protection of intellectual property in the local national and international artistic markets is listed as a main objective of the panel discussion on ‘The Distribution of Aboriginal Art’. The Panel composed of Audreen Hourié, Dorthy Grant and Jim Compton discussed “issues around the protection of intellectual property in the local, national and international artistic markets.

http://www.pch.gc.ca/eng/1288012608469/1288012608471

This report explores the relationship between the support, celebration, sustainability and promotion of Aboriginal cultures and tourism in Canada. Recommendations include: the development of community mechanisms that authenticate and protect intellectual property and cultural expression (i.e. Mi'Kmaq Ethics Watch); with regard to traditional knowledge, delegates suggested that Elders must be consulted as the owners of cultural institutions and intellectual property.

This report outlines the content of a series of eight collaborative discussions facilitated by the Department of Canadian Heritage with First Nations, Inuit and Metis communities that took place in different locations across Canada in May and June 2005. One of the significant themes of this report is Indigenous knowledge and intellectual and cultural properties. Examined is the relationship between existing intellectual property laws (legal rights that result from intellectual activity in the industrial, scientific, literary and artistic fields) and cultural property (the body of cultural expressions that have significance to a community). Key issues arising from the collaborative discussions include the vulnerabilities of indigenous knowledge, including concerns about exploitation and appropriation, ethical concerns raised regarding research, the misuse of Aboriginal culture, stewardship of Indigenous knowledge, gaps in policy formation, collective and individual rights, customary law, knowledge and responsibility. Themes regarding access to cultural property in institutions, as well as the lack of awareness, recognition, funding and programming were key issues also raised. Specific recommendations include, at the community level, the establishment of research protocols and ethical guidelines to protect the integrity of Indigenous Knowledge and intellectual and cultural property and to continue research on sui generis (unique) models for cultural property laws, guided through community-based actions such as the establishment of Elders Councils. At the federal level the need to support community intellectual property education programs and the development of accessible and easy-to-understand communications materials as well as to create an exemption for intellectual and cultural properties relating to Indigenous Knowledge from the time limits under copyright law.


This website reports on the exhibit, Dreamers and the Land, that the Doig River First Nation initiated based on a documentary team that visited eight significant places in their traditional territory. There, oral histories about the stories, songs, people and experiences that enable connections to the land were recorded. The Doig River First Nation asserts copyright over design, images and writings on this page to do with these traditional cultural expressions.

Guideline 2 of this document, entitled ‘Existing Legislation Can Usually be Used to Protect Intellectual Property Rights’, discusses the usefulness of the Intellectual Property system to indigenous peoples in regard to the protection of traditional knowledge. The author notes complications with the system, writing, “Intellectual property rights attempt to protect the ownership of the intellectual content of the works of an individual or a legal entity. This concept is complicated when traditional knowledge is involved. By its very nature, traditional knowledge is communal, not personal. Legislation concerning intellectual property rights is able to protect traditional knowledge only when it can be identified as belonging to a person or some group of persons who specifically developed the knowledge. Currently special alternative systems (sometimes referred to as *sui generis* systems) are being developed. The best examples of international debates developing *sui generis* approaches are in the implementation of the General Agreement on Tariffs and Trade (GATT) under the auspices of the World Trade Organization; the development and revision of the Food and Agricultural Organization (FAO) Global Plan of Action and International Undertaking on Plant and Genetic Resources; and the continuing evolution and development of the Convention on Biological Diversity through its Conferences of the Parties.” (2000:11)


Section 4.0 of Appendix B, regarding the use of traditional knowledge in Enbridge’s pipeline project contains a list of statements that the Northern Gateway project agrees to uphold. 4.1 in this list states, “Acknowledge that Traditional Knowledge is the intellectual property of study participant(s) and [First Nation/Community] and that [First Nation/Community], as represented by designated Leadership, is entitled to take steps to ensure its integrity, protection and preservation.” Also in the list are agreements relating to the return of collected information to the First Nation and other protocols related to First Nations control of the materials involving traditional knowledge and its use in the project’s development.


This report addresses in section 5.6 Appropriation of Indigenous Knowledge (26) the way in which information given to researchers becomes the property of the researchers under the Copyright Act, and the need for indigenous peoples to maintain control over the collection and dissemination of their knowledges,
practices, designs, etc. As well in section 5.7 Collective Ownership (28) identifies collective ownership as one of the 'most contentious issues' facing indigenous peoples and quotes a recommendation, “In a United Nations resolution (Resolution 1993/44 of 26 August 1993), the Sub-Commission on Prevention of discrimination and Protection of Minorities endorsed recommendations relating to collective rights of Indigenous Peoples. This recommendation states: 'Indigenous Peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people’ (27-28).


In this article Farley notes that the Canadian Copyright Act requires works to be original which defines itself in relation to the Anglo-American system, and so work must be able demonstrate original authorship in order to gain protection. This may pose some problems for folklore protection in that because of its ancient ties. Farley also comments on the problems in the Canadian Copyright Act concerning fixation and its relationship to case law (see footnote 105, p.27).


This document outlines the principles and benefits of OCAP (Ownership, Control, Access and Possession) for First Nations communities, providing a means of protection for knowledge that extends beyond the individual to address 'collective privacy.' This does not directly mention Intellectual Property but OCAP is presented as an alternative that has been developed to essentially fill the gaps left by the IP system.


RHS works according to OCAP (ownership, control, access, and possession) as it provides new ways through which First Nations’ research data may be stored, distributed, and accessed. In its Code of Research Ethics, RHS uses OCAP principles and stresses First Nations’ ownership as embedded in “(...) the relationship of a First Nations community to its cultural knowledge/data/information. The principle states that a community or group owns information collectively in the same way that an individual owns his or her personal information”. Moreover, the RHS Code of Research Ethics describes
control as related to “aspirations and rights of First Nations to maintain and regain control of all aspects of their lives and institutions include research and information. The principle of “control” asserts that First Nations, their communities and representative bodies are within their rights in seeking to control research and information management processes which impact them. This includes all stages of research projects, and more broadly, research policy, resources, review processes, formulation of conceptual frameworks, data management, and so on” (p.3).


The author of this article outlines community-based participatory research (CBPR) in Canada and describes it as an increasingly effective ethical research strategy. Included is a list of recommendations on how to approach CBPR including “24. Observe Intellectual Property rights. . .”(2003:54).


Section 1.2.2 of the document is entitled ‘Intellectual Property’ and states, “Since the information discussed during participant interviews constitutes the intellectual property of participants, and, collectively, of FMFN, the study was designed in consultation with, and is subject to the approval of, FMFN participants and FMFN representatives. Any interview information, including notes, GPS readings and/or photographs taken of traditional sites, be it in tape, transcribed or electronic form, is considered the property of FMFN and will be returned to the FMFN Industry Relations Corporation (IRC) for archival upon completion of the study. Information has been provided with the understanding that, apart from the submission of reports for the regulatory process, no copies of, or distribution of any documents produced, will take place without the express permission of the FMFN IRC. Information provided during work for the Project is intended for the one-time use of the assessment application, and the Project described therein, only.”(2008:02)

Section 1.1.3 Intellectual Property (2007:2) provides guidelines for the use and ownership of information collected during project research. It requires that information from participant interviews be considered the collective property of the Mikisew Cree First Nation and be returned upon completion to be archived. There is also a clear statement regarding the one-time use of collected information for the purposes of this specified project.


This report, with a focus on BC, notes recommendations for First Nations to protect IP in protocol agreements with researchers (p.5).

http://web.williams.edu/go/native/amauti.htm

This article discusses the protection of the amauti and Inuit traditional production of clothing, art works, etc., in relation to cultural heritage and the need to ensure that indigenous craftspeople or artisans are able to maintain a livelihood through the production of products based on traditional designs, materials, style, etc.


In the definitions section of this protocol traditional knowledge is defined as “The collective intellectual property of Dehcho First Nations' Stories, Customs, Experiences, Knowledges, Practices, Beliefs and Spiritual Teaching passed on by our parents from our ancestors. This Knowledge will continue to exist and be passed on to our children and future generation. The rights to this knowledge must be protected” (2004:3).


This newspaper article outlines a collaborative research project between the Cardiovascular Research Groups at the University of Saskatchewan and the Lac La Rouge band and English River First Nations to identify traditional herbs, using traditional knowledge, that can potentially benefit cardiovascular health.
Intellectual property rights will be shared with the aboriginal collaborators.


“The Working Group, made up of representatives of the parties, will develop frameworks to consult First Nations regarding the establishment and management of protected areas” [3] As part of the items considered for development the working group agrees to share intellectual property considerations throughout the working group process.


In this assessment TEK is recognized as an important component of the project. The assessment identifies that the consultation process with First Nations communities surrounding their knowledge of traditional land use and culturally sensitive areas was significantly important from the start of the project [3]. The principles and procedures of the document identifies that the “Canadian Environmental Assessment Act (CEAA), Section 16.1 gives Responsible Authorities conducting environmental impact assessments (EIAs) the discretion to consider aboriginal traditional knowledge” this includes “Respect intellectual property rights. Intellectual property includes inventions, literary and artistic works, symbols, names, images and designs” [7]. In section 6.3 the Berens River assessment notes that TEK has been used in the project to inform the assessment of traditional activities, it also acknowledges (6.3.4 Establishment of a Confidentiality and TEK Ownership Agreement) that “aboriginal communities own the intellectual property rights to their traditional knowledge, despite it being recorded in any way” [10] A confidentiality agreement was created for members of the assessment and their respondents. “It is acknowledged that any information provided by the respondent may include proprietary and confidential information, including, but not limited to, local or community historic knowledge, ideas, perspectives, comments and opinions, traditions, practices, values or belief systems, not previously disclosed to the general public” [11]. The TEK’s acknowledged by the assessment in this report include various hunting and trapping, fishing, berry picking, along with identification of spiritual and cultural areas.

Addresses IP in section 3 of the document, 'Ensure the Protection of Sensitive Information,' where it states, “Protocols for the protection of traditional knowledge and intellectual property rights must be discussed and agreed upon prior to proceeding with TK-related activities in any Aboriginal community”(2005:4).


In Section 2 of this guide, entitled ‘Protecting Intellectual Property Rights’, the author describes Intellectual Property laws and how they may or may not be used, both generally and specifically, by indigenous peoples. It provides an outline of approaches that researchers should take to ensure a form of protection for the knowledge produced by research participants.


This document discusses the use of traditional knowledge registries, as compiled by the Inuit of Nunavik and Canada's Dene, within the Intellectual Property system (58). Further on the use of IP by aboriginal peoples in Canada is highlighted as well as the alternative ways indigenous communities may be protecting their rights, in terms of protocols, agreements, etc.(62) This section addresses both the applicability of IP and also its shortcomings, particularly in regard to copyright, mentioning problems related to collective ownership, duration, moral rights. The example of effective IP providing is in regards to the Cowichan use of trademark to protect the authenticity of sweater production.

http://www.infomine.com/index/pr/Pa777090.PDF

This is a press release regarding the signing of a protocol between industry and the Kaska Dena First Nation to facilitate a mining operation within Kaska territory. It states, “The Protocol provides specific detail regarding Kaska Dena ownership, control and management of their traditional knowledge, including terms of prior informed consent, confidentiality and intellectual property rights.”

This article explores how a Kwakwaka'wakw dance group negotiates intellectual property issues around their music and dance presentations for the First Peoples Festival. Kwagiulth Dancers' speeches on traditional Kwakwaka'wakw concepts of intellectual property are discussed.


This report examining traditional medicine includes a section dedicated to Intellectual Property Rights. Discussed are dangers of bio prospecting and the exploitation of traditional knowledge. Recommendations are made including the development of appropriate policies and protection for Indigenous knowledge and specifically that the ownership of all information collected from Elders and healers would belong to the communities. This is critical in developing strong relationships or “rebuilding trust” between NAHO, other health agencies, researchers and interested parties. The need for guidelines and policies in the area of traditional medicine is outlined as a crucial first step. It is also recommended that communities need support in developing appropriate ethical guidelines, research codes of conduct and measures for the protection of Indigenous knowledge.


Hollowell and Nicholas outline the issues of intellectual property as protection for cultural knowledge, heritage, etc., and provide recommendations for ways in which archeologists (in particular) and other research may approach the subject of IP in ways that extend beyond the specific criteria associated with IP in its legal form, ie. copyright, trademark, etc.


The authors of this chapter argue that more explicit measures should be taken to enact forms of protection for traditional knowledge as intellectual property, and that in these traditional knowledge holders be afforded rights to prevent misappropriation. The Nisga’a Final Agreement is used as an example of an agreement that could have gone further to ensure protection mechanisms were in place and could be used to repatriate and/or control artifacts that are deemed the property of First Nations groups but held by third parties. The authors suggest
that, “National enforcement may be achieved simply through validly enacted legislation. However, if international enforcement is desired, then TK protection should proceed through conventions or treaties. Recent developments in Canadian private international law (conflict of laws) may facilitate extra-territorial protection through a broader recognition of enforcement of foreign judgements by foreign jurisdictions” (242).


“An Intellectual Property Rights (IPR) Project through the Arctic Athapaskan Council has been approved for $85,000 in funding for Phase 1, and will also identify measures meriting more detailed study for Phase 2. The Project will seek to develop an appreciation for measures currently available to Yukon First Nations to secure traditional knowledge IPR associated with local and regional heritage, cultural and genetic resources, both at home and internationally.”


Statement from indigenous peoples representing various countries, including Canada, gathered in Japan in advance of the 2008 G8 summit. The declaration has listed under the heading 'Our Issues and Concerns:' “theft of our intellectual property rights over our cultural heritage, traditional cultural expressions and traditional knowledge, including biopiracy of genetic resources and related knowledge.”


This report outlines the proceedings of a workshop held by officials from the Intellectual Property Policy Directorate (IPPD) and the Department of Canadian Heritage. Participants included representatives of approximately 20 First Nations, and the workshop included presentations by academic and research professionals. Participants expressed concerns regarding the use of inappropriate or culturally offensive trade-marks over certain Aboriginal images and names, copyright over traditional knowledge research conducted by non-Aboriginal people, the need to preserve and promote the use of Aboriginal culture and languages, and access to information issues regarding traditional knowledge held by governments. The workshop clarified the extent to which IP laws may affect the use of traditional knowledge. Three basic objectives which Aboriginal groups appear to pursue in
regard to traditional knowledge and cultural heritage include: protection against the use of items or expressions that are "sacred" and against misappropriation and misrepresentation of Aboriginal culture by outsiders; repatriation of aspects of cultural heritage that have been misappropriated; and preservation of, and control over, existing cultural heritage.


This poster is aimed at raising awareness of copyright laws to Inuit artists. Available in both Inuktitut and English.


Section 44 of the Declaration states, “Instruct ICC to engage in activities that promote the protection of Inuit intellectual property and cultural heritage and do so in bodies such as the World Intellectual Property Organization (WIPO), among others.” (2010:6)


Resolutions passed by the Inuit Circumpolar Council in regards to the protect of intellectual property. It reads “Therefore be it resolved that ICC will step up its efforts to ensure that Inuit intellectual/cultural property rights are adequately protected. Be it further resolved that ICC will, through its respective national organizations where appropriate, encourage Inuit-owned businesses and other companies to stop selling products that are unduly exploiting Inuit intellectual/cultural property.”

Jaksic, Vesna. 2009. The great not-so-white north Canada's native peoples are asserting their rights, and companies are having to make concessions. Market Report - Corporate Counsel.

This article describes how First Nations’ are protecting their intellectual property interests in the face of large-scale developments such as the Victor diamond mine in James Bay, through entering into confidentiality agreements that recognize that traditional knowledge, broadly defined, is the intellectual property of the aboriginal group.

This article contains predominantly Australian examples related to intellectual property but in Case Study 2, section 'Protecting Culture by Registration,' the example of the Snuneymuxw First Nation's use of the Canadian Trade Mark Acts 'official mark' to register and protect petroglyphs is mentioned (44). In the section 'Prior Informed Consent' the case of the Comox First Nation’s attempt to register the name 'Queeneesh,' and protect it from misappropriation, is mentioned, as well as the judge's rejection and statement that aboriginal rights are 'outside the scope of trade mark law' (44).


The Jilaptoq Mi'kmaw Language Center involves the creation of digital, multimedia, and interactive Mi'kmaw educational support material. Initially the material was designed for use with the Nova Scotia Department of Education’s Grade 7 Mi'kmaw Curriculum. However, the project website will ultimately be of use to all Mi'kmaw and Non-Mi'kmaw educators who are endeavoring to teach Mi'kmaw language and culture. The project is unique in that it is a team effort involving many individuals and organizations within Mi’kmaki. The resources include stories, songs, prayers, talking posters, videos and vocabulary as well as Mi’kmaw language sample audio files. The website content is licensed under a Creative Commons License.


This newspaper article covers the Snuneymuxw First Nation’s registration of petroglyphs as official marks.

Landry, Véronique; Bouvier, Anne-Laure; Waaub, Jean-Philippe. 2009. Aboriginal Land Planning In Canada: The Role of Strategic Environmental Assessment in Adaptive Co-Management. Research supported by the Canadian Environmental Assessment Agency’s Research and Development Program http://www.ceaa.gc.ca/7F3C6AF0-docs/ALPIC-eng.pdf

Since the amendment was made to the Act in 2003 in accordance with section C-9, number of changes have been made. The need to incorporate Aboriginal knowledge has become a priority since publishing interim principles in February 2004 on the integration of Aboriginal knowledge in environmental assessments under the Act (Canada, 2009d). These include: . . . 4. Respecting intellectual
property rights. . .” Further in the document there is an example from the Dehcho First Nation and their statement regarding collective intellectual property.


This report deals with the considerations pertaining to Bill 11 (an Act to enact the Provincial Parks and Conservation Act) and also contains complementary amendments to other acts. Chief Beardy of the Nishnawbe Aski Nation responds to Bill 11 in the following: “Subsection (5) also requires this to be added to the end: “Traditional ecological knowledge ... will form a key database for the development of the plan. First Nations retain all intellectual property rights to their TEK and will be financially reimbursed by the minister for the use of their TEK. Reimbursement must be an amount agreed to by both minister and First Nations. Management plans will not commence until an agreement regarding TEK is reached. The minister is responsible for all negotiation and reimbursement costs” [34].


This article (French) reports on Indigenous women who are artists and aim to protect their traditional cultural expressions and works. The telling Inuit example of Amauti, traditional clothing, is given and use of the intellectual property system evaluated. Inuit women have come to the conclusion that it is necessary to employ non-governmental tools to protect Amauti and are working on a certification mechanism to protect their work.


In a section of this article entitled “Difficulties in Cooperative Research” the author recommends that rights related to Intellectual Property be clearly and transparently defined between groups involved, to ensure that “. . . First Nations always own the information and any copyrights, trademarks, patents derived from that information.”(10) The article also recommends mechanisms for defining IP in the process of research and incorporating this into documentation, for example, including a statement related to IP in forms of informed consent, etc.

In this report recommendation 12 discusses the need for workshops or information sessions to create an avenue for First Nations to familiarize themselves with copyright laws. This is presented as a means of facilitating the collection of 'aboriginal materials' in a way that aboriginal peoples may be comfortable with and thus will not be in violation of rights related to intellectual property.


In these speaking notes prepared by a Chief from the Makwacis Cree and Treaty 6 Territory- the community of Niyaskweyak (Ermineskin) for a WIPO panel, Littlechild outlines a number of significant points regarding the significance of TK and TCE’s. This includes his support for the 1984 Panama Declaration of Principles of Indigenous Rights, Principle 13, in which the the original rights to the material culture, including archaeological sites, artifacts, designs, technology and works of art lie with the Indigenous People(s). Littlechild also identifies that the role of customary law, practices and protocols (both written and unwritten) are essential to sustaining and safeguarding Cree TK and TCE's. Also detailed is Littlechild’s community’s experience with misappropriation and misuse of TK and TCE's which has largely been related to tourism and the recent proliferation of new communications technology. Finally, Littlechild outlines that in order to safeguard and sustain TK and TCE's First Nations communities have acted in positive and pro-active ways. These ways include a range of practical, legal, educational and social responses. For example, internal training sessions by cultural leaders and elders such as for the Oskapewsak (helpers).


This online news article comments upon the perceived ineffectiveness of global copyright laws to protect indigenous knowledges. Examples include the Inuit kayak, amauti and Inukshuk and query the inability for groups to register traditional knowledge within the framework of copyright protection. The author notes questions raised in communities of whether to work within system or develop a new one that could speak better, and with more specificity, to local concerns.

This report, commissioned and funded by the Industry Canada through the National Biotechnology Strategy, reports on the need to “assist in identifying actual uses of intellectual property rights by indigenous peoples in Canada” (iii). Although Mann’s report focuses on issues related to sustainable uses of biodiversity he does use case studies related to the Igloolik Floe-edge boat and relations to the Patent Act (see chapter 3.2) and protecting Inuit art and sculpture in relation to multi-dimensional policy context, including both the Copyright Act and the Trade-marks Act (see chapter 3.7).


This case study was “designed to gain insight into issues concerning First Nations intellectual property and heritage resources with a view to discovering or devising legal means to address these issues” (n.d.:1). The paper examines the Giksan and Tsimshian verbal record, termed adawx, and the associated concepts of identity and history. Marsden argues that “the concepts of intellectual property and heritage resources arises out of a way of viewing the world that either excludes or is antithetical to that of many First Nations and therefor precludes a real understanding of Aboriginal culture and society” (n.d.:1). Marsden concludes that for the Tsimshian and Gitksan the greatest issue associated with what the Euro-Canadian world calls ‘intellectual property’ is the lack of acknowledgement and respect for their identity in its fullest sense.


“This paper was presented to SSHRC’s Board members and Senior Management in October 2003 and was used as the basis for a series of program and organizational initiatives designed to launch SSHRC’s Aboriginal Research Agenda.” Includes a section on ‘Community Protocols Information’ (CPI), with examples and states, “The CPI initiative may also provide a useful way of developing practical understandings among researchers and ethics boards on various ethical questions, including those focussed on intellectual/cultural property”(2003:12).

The principles and protocols outlined in the document, established by the Mi'kmaq Ethics Committee, are intended to protect the integrity and cultural knowledge of the Mi'kmaw people as well as guide research and studies in a manner that will guarantee that the right of ownership rests with participating Mi'kmaw communities. The principles state: Mi'kmaw people have the right and obligation to exercise control to protect their cultural and intellectual properties and knowledge. Furthermore, Mi'kmaw knowledge is collectively owned, discovered, used, and taught and so also must be collectively guarded by appropriate delegated or appointed collective(s) who will oversee these guidelines and process research proposals. Each community shall have knowledge of, and control over, their own community knowledge and shall negotiate locally respecting levels of authority.


The talking dictionary project was developed as an Internet resource for the Mi'gmaq/Mi’kmaq language. Each word is recorded by a minimum of three speakers and each recorded word is used in an accompanying phrase. There are over 3500 headwords posted, a majority of these entries include two to three additional forms. The site also includes songs and stories. The website content is licensed by a Creative Commons License.


Online newspaper article, “Indigenous people retain majority of intellectual property rights over research findings stemming from their traditional knowledge of local medicinal plants.”


In this article the authors locate the example of the Klahowya Village, a “traditional First Nations Village” and new tourist attraction in the heart of Vancouver, British Columbia in a global context, reflecting on intellectual property, “specifically the intangible elements of cultural heritage.” The authors consider the challenges of cultural tourism as well as proposing strands of possibilities, in particular the affordances of community-based heritage research.
The intersection of intellectual property and cultural tourism is presented by the authors as a critical area for understanding the ways in which the commodification of heritage is reshaping the relationships between culture, communities and consumers.


This website sells Anishinabe Teepees and materials. The company claims that it is “retaining or Cultural Traditions that were handed down to us. Our teepees comply with the Native Intellectual and Cultural Property Rights Acts Now being developed.”


A chapter of this book covers the limitations of copyright and provides new policy recommendations for the protection of traditional knowledge. They comment on Robert Bringhurst’s reputed appropriation of Haida culture through the publication of traditional stories. Murray et al also note that it was only through the Olympic Committee specific concern that special legislation was created in order to fortify the rights of the inukshuk Olympic logo. They also acknowledge that collective production is recognized in the Copyright Act but that such policies still rely on the foundation of individual ownership.


This chapter problematizes the practice of embedding indigenous peoples’s tangible and intangible property under what Napoleon refers to as an ‘umbrella of “culture”’(370), suggesting that this process distances these properties from their involvement in contemporary political, social, legal and economic contexts. The author offers three strategies for First Nations peoples to engage with disputes over cultural property; these are: “(1) re-embedding tangible and intangible and intangible property into the aboriginal group’s political project in a public way so that the property is advanced politically as owned, (2) conducting practical customary law research, and (3) developing legal pluralism models that would frame the relationships between aboriginal peoples and the state, and between aboriginal peoples”(386).

The ‘rules of conduct’ outlined in this document have been developed at the direction and request of the Council, Advisors and the “Keepers of our Culture”. These guidelines are meant to apply to all individuals conducting research with the First Nation. With regard to IP mechanisms, the Band maintains that it may wish to retain copyright of both the research and any data publications (including papers presented in a public or professional forum) arising from the outcome of the project. The matter of copyright and any restrictions the Band may wish to place on either the dissemination of research data or interpretations derived are to be discussed or negotiated at the outset of the project and formalized through a contract between the Band and visiting researcher.


This report by artists/community developers/entrepreneurs Lou-ann Neel (Mamalililikala, Da'na'xda'xw, Ma'amatagila, and Kwagiulth) and Dianne Biin (Tsilhqot'in) describes the newly established artist network CIA and practical solutions around issues of copyright, intellectual properties, and the traditions of artistic disciplines. Copyright law is discussed from a ‘traditional perspective’ and suggestions made on how to implement protection of cultural expressions through a form of protection that comes from within the framework of the traditional systems itself. Generally, artists agree that traditional systems, for instance, potlatches, provide the basis of their rights for their work. (especially pp.5-9)


In this article Nicholas comments on the position of First Nations communities in British Columbia on the protection of their traditional knowledge as implemented through their heritage policies and permit systems. He talks about the emergence of intellectual property issues in archeology in Canada and how legislation may not always be the answer to such debates.


In this paper Nicholas and Bannister examine the “intellectual-property-rights-related issues in archeology, including the relevance of such rights within the discipline, the forms these rights take, and the impacts of applying intellectual property protection in archeology” (327). They comment on the control indigenous peoples of Canada have over the archaeological process.
and the limits for heritage protection in Federal legislation. This includes that in 1996 under the Canadian Heritage Act “there is no provision for site identification surveys for all proposed developments, and therefore many sites are lost” (330). They identify the limits of legislative heritage protection as a product of basing legislation on notions of physical property. Coverage is provided on the trademarking of the amauti by members of Pauktuutit, Cowichan sweaters by the Cowichan Band Council, registered petroglyphs in 2000 by the Snuneymuxw Nation and the protected place-name, Queneesh, by the Comox Indian Band.


In this article Noble looks at “the correspondences and divergences in how the World Intellectual Property Organization (WIPO) transposed the “facts” of Blackfoot tipi-transfer practices in efforts to harmonize global intellectual property (IP) regimes and to achieve “justice” and “empowerment’” (338). He makes comments on (345) Michael Asch’s discussion on how invoking property becomes an instrument for northern Dene people seeking to reduce “distortions” about their autonomous, transactional relations with the land “by providing Canada and Canadians terms in their own language” (n.d.); that is, the Dene smartly appropriate “property” to counteract the ravages of its erstwhile translations.”


Noble’s article investigates First Nations positions on the ownership and protection of their cultural heritage within the larger context of liberal state conditions as based on histories of colonialism. Noble stresses the fact that Euro-Canadian law and notions of property continuously displace contemporary Indigenous law and property practices whereby Indigenous ownership is best described by ‘belonging’ rather than by ‘property’ (p.465). Noble asks if and how these two notions can be recognized given the fact that First Nations and settlers live interculturally and share the land (p.476). Crucially, Noble identifies consistencies in some principles underlying notions of ownership.

http://www.edt.gov.nu.ca/docs/Sanaugait_eng.pdf
This document addresses concerns related to the production of Inuit art, and aims towards ensuring that artists’ works are protected from misappropriation. The strategy identifies goals, time-lines and action plans and addresses the IP system directly. Goal 3, introduced on p.7 and elaborated on p.22, is to: “Secure market share through protection of intellectual property rights” and includes the following points, “Provide information about copyright and intellectual property rights in Inuktitut and Inuinnaqtun. Provide intellectual property rights training for artists. Lobby for international recognition of Nunavut’s intellectual property rights.” (7) Goal 4 (Pages 8 and 23) is to: “Secure market share through international brand recognition” and includes the following points, “Make Nunavut’s art instantly recognizable throughout the world. Promote the difference between “fakelore” and authentic Nunavut art. Augment the Igloo Tag program.” (8)


This article discusses Pauktuutit, an Inuit women’s collective organization, and their efforts to protect Inuit intellectual and traditional knowledge; this effort is representing through the particular case of the amauti parka. Shortcomings of IP to protect collective knowledge are addressed.


Section 1.1 of this document, 'Development of Culturally Appropriate Regulatory Environment', describes the urgent need for a regulatory framework that would address issues facing First Nations peoples in relation to the development of health policy; included in this is the recommendation to address intellectual property rights, especially in consideration of the commercialization of products or practices derived from indigenous knowledges.


The article covers the appropriation of First Nations intangible cultural property and limitations of intellectual property policy and other legal legislation. The authors report on the limitations of the Copyright Act in Canada and its 50 year policy. They also use the example of The Spirit Sings exhibit at the Glenbow Museum in Calgary Alberta in relation to claims of ownership of cultural property.
and the misuse of that property.


This report describes the significance of the amauti to Inuit culture and the need to protect its design from misappropriation to ensure that employment opportunities related to its production remain in Inuit communities and that women are able to support themselves through traditional skills. The report discusses how the amauti became a case study of how Intellectual Property laws relate to indigenous peoples and highlights both the uses and shortcomings of these laws. The workshop that this report summarizes intended to clarify needs related to IP and define expectations as well as raising local awareness about the function of IP laws. The workshop emphasized 'plain language' explanations of IP to make it accessible. This document summarizes the events and proceedings of the workshop and emphasizes the need for forms of protections that consider Inuit knowledge and practice concerning the amauti, rights to design based on inheritance, regionality, etc. It summarizes the development of a work plan to outline concerns and objectives resulting from the workshop.


This is a news article about Inuit attempts to protect culture, designs, etc., from being misappropriated by non-Inuits. The primary examples used are the inukshuk and the amauti. The article states, “The Inuit groups want the law to protect what is known as their “intellectual property rights.” Current federal legislation designed to protect intellectual property covers art, trademarks, and technologies – but only if they are new or original. This makes it difficult to protect old designs, such as the traditional inuksuk symbol.”


This summarizes the results of the first continental workshop, held in Ottawa and organized Continental Network of Indigenous Women and Rights and Democracy, of the Commercialization and Intellectual Property Commission. The commission included representatives from Canada, Panama and Peru and discussed was mechanisms available to protect the designs and products produced by women. Recommendations made were concerned with the recognition of
collective property, the adaptation needed to protect indigenous knowledge, the ineffective short term (50 years) of IP laws to protect knowledge that may be hereditarily passed down. There is acknowledgement within this report that the IP system can be utilized but that it is limited in the way it can effectively protect indigenous traditional cultural expressions.

Rights and Democracy. n.d. Protecting Indigenous Women’s Intellectual Property: Guiding Principles to be used by Indigenous Peoples and/or their Organizations.  

This document outlines that Indigenous peoples are the owners of their cultural heritage, particularly their designs; ownership is collective, permanent, inalienable and an imprescriptible right, as set out in the customs, laws and practices of each people; Indigenous peoples are the primary beneficiaries of their cultural heritage, particularly their designs. A useful, extensive list of suggestions are made for indigenous people entering into contracts with industry looking to market traditional designs, dealing with issues of benefit sharing, controlled marketing, identifying appropriate IP rights holders, limits on use, revokability of licence of rights, and dispute resolution.


This is a comic book dealing with issues of copyright and how to address the misappropriation of artistic designs, creations, etc. Available in both English and Inuktitut.

http://books.google.com/books?id=8yGlSH-og6EC&lpg=PA149&pg=PA197#v=onepage&q&f=false

Robertson describes the Kainaiwa Cultural Property By-law passed by the Kainai Tribal Council, which lists a broad range of cultural properties, including traditional cultural expressions such as artistic creations, customs, traditions, oral histories, and elders’ testimonies, as being an area of jurisdiction of the chief and Council. The by-law was passed by Band Council Resolution and given authority by the Minister under the Indian Act. With respect to the documentation of these traditional cultural expressions, the by-law required the consent of chief and council, ongoing access to documented materials, and sets out penalties for unauthorized documentation under sections 31 and 91 of the Indian Act. Her article discusses the ways in which these traditional cultural expressions, when documented as ‘data’ in research become “cocooned within hegemonic
structures” which limit aboriginal peoples’ ability to enforce their jurisdictions.

Robbins, David. 1999. Aboriginal Custom, Copyright & Canadian Constitution. Woodword & Company; Victoria, B.C.

In this article Robbins argues that “aboriginal peoples in Canada have constitutional grounds to seek recognition of their customary intellectual property rights regarding crests, songs, dances etc” (2). Robbins notes the potential for the Kwakwak’wakw to pursue claims over the exclusive use of the Sisiutl and Sun crest. He argues that section 35(1) of the Constitution Act, 1982 makes successful claims for aboriginal intellectual property. He also highlights some of the issues that may arise out of copyright negotiations for aboriginal peoples in Canada.


Article regarding the Igloo trademark with Canadian IP laws. Recommendation that trademarks be supported by campaigns of public awareness regarding the authentication of artistic works prior to purchasing.


“The key notions outlined in this paper relate to the collective ownership of group information; First Nations control over research and information; First Nations’ management of access to their data and physical possession of the data” Discusses benefits of OCAP. [doesn't directly mention IP]

http://www.johnco.com/newspage/fake.htm

Article describing the misappropriation of traditional designs particularly in relation to tourist items. The author writes, “The Canadian Copyright Act has done much to improve the situation for artists. An artist's original idea or design is considered to be intellectual property by the act and ownership of this property remains in the hands of the artist unless otherwise sold by agreement. Theft of intellectual property constitutes an infringement of copyright law. But by the time the law catches up with the infringement, it's often too late.” And concludes with
the recommendation that, “Until concrete new legislation is passed to protect the interests of aboriginal cultures, establishing statistics for the trade in fakelore will be, at best, guesswork. And only then will the Inuit begin to experience the benefits from their art that they so rightfully deserve.”


This conference paper describes three different ways of protecting cultural heritage: international documents; national *sui generis* legislation; and revision of existing intellectual property legislation. The author asks why copyright and indigenous art practices are so incompatible and if copyright can be reconciled with indigenous interests (p. 10-13). He uses a case study from Australia in which ownership and copyright were asserted and explores the applicability of it for Canada.


This application for ethics approval includes a section in which the researcher is asked to “indicate the measures you have taken to mitigate the risks of misuse or misappropriation of tangible and intangible cultural property of Six Nations” (p. 5). In the final section under ownership of the research it is stated that “The Six Nations Council will retain ownership of any Indigenous knowledge collected” (p. 8).


This article addresses codes and conducts as an inventory of examples, including Canada, and provides a list of consultative IP resources.


Powerpoint presentation of the Cultural Assessment Overview with Stoney
Nakoda First Nation as example. Intros phases for assessment: 1) Identification and Interviews (this includes “identification and protection of intellectual property recorded and documented from First Nations participants”(2008:10), 2) Verification, and 3) Protection. Phase 3 involves creation of a Cultural Protection Plan (CPP).

Spratley, David. 23 2007 November. Copyright Law Offers Poor Protection for Aboriginal Cultural Property. The Lawyers Weekly 27, no.34.

This short article covers the controversy of the city of Duncan’s copyright over the city’s totem poles. Spratley notes the suspect nature of the city of Duncan ownership over these objects and notes other common copyright pitfalls such as time constraints and issues concerning ‘individual’ ownership.


Discusses IP in relation to research settings involving First Nations. Outlines uses and shortcomings of the IP system, recommending *sui generis* protections for First Nations' traditional cultural expressions as a more comprehensive and effective mechanism.

Tail Feathers, Kelly Marvin. 2010. The Development of the Kainai Peacemaking Centre. Integrated Studies project submitted to Dr. Ken Banks in partial fulfilment of the requirements for the degree of Master of Arts - Integrated Studies. Athabaska University, AB. Pp 1-60.

http://library.athabascau.ca/drr/download.php?filename=mais/Kelly%20Tail%20Feathers%20Final%20Project.pdf

Paper describes the development of the Kainai Peacemaking Centre on the Blood Indian Reserve in Alberta. The author notes in the section 'Architect Contract' (Pp.35-36) that clauses were added to the standard contract (Canadian Standard From of Agreement Between Client and Architect Abbreviated Version) to ensure the protection of intellectual property. The addition clause, 3.1.4, states: The Architect agrees that there are specific parts of the Architect’s services that will be generated as a result of information that is collected pertaining to the customs, religious practices, religious artifacts, traditions, language, art dating from pre-contact, sacred objects, tools, ornaments, designs/motifs on tipis and tipi liners, oral history, Elders testimonies and archaeological sites and finds of the Blood Tribe and that the Blood Tribe, as represented by the Client, has sole ownership of this cultural and intellectual property including all such information that is collected from the Client that is unique to Blood Tribe ways (Blood Tribe and Kasian Contract, 2009).”(2010:36)

Media coverage on the trademarking of petroglyphs by the Snuneymuxw First Nation.


This report outlines the unique position of aboriginal intangible property and the way in which the Intellectual Property framework of Canadian law does not provide any special mechanisms to suit the collective concerns of aboriginal intangible property. The report significantly outlines a case study of the collaboration between the Hul’qumi’num Treaty Group and the Linguistics Department of the University of Victoria. In order to achieve the goals of respecting and protecting intangible properties, the University researchers and First Nations community drafted a mutually agreeable legal framework. This framework consisted of a Memorandum of Understanding (MoU) between the University of Victoria (signed by the vice-principal of research) and the six Chiefs of the HTG communities, and a template contract for researchers. These documents set out how Hul’qumi’num intangible property would be respected in the conduct of research, creating common understandings and contractual obligations between the parties, with a clear articulation of the intellectual property interests of the First Nations communities as they relate to the work that the linguists would do.


This paper explicitly states that it does not focus on the issues and implications of the appropriation of Aboriginal traditional knowledge and traditional cultural expressions by non-Aboriginal people for commercial purposes, or how traditional knowledge and traditional cultural expressions may (or may not adequately) be protected by the western intellectual property system. Rather, the authors outline that Aboriginal customary protocols with respect to intangible property must be understood in their own right. This review includes an ethnographic overview of specific, concrete examples of customary protocols respecting intangible property in four of the major Aboriginal cultural regions of Canada: Northwest Coast (Kwakwaka’wakw and Coast Salish), Subarctic (Carrier), Arctic (Inuit) and Plains (Blackfoot, Blood and Peigan, as well as the nearby Crow and Hidatsa Native American Tribes).
Discussion of traditional cultural expressions (TCE) in an institutional setting (museums, libraries, archives) and how to care for them. This report presents a number of international examples, as well as a few brief mentions of Canada. These Canadian examples are in reference to the Copyright Act of Canada, which permits libraries to make copies of works under various circumstances for purposes of preserving or maintaining library collections. The specific copyright claim made by the government in its works, called “Crown copyright,” in the United Kingdom, and several other Commonwealth countries such as Canada, is also mentioned. Finally, there is a brief description of the process of marketing the “Indigenous” line of products by American cosmetics and beauty company Aveda Corporation. Aveda also registered “Indigenous” as a trademark in a number of jurisdictions including, Canada. This provoked negative reactions from several indigenous groups. Following a range of lobbying and discussions, Aveda decided to drop the Indigenous product line and to discontinue using the trademark and the product line. As Aveda explained in a press release, “we are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources.”(2010:59).

Page 17 of the document contains a statement towards First Nations involvement in curriculum development and protection of intellectual property. There is also a brief discussion of community members desire to repatriate copyright from earlier materials gathered by Alberta Education from First Nations peoples. Section 3.6 in the list of recommendations states, “Protect our intellectual property rights and have our First Nations hold copyright to materials produced.”(2000:40)

In their Final Agreement, Tsawwassen First Nation, Canada and British Columbia have defined intellectual property as including “any intangible property right resulting from intellectual activity in the industrial, scientific, literary or artistic fields, including, but not limited to, any rights relating to patents, copyrights, trademarks, industrial design, or plant breeders’ rights” (p.7), and have agreed that Tsawwassen will not have law making authority which extends to intellectual property matters in any way.
This Act sets out Tsawwassen law in respect of the right to culture defined in the Tsawwassen Final Agreement, including the rights of Tsawwassen individuals and collectives to “preserve and protect Tsawwassen First Nation history, traditions, traditional beliefs and symbols”, and “advance, promote and participate in Tsawwassen First Nation ceremonies, songs, dances, storytelling, and naming practices” (p. 68). It also provides Tsawwassen Executive Council authority to make regulations “respecting the preservation, promotion and development of the culture of Tsawwassen First Nation, including its history, laws, ceremonies, symbols, songs, dances, storytelling, and traditional naming practices”. These law-making provisions have priority over federal and provincial laws, but do not touch on intellectual property law-making powers, as per the Final Agreement. The cultural rights that are elaborated in the Culture and Heritage Act are “limited only by the laws of Canada, the law of British Columbia, and Tsawwassen law” and “the oral and written traditions of Tsawwassen First Nation”. To date, no regulations under this act have been passed.


This memorandum of affiliation was put in to place to encourage the sharing of knowledge between the University and the band in terms of expanding and creating programs for Aboriginal Youth. The UBC Museum of Anthropology does have a confidential Memorandum of Understanding with Musqueam Indian Band council. Because of the confidentiality of this report we are not able to comment on its content in relation to IP protocols however we feel it is important to mention here. Under section 12 of the MOA, UBC and the Musqueam Nation acknowledge that their affiliation is based on the “recognition that the Musqueam Nation maintains ownership over all cultural material for which it has intellectual property rights” and that a “recognition that any intellectual property rights created through collaboration should reflect the respective contributions of the party”. In section 17 it is stated that both parties acknowledge that each of them holds proprietary interests in their names and their trademark logos and it is agreed that another party’s Trademarks will not be used without written consent is given of the party for every example of usage.


This is a document created for the Yukon First Nations to ensure research is
conducted ethically within communities. It provides “principles, guidelines and tools” (2008:2) for both First Nations and researchers, and in relation to intellectual property states, “Respect for Yukon First Nation jurisdiction over its intellectual property is central to conducting health research in Yukon First Nation communities and includes written, oral and visual documentation (i.e. videos, radio, tapes, TV interviews, etc.) It acknowledges that communities own information collectively, in the same way that individuals own personal information. It respects Yukon First Nations’ right to control and own research data. Research funding should include the cost of developing the necessary infrastructure and training for staff to build local capacity for stewardship of research data” (2008:6)


Wenzel comments on the rights of Inuit over their intellectual property, such as ecological knowledge. He also states that Inuit ecological knowledge should not be permitted to enter the public domain without proper approval.


Page 172 of the document states: “With respect to the use of databases for positive legal protection of traditional knowledge, Member States, indigenous peoples and local communities are compiling registers of traditional knowledge, usually in limited-access databases, in efforts to organize, promote and protect their heritage of traditional knowledge and to facilitate its exchange. Such registers have been created in India, Peru, the Philippines, and by the Inuit of Nunavik and the Dene in Canada. In addition to their proven usefulness in improving the availability and exchange of information in digital form, such registers may gain even greater importance if legal protection is granted to registered knowledge.”(2002:172)


This publication is part of a series of background papers prepared by the World Intellectual Property Organization (WIPO) dealing with IP issues in relation to genetic resources, TK, and TCES/folklore. It is intended to provide a comprehensive analysis of the policy issues that arise in the debate over improved IP protection of TCES/folklore, as an information resource for policy makers, negotiators, legislators, indigenous and traditional communities, users of
TCES/folklore, researchers and others interested in exploring these issues in detail. With regard to Canada, specific examples mentioned are: the amauti, the use of the *Trademarks Act* by the Snuneymuxw First Nation to protect ten petroglyphs, the restriction of access to some collections of sacred Aboriginal materials to members of culturally affiliated groups by the Canadian Museum of Civilization, as well as the Inuit Tapiriit Kanatami Guidelines for Responsible Research, the Dene Cultural Institute Guidelines and the TK Research Guidelines: A Guide for Researchers in the Yukon, prepared by the Council of Yukon First Nations.


This article discusses international mechanisms for the protection of indigenous cultural expressions with an inclusion of intellectual property laws. In a section entitled 'Customary Protocols Regarding Traditional Design, Music and Dance in North America' the author uses the example of Alberta's Kainai First Nation, writing, “Canada’s Kainai (Blood) nation has complex rules that determine who can create works using traditional designs, replicate them, revise them or display them. They also have rules governing the transfer and delegation of these rights, as well as a dispute resolution mechanism that provides recourse when rights are violated. The holders of rights to use traditional designs may be individuals, families, or entire communities. For these purposes, the scope covered by traditional design includes clothing, hair ornaments, moccasins, baskets, tents, etc. Failure to abide by the rules when using these designs constitutes a violation of customary law. With the exception of a limited number of sacred totems, the Kainai do not object to the commercialization of traditional designs, as long as such commercialization is undertaken in accordance with their rules.” (2010: 53-54)


In this paper it is stated that “(...) to determine the effectiveness of Affiliation Agreements that have been included with proposals to ISSP between 2006 and 2008 from Aboriginal controlled institutes/First Nations communities in partnership with public post-secondary institutions in British Columbia. The research focussed on the following issues: affiliation agreements – their structure and effectiveness, program costs covered by affiliation agreements, partnership benefits derived from affiliation agreements, ownership of intellectual property as covered by affiliation agreements” (2008:5).

Younging writes from an indigenous and Canadian background. In his article, he argues that just as indigenous territories were conceptualised as Terra Nullius during colonization so has TK been rendered as Gnaritas Nullius (Nobody’s Knowledge) by the IPR system. Telling case studies include the Snumeymuxw people’s ancient petroglyphs, (the trademark case) the Igloolik Floe Edge Boat Case (patent case study), The Cameron Case (copyright case study), the latter two also being discussed in great length in Younging’s doctoral dissertation (2006).

Younging, G. 2006. Intellectual Property Rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge. (Doctoral Dissertation)

Younging’s dissertation examines how Indigenous Intellectual Property (IP) and Traditional Knowledge (TK) should be morally, legislatively and legally treated and what mechanisms are required to protect it. The paper argues that existing protective measures such as trademark, copyright, patent, trade secrets, commercial law, etc., do not provide appropriate protection for Indigenous Intellectual property and TK. Chapter five, case studies in the IPR and TK interface, deals specifically with examples of how TK has been misappropriated and protected or unprotected under copyright, patents and trademarks. Under the section on copyright cases, the author contrasts two cases where stories of Indigenous peoples were published in children’s books. The fist case - the Cameron Case - denotes how an author overtly appropriated and copyrighted Indigenous stories while the second one describes how an Indigenous publisher attempted to adopt aspects of Customary Law into the publishing process. The author explains that in the Cameron Case, children’s books based on Westcoast Indigenous traditional stories were published by Euro-Canadian author Anne Cameron through Harbour Publishing. Cameron learnt the traditional stories through Indigenous storytellers. The original printing granted Anne Cameron sole authorship, copyright and royalty beneficiary, but did not credit the Indigenous origins of the stories. In the 1990s, Cameron’s books came under severe Indigenous criticism; not only in regards to cultural appropriation, but the Indigenous TK holders asserted that some of the stories and were incorrect. A major confrontation between the parties arose. Cameron agreed not to publish any more Indigenous stories in the series. However, she did not keep her word and the books continued to be reprinted and published. Some minor concessions have been made in subsequent reprints of books in the series and new additions. Reprints of the books that were produced after around 1993/94 contained a disclaimer while Cameron continued to maintain sole author credit, copyright and royalties. In a further concession, the 1998 new addition to the series T’aal: the One Who Takes Bad Children is co-authored by Anne Cameron and the
Indigenous Elder/storyteller Sue Pielle who also shares copyright and royalties. The second case The Kou-skelowh Case, denotes an innovative use of the system based on the good will of a publisher to respect TK protocols. The Kou-skelowh Series, published by Theytus Books consists of traditional Okanagan stories that were translated into English. Crucial in this case is how its development aimed at incorporating Indigenous cultural protocols into the publishing process. Firstly, in the early 1980s, on behalf of Theytus, Okanagan author Jeannette Armstrong approached the Okanagan Elders Council and asked if some traditional legends could be used in the project. Elders gave permission for three legends to be used and Armstrong translated the legends into English. English versions were then taken back to the Elders Council for examination and were edited sufficiently. The Elders Council was then asked if Theytus Books could have permission to publish the stories for the book trade. Theytus was granted permission on the grounds that several conditions were met, including that no individual would claim ownership of the legends or profit from the sales. Then, the Elders Council was also asked to provide a name for the series: Kou-skelowh, means “we are the people.” The series is authorless and each book holds the caption “An Okanagan Legend.” The series is also copyrighted to the Okanagan Tribal Council – as the Okanagan Elders Council is not an incorporated entity. (p. 52-54). Furthermore, the author explains the ‘Igloolik Floe Edge Boat Case’ as a prime example of the failure of the Patent Act to help protect Inuit designs (p.57). Trademark cases, here, include the Snumeymuxw case on the ancient petroglyphs which are now protected as trademark from all non-Snumeymuxw uses (p.59) and the Aveda case of the cosmetic products trademarked under the name “Indigenous” which led to international opposition by indigenous lobbyists (Americas, Australia and New Zealand) and the dropping of the term. As in the Cameron case, the cancelling was the result of a concession by the rights holder as based on a moral appeal by the Indigenous lobbyists.
Start studying Aboriginal Property Concepts. Learn vocabulary, terms and more with flashcards, games and other study tools. A role of language shapes indigenous law, there are alive words for things like rocks, accountability to the natural world (not exploitive like Western culture). Intellectual Property Law do not protect indigenous traditions because of the values of novelty, private ownership, exclusivity etc. indigenous people want protections over traditional knowledge, but it is not new, and is often not written down or registered in the correct way for protection; the Canadian law does not favour protection. tradition of carrying out Aboriginal-related economic research, raising awareness about Aboriginal peoples, businesses and communities. This report represents our third in the series of articles on Aboriginal social and economic issues. In this report we attempt to put to bed ten myths surrounding Canada’s Aboriginal population. The myths were chosen on the basis of misconceptions we encountered while carrying out the research on our previous reports. We also sought insight from organizations like the Canadian Council for Aboriginal Business (CCAB) which have community and business reach. The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles. The Protection of Traditional Knowledge: Revised Objectives and Principles. Genetic Resources: Revised List of Options. Traditional cultural expressions. However, the draft materials are prepared in the understanding that for many communities these are closely related, even integral, aspects of respect for and protection of their cultural and intellectual heritage. The two sets of draft provisions are therefore complementary and closely coordinated. Taken together, they do form a holistic approach to protection. This reflects existing practice at the international and national levels. Some jurisdictions protect both TCEs and TK in a single instrument. Discussions of Aboriginal traditional knowledge (TK) often emphasize differences between TK and Western science in terms of fundamental intellectual orientation, methodology, and substantive findings. Some observers, however, suggest that the two scientific paradigms need not necessarily be in conflict and indeed, with good will and open-mindedness, can complement one another. In the context of wildlife management and environmental protection the central missions of most land-claim boards’ Aboriginal principles and values are frequently understood in terms of traditional knowledge (TK), though in practice, this typically means traditional ecological knowledge (TEK), a narrower concept.