

Vézina, Brigitte

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CIGI Papers No. 243 – May 2020

Ensuring Respect for Indigenous Cultures

A Moral Rights Approach

Brigitte Vézina



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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
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About the Author

Brigitte Vézina is a CIGI fellow whose work analyzes the key challenges within ongoing efforts to develop an international system of protection for traditional cultural expressions (TCEs). Her research aims to present ways of protecting TCEs on both the domestic and international levels. She is currently open policy manager at Creative Commons, where she drives policy and advocacy work primarily in the field of copyright. She is also an international law consultant at Brigitte Vézina — Law & Culture, where she advises clients on legal and policy issues related to copyright and cultural heritage. From 2006 to 2016, Brigitte worked at the World Intellectual Property Organization in Geneva, Switzerland, as a legal officer in the Traditional Knowledge Division, dealing with intellectual property (IP) issues related to TCEs. Brigitte also worked in the Cultural Enterprise and Copyright Section at the United Nations Educational, Scientific and Cultural Organization in Paris, France, and with the Montreal-based IP law firm, ROBIC. Brigitte holds an LL.B. from the University of Montreal (2002) and an LL.M. from Georgetown University (2005, with distinction). She has been a member of the Quebec Bar since 2003.

Acronyms and Abbreviations

ARIPO	African Regional Intellectual Property Organization
ICMR	Indigenous Communal Moral Rights Bill
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	intellectual property
TCE	traditional cultural expression
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
VARA	Visual Artists Rights Act
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Introduction

Can a group of women perform the *haka Ka Mate* — a traditional cultural expression (TCE) of the Māori intended exclusively for men to perform — in a television advertisement to sell Italian cars?¹ Back in 2006, the response from the Māori was an incensed “no.” At that time, the Italian car maker Fiat had aired an advertisement in which a horde of black-clad mothers performed a disparaging rendition of the *haka Ka Mate*.² Fiat had not sought permission from anyone to do so, had not acknowledged the source as Māori culture and had made no financial compensation to the Māori people. The New Zealand government stepped in to request Fiat to either have the *haka* in the commercial performed by a Māori group or for the actresses to perform a *haka* composed for women.³ The Italian company declined both options and continued airing its advertisement; the matter eventually fizzled out.

A few years before the Fiat case, in the context of the 2000 Summer Olympic Games held in Sydney, Australia, the International Olympic Museum, located in Lausanne, Switzerland, organized an exhibition entitled *Aboriginal Art: An Immemorial Fountain of Youth*. Without seeking permission from the artists, the museum posted on its website three artworks, which visitors could download as computer screen wallpapers.⁴ For the artists, such alterations of their artworks were offensive, as the artworks had deep cultural meaning related to sacred knowledge about their land. The artists took issue with the museum and raised concerns about copyright infringement, including moral rights violation. Negotiations ensued and the parties settled; the artwork copies

were removed from the website, the artists were paid damages for the infringement and they received a letter of apology signed by Juan Antonio Samaranch, president of the Olympic Museum Foundation, acknowledging the copyright infringement and apologizing for cultural harm.⁵

What can explain such diametrically opposed outcomes in relatively similar situations? In both cases, the matter was about the culturally insensitive, inappropriate, disparaging, offensive and disrespectful use of cultural creations of Indigenous peoples, which are generally referred to as TCEs. The answer hinges on one major factor: the recognition of copyright in TCEs. In the Olympic Museum case, the Aboriginal artists, as authors of their artistic works, were able to rely on copyright law and bring a claim for infringement; in the *haka* case, the Māori had no legal ground to stand on, since the *haka Ka Mate* fell outside the scope of copyright protection.

These two cases are far from exceptional. Indigenous peoples the world over have for decades decried the use of their TCEs without any form of care, respect or acknowledgement. For instance, considering solely the *haka*, one can uncover a plethora of cases of misuse: a mock performance by gingerbread men was featured in New Zealand’s Bakery of the Year Awards;⁶ the Dutch brewer Heineken encouraged shoppers to perform “their” *haka*;⁷ an American high-school rugby team performed it in the Hollywood movie *Forever Strong*;⁸ in Japan, rival groups of men and women performed it in a television commercial for a soft

1 Haka is a form of TCE of the Māori, the Indigenous peoples of New Zealand, encompassing chant, dance and performance. Specifically, the *haka Ka Mate* was made famous through its performance by the national rugby team, known as the All Blacks, and is now globally well known. *Ka Mate* was composed by Te Rauparaha, a chieftain of the tribal group Ngāti Toa iwi, who died in 1849. It is viewed by the Ngāti Toa as a *taonga* (treasure) and Te Rauparaha’s descendants consider themselves the *kaitiaki* (guardians) of *Ka Mate*. For more information, see Susy Frankel, “‘Ka Mate Ka Mate’ and the Protection of Traditional Knowledge” (2014) Victoria University of Wellington Legal Research Paper No 5/2014.

2 The advertisement can be viewed on YouTube. See Haka International, “Best of the Worst Haka Commercials – Italian Fiat” (5 September 2012), online (video): YouTube <<https://youtu.be/ORK5qflePGM>>.

3 Frankel, *supra* note 1 at 20.

4 The artworks were *Bush Flowers* by Mary Kemarre, *Tiddal in the Great Sandy Desert* by Richard Tax Tjupurulla and *Kulkun near Lake Mackay in the Great Sandy Desert* by Tjampitjin.

5 For more on this case, see Australia Council for the Arts, *Protocols for producing Indigenous Australian media arts* (Australia Council, 2007), online: <www.australiacouncil.gov.au/workspace/uploads/files/media-protocols-for-indigenous-5b4bfd105bfa3.pdf>; Antony Balmain, “Black artists sue IOC over copyright – Artists’ Olympian struggle to get justice for brushstrokes”, *The Age* (19 June 2001); “Case Study: Olympic Museum Website” (22 October 2013), online (blog): *Indigeridon’t* <<http://indigeridon.t.blogspot.com/2013/10/case-study-olympic-museum-website.html>>.

6 “Gingerbread haka causes upset”, *Stuff* (31 January 2009), online: <www.stuff.co.nz/national/14479/Gingerbread-haka-causes-upset>.

7 Teparo Koti, “Haka Energy drink company apologises to Māori”, *Māori News* (9 May 2017), online: <<https://teaomaori.news/haka-energy-drink-company-apologises-maori>>.

8 The movie clip is available on YouTube. See MrMixerOne, “Forever Strong – Haka Maori (Ka Mate)”, online (video): YouTube <<https://youtu.be/BETjxeTK-zQ>>; see also “Hollywood highjacks haka”, *Stuff* (31 January 2009), online: <www.stuff.co.nz/entertainment/701595/Hollywood-hijacks-haka>.

drink by the Coca-Cola Company;⁹ and a haka was performed to the music of the song “Macarena” to parody the All Blacks, New Zealand’s national rugby team.¹⁰ More broadly, those taking a peek into the world of fashion and design will discover countless occurrences of Indigenous traditional patterns and styles being used in disrespectful ways on clothing, accessories and home decor items.¹¹ These examples are the tip of the iceberg.

The surge in instances of misuse of TCEs around the globe can be explained by their increasing accessibility, not least due to the technological advancements that brought us digitization, the internet and a hyper-interconnected world.¹² Such misuses not only wield an economic blow; they also undermine TCEs’ traditional significance, and divest their bearers of their identity, distort and damage their culture, critically sap their personhood and strip them of their dignity.¹³ On account of the marginalization that has afflicted Indigenous peoples for centuries in the wake of colonization and the deep offence they have experienced as a result of cultural theft, addressing their grievances is pressing. As Dale Campbell, a woodcarver from the Wolf clan of the Tahltan Nation, living in British Columbia, Canada, puts it: “Our artwork is one of the last things that

[Indigenous peoples] have left and then to hear that there’s people out there abusing it — it’s wrong.”¹⁴

The key to righting this wrong lies in a form of intellectual property (IP) protection for TCEs that is focused on acknowledgement, respect and integrity — the tenets of copyright’s moral rights.¹⁵ Because TCEs, as forms in which creativity is expressed, share so many characteristics with copyright works, one is tempted to look at what the extant copyright system provides in terms of moral rights protection. However, attempts to apply copyright law to TCEs generally fail, due to a conceptual divide between Western and Indigenous notions of cultural creativity.¹⁶

To overcome copyright’s shortcomings in preventing disrespectful uses of TCEs, this paper argues for the adoption of a *sui generis* model of protection based on the precepts of copyright’s moral rights and geared toward preserving the honour and reputation of Indigenous peoples, maintaining the integrity of their culture and ensuring proper attribution when their TCEs are used by others.¹⁷ The proposed model of protection comes within the scope of the work carried out by the World Intellectual Property Organization (WIPO), the UN agency in charge of IP matters. Since 2001, WIPO member states have been discussing the establishment of an international *sui generis* form of protection for TCEs, but to date, no legal instrument has been adopted.

9 The advertisement can be viewed on YouTube. See Haka International, “Coca Cola Haka Namie Amuro Commercial”, online (video): YouTube <<https://youtu.be/AOJJOW7eokU>>; see also Kelly Burns, “Japanese Coke haka has Rugby Union fizzing”, *Stuff* (3 February 2010), online: <www.stuff.co.nz/sport/rugby/3357486/Japanese-Coke-haka-has-Rugby-Union-fizzing>.

10 Oliver Brown, “New Zealand furious with Matt Dawson video mocking the haka”, *The Telegraph* (16 September 16), online: <www.telegraph.co.uk/sport/rugbyunion/international/newzealand/11870268/New-Zealand-furious-with-Matt-Dawson-video-mocking-the-haka.html>.

11 For more examples of cultural appropriation cases in fashion, see Brigitte Vézina, “Curbing Cultural Appropriation in the Fashion Industry” CIGI, CIGI Papers No 213, 3 April 2019 [Vézina, “Curbing Cultural Appropriation”], online: <www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry>; Brigitte Vézina, “Curbing cultural appropriation in the fashion industry with intellectual property”, *WIPO Magazine* (August 2019), online <www.wipo.int/wipo_magazine/en/2019/04/article_0002.html>.

12 Michael F Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003) at 6.

13 Madhavi Sunder, “Intellectual Property and Identity Politics: Playing with Fire” (2000) 4:1 *J Gender, Race & Justice* 69 at 73; Dalindyebo Bafana Shabalala, “Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes” (2017) 51:4 *Akron L Rev* 1125 at 1148; Kay Mathiesen, “A Defense of Native Americans’ Rights over Their Traditional Cultural Expressions” (Fall/Winter 2012) 75:2 *American Archivist* 456 at 472; Victoria F Phillips, “Beyond Trademark: The Washington Redskins Case and the Search for Dignity” (2018) 92 *Chicago-Kent L Rev* 1061.

14 As reported in Rachel Emmanuel, “Registry aims to help Indigenous artists protect their work”, *The Globe and Mail* (30 August 2019), online: <www.theglobeandmail.com/politics/article-registry-aims-to-help-indigenous-artists-protect-their-work/>.

15 On moral rights protection for TCEs, see Kamal Puri, “Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action” (1995) 9 *IPJ* 293 at 332–34 [Puri, “Cultural Ownership”]; Kamal Puri, “Preservation and Conservation of Expressions of Folklore” (1998) 32:4 *Copyright Bull* 5 at 23; Christine Haight Farley, “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” (1997) 30:1 *Conn L Rev* 1 at 48; Cathryn A Berryman, “Toward More Universal Protection of Intangible Cultural Property” (1994) 1:2 *J Intell Prop L* 293 at 333.

16 For an analysis of IP law’s failure to efficiently protect TCEs, see WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO/GRTKF/IC/37/7 (2018) [WIPO, *Protection of TCEs*], online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365>; see also David B Jordan, “Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?” (2000–2001) 25:1 *Am Indian L Rev* 93 at 94.

17 While the paper aims to bring clarity on the scope and characteristics of moral rights, the author does not take any position on whether these should be the only rights (excluding economic rights), nor does the author presuppose any hierarchy between economic and moral rights for the protection of TCEs.

This paper is structured according to the following outline: First, it succinctly describes TCEs. Second, it offers a primer on moral rights. Third, it shows how moral rights have the potential to respond to many of the concerns of TCE holders. Fourth, it critically exposes the inadequacy of extant moral rights regimes to protect TCEs. Fifth, it points to national initiatives for moral rights protection of TCEs. Lastly, it recommends a model for an international legal instrument inspired by moral rights, but adapted to the characteristics of TCEs and aimed at responding to the wishes and aspirations of their guardians.

TCEs: Meaning and Significance

WIPO describes TCEs (or “expressions of folklore”) as the forms in which traditional cultures are expressed or manifested.¹⁸ Passed down from generation to generation, TCEs form part of a community’s heritage and are deeply linked to the community that holds them. Examples include music, dance, art, designs, names, signs and symbols, performances, ceremonies, handicrafts and narratives (such as lore, legends or tales), and many other artistic or cultural expressions.

TCEs are part and parcel of the social identities of their holders.¹⁹ In relation to outsiders, TCEs shape the collective identity of the group; within a community, they communicate the members’ rank and responsibilities and indicate kinship relations. For the Maasai, an Indigenous people living in Kenya and Tanzania, the combination of colours in jewellery and clothes denotes the status of a member.²⁰ For the Sámi, an Indigenous people living in northern Europe, customs dictate how

to place the ribbons on a traditional dress called a *gákti*, each of them having a particular meaning.²¹

TCEs are often not intended for commercialization but are instead used as a tool to preserve and pass down a group’s living culture and traditions, in a context and through processes in accordance with their customary and traditional usage, religion and creed.²² For instance, according to Navajo beliefs, telling winter stories between April and September is not allowed, as it could result in grave consequences, such as crop failures and increased illness.²³ TCEs are therefore the *sine qua non* of an Indigenous culture’s survival.²⁴

In the face of dire threats to their fragile identity and cultural vitality caused by misappropriation and misuse of their TCEs, Indigenous peoples need to have better control over their TCEs, to ensure any uses are respectful and according to their wishes.²⁵

Moral Rights: Copyright’s Poor Relation

Although they may share similar underpinnings, copyright’s moral rights are different from other areas of the law concerned with morality, morals, moral standards or decency. Under most copyright regimes, moral rights are one of two categories of rights that are typically afforded to authors, along with economic rights. On the one hand, economic rights are designed to provide authors with a financial incentive and reward to invest time, resources and creative input in producing works. They mainly provide

18 For a more detailed description, see WIPO, “Traditional Cultural Expressions”, online: <www.wipo.int/tk/en/folklore/>.

19 Kristen A Carpenter, Sonia K Katyal & Angela R Riley, “In Defense of Property” (2008) 118 Yale LJ 1022 at 1028.

20 Elizabeth M Lenjo, “Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry” (2017) 21:2 Marq Intell Prop L Rev 139 at 146.

21 Britt Kramvig & Anne Britt Flemmen, “Turbulent indigenous objects: Controversies around cultural appropriation and recognition of difference” (2019) 24:1 J Material Culture 64 at 70–71.

22 Molly Torsen, “‘Anonymous, Untitled, Mixed Media’: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions” (2006) 54:1 Am J Comp L 173 at 182.

23 Roberta Rosenberg, “Being There: The Importance of a Field Experience in Teaching Native American Literature” (Summer 2000) 12:2 Studies in American Indian Literatures 38 at 52–53.

24 Amina Para Matlon, “Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the *Bulun Bulun* Equity to Navajo Sandpainting” (2004) 27 Colum J L & Arts 211 at 220.

25 Rebecca A Tsosie, “Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights” (2002) 34 Ariz St LJ 299 at 310.

an author the legal means to control whether their work may or may not be used, and under which conditions. Economic rights ensure that creators can earn a living from their work. Basic economic rights include, among others, the rights of reproduction, adaptation, display, public performance and communication to the public.

On the other hand, moral rights generally protect an author's personality (or personhood) as part of their natural, inherent rights.²⁶ Considered personal to an author, moral rights' function is to safeguard their non-economic interests, such as to protect their spirit as expressed and intertwined in their work.²⁷ They are based on the notion of the "inalienable artistic worth that exists within a creation, regardless of its economic value."²⁸ Just like economic rights, moral rights can serve to incentivize creation by guaranteeing "moral autonomy" to an author.²⁹ In some legal traditions, moral rights are considered the essence of copyright.³⁰

Moral rights are generally treated as distinct from and independent of authors' economic rights, even though the two are interrelated.³¹ In practice, an author may thus assign their economic rights while retaining their moral rights in a work. Likewise, it is possible for an act to infringe moral rights but not economic rights, and vice versa. Importantly, scholars have argued, and courts in several jurisdictions have established, that moral rights are not a backdoor into economic

rights.³² As such, an author may not rely on their moral rights to prevent others from carrying out acts within the remit of economic rights.

In the international arena, debates revolve almost exclusively around economic rights.³³ In countries of common law tradition, moral rights are given relatively little to no consideration. In contrast, they are broadly recognized and permeate much of the copyright discourse in countries of civil law tradition, whence they originate.

Looking at their origins, moral rights have a long history, going back to ancient Rome before being picked up again during the Renaissance and the Reformation and truly celebrated in Enlightened Germany and Revolutionary France, with French copyright law having the oldest and strongest tradition of moral rights law.³⁴ By the turn of the twentieth century, moral rights were firmly implanted in many European countries.

Nowadays, the international mandatory standard for moral rights is set by article 6bis of the Berne Convention for the Protection of Literary and Artistic Works.³⁵ Adopted in 1928, article 6bis requires Berne parties to grant authors two types

26 Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26:1 J Leg Stud 95 at 109.

27 Amy Skelton, "VARA's Orphans: How Indigenous Artists Can Still Look for Hope in the Moral Rights Regime" (2013) 1:1 Indiana J L & Social Equality 260.

28 Erin Mackay, "Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach" (2009) 32 UNSWLJ 1 at 8.

29 Stephanie Spangler, "When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law" (2009–2010) 27 Cardozo Arts & Ent LJ 709 at 717.

30 Henri Desbois, *Le droit d'auteur en France*, 3rd ed (Paris: Dalloz, 1978). See also Pierre-Yves Gautier, *Propriété littéraire et artistique*, 7th ed (Paris: Presses Universitaires France, 2010); Christophe Caron, *Droit d'auteur et droits voisins*, 5th ed (Paris, LexisNexis: 2017); Carine Bernault, André Lucas & Agnès Lucas-Schloetter, *Traité de la propriété littéraire et artistique*, 5th ed (Paris, LexisNexis, 2017).

31 Those interested in the monist and dualistic approaches to moral rights may refer to Michel M Walter, "Dualistic aspects in monistic systems of moral rights" (2019) 14:4 J Intellectual Property L & Practice 318.

32 See e.g. in France: Christophe Caron, "Le droit moral de la personne morale" (June 2012) 6 Communication Commerce Électronique; in Canada: *Théberge v Galerie d'Art du Petit Champlain Inc*, [2002] 2 SCR 336, 2002 SCC 34 at para 74, Binnie J.

33 As an illustration, refer to the agenda of the WIPO Standing Committee on Copyright and Related Rights over the past decade: WIPO, "Standing Committee on Copyright and Related Rights (SCCR)", online: <www.wipo.int/policy/en/sccr/>.

34 France started to recognize moral rights in the nineteenth century; a court decision from 1814 recognized the principle of the right of integrity: *Trib. civ. Seine*, 17 August 1814, in Augustin Charles Renouard, *Traité des Droits d'Auteurs Dans La Littérature, Les Sciences et Les Beaux-Arts*, vol 2 (Paris: J Renouard et Cie, 1838–1839) at 332–33. See also Nicolas Binclin, "Le droit moral en France" (2013) 25:1 Les Cahiers de Propriété Intellectuelle 303 at 306. For an overview of moral rights in Germany, see Aaron D White, "The Copyright Tree: Using German Moral Rights as the Roots for Enhanced Authorship Protection in the United States" (2009–2010) 9 Loy L & Tech Ann 30. For more information on the history of moral rights, see Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993); Katharina de la Durantaye, "The Origins of the Protection of Literary Authorship in Ancient Rome" (2007) 25 BU ILJ 37 at 68–76; Sam Ricketson & Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed (New York, Oxford University Press, 2006) at 587–89; Susan P Liemer, "How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright" (2005) 5:1 John Marshall Rev Intellectual Property L.

35 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 1161 UNTS 3, Can TS 1998 No 18 (Paris Act of 24 July 1971 as amended on 28 September 1979) [Berne Convention], online: <www.wipo.int/treaties/en/text.jsp?file_id=283698>. The WIPO Copyright Treaty incorporates article 6bis.

of moral rights: the right to claim authorship of a work (right of attribution) and the right to object to any distortion or modification or other derogatory action in relation to a work that would be prejudicial to the author's honour or reputation (right of integrity). While the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property of 1994 largely incorporates the provisions of the Berne Convention, it does so with one explicit exception: article 6bis.³⁶ As a result, the coercive nature of the agreement and the trade sanctions imposed through the WTO dispute settlement mechanism are not available to compel WTO member countries to recognize moral rights.

Moral rights are granted not only to authors but also to performers. The 1996 WIPO Performances and Phonograms Treaty³⁷ and the 2012 Beijing Treaty on Audiovisual Performances³⁸ both include the moral rights of attribution and integrity, which, importantly, apply to performances of expressions of folklore (a synonym of TCEs).³⁹

Nationally, countries handle moral rights in various ways. In 1931, Canada was the first country of common law tradition to legislate on moral rights.⁴⁰ Much later, when the United States joined the Berne Union in 1989, it relied on various provisions of state and federal law rather than enacting a specific moral rights statute in its Copyright Act.⁴¹ The Visual Artists Rights Act, passed by the US Congress in 1990, expressly provides moral rights for works of visual arts; however, protection is

incomplete in several respects.⁴² Moral rights became part of New Zealand copyright law in 1994,⁴³ while Australia only incorporated moral rights into its legislation for authors in 2000 and for performers in 2007.⁴⁴ Several African countries that had been colonized by France implemented similar moral rights regimes in the 2000s.⁴⁵

Overall, moral rights include four main types of rights:

- the right of attribution (or paternity), where the author has the right to claim authorship and to be recognized as the author of a work;
- the right of integrity (or respect), where the author can prevent modifications of their work and object to derogatory treatment;
- the right of disclosure (or publication), where the author alone may decide whether, when and how their work may be published or made available to the public; and
- the right of withdrawal (or retraction or renunciation), where the author can take back their work and prevent any further reproduction, distribution or representation.

All four rights were proposed for inclusion in the 1928 revision of the Berne Convention, but the last two were dropped due to lack of agreement.

The Right of Attribution: Give Credit Where Credit Is Due

Also called the right of paternity, the right of attribution is the right to claim authorship and to be correctly identified as the author of a work. Stated otherwise, an author has the right to be named as the author and to insist that their name is associated with their work. The author

36 *Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 869 UNTS 299, 33 ILM 81, Annex IC, art 9(1).

37 *WIPO Performances and Phonograms Treaty*, 20 December 1996, Can TS 2014 No 21, 36 ILM 76 art 5, online: <www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578>.

38 *Beijing Treaty on Audiovisual Performances*, 24 June 2012, 51 ILM 1214 art 5 (entered into force 28 April 2020), online: <www.wipo.int/wipolex/en/details.jsp?id=12213>.

39 For a commentary on the application of the rights of performers of expressions of folklore in the *Return to Innocence* case, see Brigitte Vézina, "Cultural Institutions and the Documentation of Indigenous Cultural Heritage: Intellectual Property Issues" in Camille Callison, Lorie Roy & Gretchen Alice Lecheminant, eds, *Indigenous Notions of Ownership and Libraries, Archives and Museums* (Berlin: De Gruyter Saur, 2016) at 89–90 [Vézina, "Cultural Institutions"].

40 *Copyright Act*, SC 1921, c 24, s 1, art 12(5), amended by the *Copyright Amendment Act 1931* (UK), 21 & 22 Geo 5, c 8.

41 *Berne Convention Implementation Act of 1988*, Pub L 100-568, 102 Stat 2853.

42 US Copyright Office, Library of Congress, "Study on the Moral Rights of Attribution and Integrity", *Federal Register* (23 January 2017) [US Copyright Office, "Study on Moral Rights"], online <www.federalregister.gov/documents/2017/01/23/2017-01294/study-on-the-moral-rights-of-attribution-and-integrity>.

43 *Copyright Act 1994* (NZ), 1989/143, Part 4, ss 94–110.

44 *Copyright Act 1968* (Austl), Part IX, ss 189–195AZR.

45 Mathilde Pavis & Andrea Wallace, "Response to the 2018 Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials" (25 March 2019) at 5, online: <<https://ore.exeter.ac.uk/repository/bitstream/handle/10871/36770/RESPONSE%20TO%20THE%202018%20SARR-SAVOY%20REPORT%20ZENODO.pdf?sequence=1&isAllowed=y>>.

has the right to be acknowledged as the author, following the adage to render unto Caesar the things that are Caesar's. Practically, an author has the right to insist that their signature appears on their drawing, that their name appears in the end credits of a film, or that their name features next to their text (such as a poem or magazine article) or a citation or quote from that text.

In some countries, such as New Zealand and Australia, the right of attribution includes the right against false attribution.⁴⁶ In the United States, that right is phrased as the right to "prevent the use of one's name on any work the author did not create."⁴⁷ For instance, unauthorized imitations of an artist's drawings bearing a forged signature would be infringing. Canada and France do not have a separate right, but the courts may interpret the right of attribution to cover acts of false attribution.⁴⁸

Further corollaries to the right of attribution comprise the right not to have one's name associated with a work, that is, to publish anonymously or pseudonymously. For various reasons, an author might wish to self-distance from their work, to the point of wishing not to be recognized as the author. This could arise in cases of works laden with a controversial message with which the author no longer identifies.

Some national laws afford authors the right to associate, or not, with products, services, causes or institutions, and to prevent anyone from doing so.⁴⁹ As such, an author can decide how their work is used even if the author no longer owns the work. One could imagine a photographer having sold a photograph depicting the atrocities of gun violence to a gallery and seeing their photograph displayed as part of an exhibition promoting the right to bear arms, or an artwork celebrating human diversity included in an exhibition promoting racist views. The photographer could rely on their moral right to prevent the display of their works as part of these exhibitions.

The Right of Integrity: Show a Little R.E.S.P.E.C.T.

The right of integrity (or right of respect) allows the author to object to any distortion, mutilation or other modification, or derogatory action in relation to the work that would be prejudicial to their honour or reputation. The right contains two elements: a modification and a prejudice to the author's honour or reputation. Specifically, the author has the right to preserve the intended meaning of their work and to object to any addition, deletion, alteration, adaptation (including translation), destruction or other modification in relation to a work that would negatively affect their honour or reputation.⁵⁰

Real examples of violation of the right of integrity include exhibiting an artwork in a different place than was initially specified;⁵¹ deletions and mutilations of a person's memoirs in a way that gives a distorted image of the person;⁵² and dismembering a multi-part artwork into several different pieces.⁵³ A famous Canadian case involved the Toronto Eaton Centre, a large shopping mall, which had commissioned an artist to create Canada geese sculptures to decorate the atrium. The artist successfully stopped the mall from decorating his sculptures with bows, ribbons and wreaths at Christmas time.⁵⁴

Regarding the prejudice to the author's honour or reputation, countries adopt different approaches: assessment is done either from an objective standpoint (that is, objectively judged by the court and based on the perception

46 Copyright Act 1994, *supra* note 43, s 102; Copyright Act 1968, *supra* note 44, s 195AE.

47 17 USC § 106A(a)(1)(B).

48 Sabine Jacques, *The Parody Exception in Copyright Law* (New York: Oxford University Press, 2019) at 180.

49 Canada is one example. Copyright Act, RSC, 1985, c C-42, ss 14.1, 17.1.

50 For an example of legal protection in case of destruction, see the Swiss Federal Act on Copyright and Related Rights of 1992, art 15(1). In Germany, the matter was addressed in the German Federal Supreme Court's decisions of 21 February 2019 (ref.: I ZR 98/17, I ZR 99/17 and I ZR 15/18). See Jan Bernd Nordemann & Laura Leidl, "German BGH: The destruction of the work does not infringe the moral rights of the author" (19 August 2019), online (blog): *Kluwer Copyright Blog* <<http://copyrightblog.kluweriplaw.com/2019/08/19/german-bgh-the-destruction-of-the-work-does-not-infringe-the-moral-rights-of-the-author/>>. In the United States, the Visual Artists Rights Act (VARA) does not give a right to prevent complete destruction, except for works of "recognized stature"; 17 USC § 106(a)(3)(B).

51 Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003) at 37–40.

52 CA Paris, 28 July 1932, *Chaliapine*, DP 1934, 2 at 139.

53 Judgment of 6 July 1962 (*l'affaire Bernard Buffet*), CA Paris, *Recueil Dalloz* [D Jur] 570. See also John H Merryman, "The Refrigerator of Bernard Buffet" (1976) 27:5 *Hastings LJ* 1023.

54 *Snow v The Eaton Centre Ltd* (1982) 70 CPR (2d) 105.

of the author's standing by society)⁵⁵ and/or subjectively (that is, based on the view of the author, by asking their opinion).⁵⁶

The Right of Disclosure: Going Public

The right of disclosure (or right of divulgation) allows an author to decide whether a work may be disclosed or released to the public, and when and how such disclosure takes place.⁵⁷ An author can prevent third parties from disclosing their work without their consent (or under conditions that they specify).⁵⁸ Disclosure is a crucial step for authors: what was private becomes public, and what was secret is now disclosed.⁵⁹ Absent from the Berne Convention, the right is controversial; recalling the fate of Franz Kafka's unpublished manuscripts (including *The Trial*), which the author had ordered be destroyed upon his death, but which were nevertheless rescued by his executor, some scholars wonder about the damaging losses that may ensue from the application of this right.⁶⁰ This moral right of disclosure is akin to the economic right of first publication or first issuing available under common law copyright.⁶¹

55 Eugene C Lim, "On the Uneasy Interface between Economic Rights, Moral Rights and Users' Rights in Copyright Law: Can Canada Learn from the UK Experience?" (2018) 15:1 SCRIPTed 70 at 90. Section 28.2 of the Canadian Copyright Act places the onus to demonstrate prejudice on the authors, except in the case of paintings, sculptures or engravings, where a presumption applies.

56 Hansmann & Santilli, *supra* note 26 at 102.

57 Gillian Davies & Kevin Garnett, *Moral Rights* (London, UK: Sweet & Maxwell, 2010) at 6.

58 Christopher Jon Sprigman & Jeanne C Fromer, *Copyright Law: Cases and Materials* (independently published, 2019) at 322, online: <www.copyrightbook.org>.

59 Binctin, *supra* note 34 at 327.

60 Associated Press in Jerusalem, "Unseen Kafka works may soon be revealed after Kafkaesque trial", *The Guardian* (17 April 2019), online: <www.theguardian.com/books/2019/apr/17/unseen-kafka-works-may-soon-be-revealed-after-kafkaesque-trial>; Linda J Lacey, "Of Bread and Roses and Copyrights" (1989) Duke LJ 1532 at 1593–94.

61 See US Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States – A Report of the Register of Copyrights* (April 2019) ("the right of divulgation...supports the economic right of first publication" at 14) [US Copyright Office, *Authors*], online: <www.copyright.gov/policy/moralrights/full-report.pdf>. In the United Kingdom, the recognition of the right of first publication can be found in the English Parliament decree of 1642, which required publishing houses to receive consent from the authors before publishing their works; see Rose, *supra* note 34 at 20–22.

The Right of Withdrawal: Taking It Back

Not recognized in the Berne Convention, the right of withdrawal is rarely invoked (even in France⁶²). It empowers authors to withdraw (remove or retract) works from the market, even in violation of their contractual commitments.⁶³ For example, an author might wish to take back all commercially available copies of a previously published pamphlet that conveys ideas that the author no longer wishes to communicate. Certain conditions must be satisfied, such as the payment of appropriate financial compensation to third parties.

Moral Rights: Echoing the Concerns of TCE Holders

Over and above economic injustices, TCE holders often emphasize cultural, spiritual and social grievances.⁶⁴ Beyond achieving mere economic safeguards, they seek to protect the holistic essence of their TCEs and to alleviate the moral harm caused by misuse. As seen in the brief overview above, moral rights present several features that make them particularly apt as responses to some of those concerns vis-à-vis disrespectful, disparaging and inconsiderate uses of TCEs.

62 Binctin, *supra* note 34 at 337.

63 Sprigman & Fromer, *supra* note 58 at 322.

64 Robert K Paterson & Dennis S Karjala, "Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples" (2003) 11 Cardozo J Int'l & Comp L 633 at 658; Enyinna Nwauche, *The Protection of Traditional Cultural Expressions in Africa* (Cham, Switzerland: Springer, 2017) at 208 [Nwauche, *Protection of Traditional Cultural Expressions*]; Chidi Oguamanam, "WIPO IGC 39: Unraveling the Tiered Approach to TK/TCEs", ABS Canada (23 March 2019) [Oguamanam, "WIPO IGC 39"], online: <www.abs-canada.org/events/wipo-igc-39-unraveling-the-tiered-approach-to-tk-tces/>; Molly Torsen & Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO, 2010). For example, speaking about the haka Ka Mate settlement in 2009, John Key, New Zealand's prime minister, said the issue was about cultural redress and was not financial. See Ellen Connolly, "Maori win battle to control All Blacks' haka ritual", *The Guardian* (12 February 2009), online: <www.theguardian.com/world/2009/feb/12/new-zealand-haka-maoris>; Claire Trevett, "Haka deal 'is cultural, not financial'", *NZ Herald* (12 February 2009), online: <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10556330>.

Acknowledgement and Recognition

Many TCE holders express the need to be fully, properly and accurately acknowledged, recognized and named as the primary guardians and interpreters of their culture when elements thereof are used and reinterpreted by others.⁶⁵ For example, Enigma, the German new-age music group behind the hit “Return to Innocence” failed to attribute a sample of a recorded performance to its Indigenous performers, who then successfully asserted their moral rights in their performance.⁶⁶ In a similar case, the Grammy-winning world music album *Deep Forest* referred to the music of the Pygmies of the Central African rainforest, whereas its major hit “Sweet Lullaby” used a recorded performance by a woman from the Solomon Islands in the South Pacific.⁶⁷ Likewise, the lack of acknowledgement was central in the clash opposing French designer Isabel Marant to the Mixe people of Mexico regarding the copying of a *huipil*’s traditional embroideries.⁶⁸

Where a moral right of attribution can ensure appropriate recognition of an Indigenous community as the source of a TCE, similarly, the absence of recognition can alert third parties to a lack of association with the community.⁶⁹

Respectful Use

TCEs are often interwoven with cultural significance as well as spiritual or sacred meaning. They are also expressed and preserved according to traditions that may be executed

and transmitted only within fixed parameters.⁷⁰ Maintaining the overall integrity, context and holistic essence of TCEs is fundamental for the proper representation of Indigenous cultures. When TCEs are used in derogatory, offensive or fallacious ways, that meaning is diluted — indeed, lost.⁷¹ Indigenous peoples contend that using images imbued with meaning out of context, simply for their aesthetic appeal, ignores “the context of colonialism and stolen lands”⁷² and “will cause their imagery to lose its original significance which will lead to a dissolution of their culture.”⁷³

For example, the advertising campaign for a perfume named “Sauvage” (meaning “wild” in English) by the French luxury house Dior included a short film that was decried for “racism, tokenism and fetishizing indigenous American culture”⁷⁴ and for “calcifi[ying] dangerous colonial tropes.”⁷⁵ The film triggered worldwide outrage and caused Dior to swiftly remove the offensive video.⁷⁶ The case of the Olympic Museum mentioned in the introduction also shows how the trivialization of symbolic pieces of art into electronic wallpapers can scathe an artist and their community’s honour and reputation.

The right of integrity is particularly relevant in the context of digitization of TCEs. Creating thumbnail

65 IP Australia, *Protection of Indigenous Knowledge in the Intellectual Property System – Consultation Report*, (Australian Government, 2019) at 5, online: <www.ipaustralia.gov.au/sites/default/files/reports_publications/indigenous_knowledge_consultation_report.pdf>; Terri Janke and Company, Lawyers & Consultants, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (1999), online: <www.terrijanke.com.au/our-culture-our-future>.

66 For a discussion of the *Return to Innocence* case, see Vézina, “Cultural Institutions”, *supra* note 39.

67 For details on the *Deep Forest* case, see Brigitte Vézina, “Are they in or are they out? Traditional cultural expressions and the public domain: implications for trade” in Christophe B Graber, Karolina Kuprecht & Jessica C Lai, eds, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Cheltenham, UK: Edward Elgar, 2012) 196 at 197 [Vézina, “Are they in?”].

68 Vézina, “Curbing Cultural Appropriation”, *supra* note 11 at 7, 12.

69 Peter K Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) 81 Temp L Rev 433 at 461. See also Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (New Brunswick, NJ: Rutgers University Press, 2005) at 66.

70 Nancy Kremers, “Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?” (2004) 15:1 Fordham Intell Prop Media & Ent LJ 1 at 13.

71 Terri Janke and Company, Lawyers & Consultants, *supra* note 65.

72 Jill Sanford & Len Necefer, “Op-Ed: Stop Buying ‘Native Inspired’ Designs”, *Outside Online* (25 July 2018), online: <www.outsideonline.com/2328411/stop-buying-native-inspired-designs>.

73 Haight Farley, *supra* note 15 at 15.

74 Rachel Graham, “Johnny Depp & Dior Silent Amid ‘Racist Advert’ Claims”, *euronews* (2 September 2019), online: <www.euronews.com/living/2019/09/02/johnny-depp-dior-silent-amid-racist-advert-claims?utm_medium=Social&utm_source=Twitter#Echobox=1567436484>; see also Zukekha Nathoo, “Tone-deaf or great marketing? Controversial ads can help brands stand out”, *CBC News* (1 September 2019), online: <www.cbc.ca/news/entertainment/controversial-ads-marketing-1.5267025?_vz=medium%3Dsharebar>.

75 Joseph Pierce, “Why Dior’s Appropriation of Native Identity to Sell Perfume Miserably Backfired”, *Hyperallergic* (6 September 2019), online: <<https://hyperallergic.com/516186/why-diors-appropriation-of-native-identity-to-sell-perfume-miserably-backfired/>>.

76 Kara Nesvig, “Dior Pulls Fragrance Campaign After Cultural Appropriation Backlash”, *Teen Vogue* (3 September 2019), online: <www.teenvogue.com/story/dior-pulls-fragrance-campaign-after-cultural-appropriation-backlash?utm_source=twitter&utm_medium=social&utm_campaign=onsite-share&utm_brand=teen-vogue&utm_social_type=earned>.

images of TCEs or cropping, rotating, resizing or reproducing their images partially or with poor quality, as well as inappropriately placing them online, may all cause the imbedded meaning to become corrupted and may be considered as assaults on the integrity of a TCE.⁷⁷ The online platform Mukurtu, built for Indigenous digital cultural heritage, and the rights and interests management tools made available at Local Contexts are some of the initiatives aimed at providing strategies to navigate the rights and interests of Indigenous communities in their TCEs in the digital world, although their use does not win unanimous support from Indigenous peoples.⁷⁸

Where matters of cultural respect are a chief concern under customary law, the right of integrity can potentially address obligations to guard against derogatory treatment, debasement, mutilation or destruction.⁷⁹ For instance, many TCEs have not been created for the purpose of entering commerce, and their use for commercial purposes is contrary to the underlying customary rules governing their use.⁸⁰ Jamie Okuma, a Shoshone-Bannock and Luiseño artist and fashion designer based in California, eloquently expresses this sentiment: “I would never sell sacred things, or designs I shouldn’t be using.”⁸¹

Moral rights thus allow Indigenous creators to meet customary obligations in relation to the integrity and customary treatment of their works. This integrity was at stake where a sacred design was applied onto a portable toilet⁸² or copied onto a carpet on which people could trample, the latter use exemplified in *Milpurrruru v. Indofurn*

Pty Ltd.⁸³ In this case, several Aboriginal Australian artists initiated legal proceedings to prevent the importation of carpets upon which their designs had been reproduced without permission. The artists were successful with their claim for infringement of their economic rights: the court awarded substantial damages and ordered an injunction. However, the artists could not invoke a right of integrity because moral rights were not recognized in Australia at the time — they were only introduced in 2000. Had moral rights existed back then, the derogatory alteration of the artworks could have likely given rise to a claim for violation of the right of integrity.

In North America, sacred Diné (or Navajo) designs have been plastered with no respect for their traditional meaning on everything from scarves to snowboards. Realizing the deep offence that this causes, Mountain Equipment Co-op, a Canadian outdoor equipment retailer, partnered with Coast Salish lawyer and artist Shain Jackson to develop policies to avoid Indigenous-inspired designs,⁸⁴ thereby respecting the idea of a moral right of integrity in Indigenous sacred designs. Sacredness is, in fact, often invoked to justify an increased degree of protection.

Sacredness and Secrecy

Indigenous peoples often call attention to the need to maintain the secret and sacred character of some of their TCEs and to preserve their symbolic and private character.⁸⁵ According to Christine Haight Farley, “sacred TCEs are those that are related to a sacred ritual or rite often associated with a religious or spiritual ceremony.”⁸⁶ As such, some TCEs can only be accessed, even within a community, after an initiation ritual. The sacred or secret character of TCEs ties into the rights conferred in articles 11 and 12 of the 2007 United Nations Declaration on the Rights of Indigenous

77 Mackay, *supra* note 28 at 8.

78 Mukurtu, online: <<https://mukurtu.org>> (last visited 10 January 2020); Local Contexts, online: <<http://localcontexts.org>> (last visited 10 January 2020); see also Kimberly Christen, “Tribal Archives, Traditional Knowledge, and Local Contexts: Why the ‘s’ Matters” (2015) 6:1 J Western Archives.

79 Puri, “Cultural Ownership”, *supra* note 15 at 332.

80 Daniel Gervais, “Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach” (2005) Mich St L Rev 137 at 149; Paterson & Karjala, *supra* note 64 at 634.

81 Haley Lewis, “Indigenous Artists: It’s OK to Buy, Wear Indigenous Art. Just Make Sure It’s Authentic”, *Huffington Post* (28 September 2018), online: <www.huffingtonpost.ca/2018/09/28/indigenous-art-knockoffs-backlash_a_23541472/?utm_hp_ref=ca-cultural-appropriation>.

82 This occurred in the case of the Zia sun symbol. See Stephanie B Turner, “The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols” (2012) 11:2 Chicago-Kent J Intellectual Property 116, online: <<https://scholarship.kentlaw.iit.edu/ckjip/vol11/iss2/2/>>.

83 *Milpurrruru v Indofurn Pty Ltd* (1994), 30 IPR 209, 239 (von Doussa J).

84 Sanford & Necefer, *supra* note 72, as quoted in George Nicholas, “Confronting the Specter of Cultural Appropriation”, *Sapiens* (5 October 2018), online: <www.sapiens.org/culture/cultural-appropriation-halloween/>.

85 Terri Janke and Company, Lawyers & Consultants, *supra* note 65.

86 Haight Farley, *supra* note 15 at 10.

Peoples (UNDRIP)⁸⁷ related to cultural traditions and customs as well as spiritual and religious freedom.

Some sacred and secret TCEs have been diffused without their holders' consent. This happened to the sun symbol of the Pueblo of Zia people, who live in New Mexico.⁸⁸ In 1984, a sacred, private ritual was illicitly disclosed to the outside world, in spite of the community's efforts to keep it secret through strict protocols regulating visitors and photography. The ritual was required to be performed in open air to enable the participants to communicate with the Creator and tribal spirits.⁸⁹ As a result, photographs were taken from an airplane flying over the site. One photograph was printed in a local newspaper, accompanied with an offensive caption depicting the event as a "pow-wow."⁹⁰ For the community, the prime concern was to keep the ritual and all its cultural aspects private; once exposed to the public, the ritual was disturbed, misinterpreted and misrepresented.⁹¹ In 2018, Anthony Delgarito, governor of the Pueblo of Zia, said on the margins of a WIPO meeting: "Zia...want respect for the symbol and that it is not desecrated."⁹²

For the Zia sun symbol and other TCEs that are considered secret or sacred and are not meant to be shared with outsiders or those without appropriate qualifications, let alone made public outside of a customary context, the moral right of disclosure can prohibit making them public without authorization.⁹³ Likewise, the right of withdrawal might be used to recall TCEs whose holders do not wish them to be in public circulation and may be linked to the principle of restitution enshrined in article 11(2) of UNDRIP.

Intergenerational Transmission

As noted, most TCEs are not produced to be sold but are intended by virtue of customary laws to be transmitted down through the generations as a means to perpetuate a culture's practices and ensure its survival.⁹⁴ In the words of Adriana Pavón, a Mexican fashion designer and founder of Mexico Cultural y Orgullo, an initiative to support Indigenous artisans to conceptualize, produce and sell their designs: "If we have the ability to promote and continue the legacy of our 'antepasados' [ancestors] it's an important role to take to continue our tradition and continue to keep our culture alive."⁹⁵

Moral rights protection can also accommodate the need for an indefinite term of protection. Indeed, the Berne Convention requires that moral rights last at least an author's entire lifetime, which leaves three options for duration: they may be perpetual, have the same duration as economic rights, or end with the life of the author.⁹⁶ Some laws offer different terms, depending on the subject matter or type of right.⁹⁷ In France, moral rights last in perpetuity and continue to apply to works that have fallen into the public domain through expiration of the economic rights.⁹⁸ This potentially limitless protection makes moral rights particularly attractive as a way to adhere to the obligation to transmit TCEs to future generations.

87 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

88 Catherine Saez, "Indigenous Knowledge Misappropriation: The Case Of The Zia Sun Symbol Explained At WIPO", *Intellectual Property Watch* (11 December 2018), online: <www.ip-watch.org/2018/12/11/indigenous-knowledge-misappropriation-case-zia-sun-symbol-explained-wipo/>; see also Turner, *supra* note 82.

89 WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Table of Written Comments on Revised Objectives and Principles*, WIPO/GTRKF/IC/11/4(b) (2007) at 34.

90 Scafidi, *supra* note 69 at 103, 106.

91 Spangler, *supra* note 29 at 727–28.

92 Saez, *supra* note 88.

93 Spangler, *supra* note 29 at 726–27.

94 Mackay, *supra* note 28 at 6.

95 As reported in Virginia Isaad, "Designer Works with Indigenous Mexican Artisans to Combat Cultural Appropriation", *HipLatina* (11 September 2019), online: <<https://hiplatina.com/indigenous-artisans-cultural-appropriation/>>.

96 Article 6bis recommends that these moral rights extend after the author's death, at least until the economic rights expire, but allows member countries to limit their duration to the life of the author.

97 In New Zealand, for example, the rights of attribution and integrity last for the duration of the economic rights, while the right relating to false attribution expires 20 years after death. See *Copyright Act 1994*, *supra* note 43, s 106(2).

98 Mathilde Pavis, "ICH and safeguarding: uncovering the cultural heritage discourse of copyright" in Charlotte Waelde et al, eds, *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Edward Elgar, 2018) 296.

Moral Rights: Shortcomings and Drawbacks Addressing Misuse

While moral rights appear germane to addressing some of the concerns expressed by Indigenous peoples, extant regimes do not match the distinct characteristics of TCEs and fail to fully capture the relationship that links TCEs with their holders.⁹⁹ This holds true except for, notably, performers of expressions of folklore, who can exercise their moral rights to prevent unauthorized use of their name and image or modifications of their performances that would cast them in a disadvantageous light.¹⁰⁰

Are TCEs Copyright Works?

Generally, moral rights only apply to copyrighted material (including, in some jurisdictions, related rights material, such as performances). Therefore, protection is only available to the limited number of TCEs that can meet the requirements for copyright protection, in particular the originality criterion. As TCEs are, by definition, transmitted from generation to generation with a focus on their preservation, originality is not necessarily encouraged in the way that it is under Western creativity paradigms. As a result, most TCEs fail to overcome the originality threshold, however low it may be. In general, contemporary expressions based on TCEs are more likely to qualify, whereas TCEs “as such” usually do not. Even where TCEs may be considered copyrighted works, several limitations make protection tenuous. For example, in the United States, moral rights are only applicable to certain works of visual art.¹⁰¹

99 Skelton, *supra* note 27; Paterson & Karjala, *supra* note 64 at 640.

100 WIPO, *World Performances and Phonograms Treaty* (WPPT), 20 December 1996, Can TS 2014 No 21, 36 ILM 76 arts 2(a), 5, online: <www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295578>; Beijing Treaty on Audiovisual Performances, *supra* note 38, arts 2(a), 5. See also WIPO, *Understanding Copyright and Related Rights* (WIPO, 2016), online: <www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf>.

101 In the United States, VARA only applies to works of visual art. The law specifically excludes films and audiovisual works, digital media and multimedia. 17 USC § 106A.

Who Is the Author of a TCE?

Moral rights generally vest in an individual, identifiable author.¹⁰² This individualist conception is supported by article 27(2) of the Universal Declaration of Human Rights.¹⁰³ By contrast, TCEs are collectively and communally generated; most TCEs are created by “authors unknown,”¹⁰⁴ a feature that conflicts with copyright’s authorship principle.

Further, Indigenous peoples do not typically conceive of their TCEs as something that they have laboured to create; rather, they might view them as “gifts from the Creator.”¹⁰⁵ TCEs can indeed be the result of supernatural forces or appear in a dream,¹⁰⁶ such as in the case of the Wandjina paintings of the Indigenous people in the Kimberley region of Australia. Wandjina are cloud and rain spirits that allegedly create the paintings themselves;¹⁰⁷ under copyright law, it is impossible to reconcile this belief with a claim of authorship in a contemporary painting.¹⁰⁸ As a result, Indigenous artists might feel uncomfortable

102 Silke von Lewinski, “The Protection of Folklore” (2003) 11 *Cardozo J Intl & Comp L* 747 at 757. In Australia, only individuals have moral rights. See Copyright Act 1968, *supra* note 44, s 190.

103 *Universal Declaration of Human Rights*, GA Res 217a (III), UNGAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (1948); see also Elizabeth Adeney, “Australia’s experience of moral rights” (2019) 14:4 *J Intell Prop L & Prac* 312 at 312–17.

104 Angela R Riley, “Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities” (2000) 18 *Cardozo Arts & Ent LJ* 175 at 191; Maiko Sentina, Elizabeth Mason & Terri Janke, “Legal protection of Indigenous Knowledge in Australia” (2017) Supplementary Paper 1, online: <www.ipaustralia.gov.au/sites/default/files/supp_paper_1_legal_protection_in_australia_28mar2018.pdf>.

105 “Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain”, WIPO, IGC, 5th Sess (2003), online: <www.wipo.int/export/sites/www/tk/en/igc/ngo/tulaliptribes.pdf>, as quoted in Mathiesen, *supra* note 13 at 462.

106 Statement by Preston Hardison, representative of the Tulalip Tribes, as reported in WIPO, IGC, Report, 37th Sess, WIPO/GRTKF/IC/37/17 (2018) at 31, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_17.pdf>.

107 Wikipedia, “Wandjina”, online: <<https://en.wikipedia.org/wiki/Wandjina>> (last visited 10 January 2020); see also Michael Blakeney, “Protecting the Spiritual Beliefs of Indigenous Peoples: Australian Case Studies” (2013) 22:2 *Pac Rim L & Pol’y J* 391 at 398 [Blakeney, “Protecting Spiritual Beliefs”].

108 Blakeney, “Protecting Spiritual Beliefs”, *supra* note 107 at 398; see also Samuel Meredith, “Cultural Appropriation & the Lack of Legal Protection for Indigenous Australian Art” (2018), online (blog): Lutzker & Lutzker LLP <www.lutzker.com/cultural-appropriation-the-lack-of-legal-protection-for-indigenous-australian-art/>.

about identifying as the “author” of a TCE, not wanting to challenge their community’s customs.¹⁰⁹

This tension was uncloaked in the Australian copyright case of *Bulun Bulun v. R & T Textiles Pty Ltd.*¹¹⁰ Johnny Bulun Bulun (1946–2010), a painter and member of the Ganalbingu people, had been authorized by his community to paint traditional designs following a customary ritual. He had created and, according to copyright law, owned copyright in a painting entitled *Magpie Geese and Water Lilies at the Waterhole*. A third-party textile company copied the painting onto clothing fabric without permission, thereby violating the artist’s copyright. Taking into account the community’s customary law, the court held that Bulun Bulun held copyright in the artwork, not as an independent creator but as a fiduciary of the community, and that he thus owed fiduciary obligations to the community in respect to the artistic work.¹¹¹ That fiduciary duty included an obligation not to exploit the work contrary to Ganalbingu customary law. The judgment fell short of granting the community any direct copyright in the painting; however, some argue that it opened the door to the possibility of extending the notion of authorship to include communal authorship.¹¹²

Who “Owns” Indigenous Cultures?

Akin to authorship, the principle of ownership in copyright law is at odds with Indigenous artistic traditions. Indeed, TCEs are usually held for the benefit of a community as a whole, since “many Indigenous societies are not organized around individuals as such but around a clan or other extended unit.”¹¹³ There can be stringent protocols governing TCE use. An Indigenous artist may thus be regarded as the owner of a copyright in their work, from a copyright law point of view, but following the customary law

of their community, the author may not have any property entitlement to their creation. As such, while an artist may have the possibility to express their own culture in their art, the community as a whole remains the cultural owner.¹¹⁴

Another case from Australia, *Yumbulul v. Reserve Bank of Australia*,¹¹⁵ exemplifies this issue. The case arose following the issue of a commemorative bank note by the Federal Reserve Bank of Australia featuring a depiction of a sacred object called the “Morning Star Pole” created by Indigenous artist Terry Yumbulul. He created works for sale depicting traditional Aboriginal stories based on his cultural training and on the authority given by his clan to create sacred designs. Having such a sacred image on a bank note was upsetting to the whole clan, which exercised strict control over the use of its TCEs by anyone without proper training. In his claim before the court, Yumbulul called attention to his clan’s customary law and argued for a form of group copyright that would belong to the entire clan. The court, however, dismissed the suit based on its finding that Yumbulul was the sole owner of copyright in the *Morning Star Pole*, and had consented to the use by granting the Reserve Bank a licence to reproduce the image of the pole on the bank note. The court conceded that this was an unsatisfying result, but affirmed that Australian law did not recognize communal ownership of copyright.¹¹⁶

Proposals to address this concern of group ownership range from the concept of joint authorship or works of collaboration,¹¹⁷ to immediate transfer of rights from the artist to their community as a corporate entity, to the application of the doctrine of works “made for hire,” to ensure ownership vests in the

109 Terri Janke and Company, *New tracks: Indigenous knowledge and cultural expression and the Australian intellectual property system* (Rosebery, NSW: Terri Janke and Company, 2012) at 12 [Terri Janke and Company, *New tracks*].

110 *Bulun Bulun* [1998], 86 FCR 244.

111 Skelton, *supra* note 27.

112 Jane Anderson, “The Politics of Indigenous Knowledge: Australia’s Proposed Communal Moral Rights Bill” (2004) 27:3 UNSWLJ 585 at 595–96; Spangler, *supra* note 29 at 719.

113 Ruth L Gana, “Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property” (1995-1996) 24:1 *Denv J Intl L & Pol’y* 109 at 132.

114 Terri Janke and Company, *New tracks*, *supra* note 109.

115 [1991] 21 IPR 481.

116 Anderson, *supra* note 112 at 587; Gurdial Singh Nijar, “Community Intellectual Rights Protect Indigenous Knowledge” (1998) 36 *Biotechnology & Development Monitor* 11; Michael Blakeney, “Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law: The Australian Experience” in FW Grosheide & Johannes Jacobus Brinkhof, eds, *Intellectual Property Law: Articles on the Legal Protection of Cultural Expressions and Indigenous Knowledge*, vol 3 (Intersentia, 2002) 152 at 152 [Blakeney, “Protecting Cultural Expressions”].

117 US copyright law recognizes multiple authorship of a work where each member of the group played an important role in the physical creation of the work. 17 USC § 101 (2006); see also 17 USC § 201(a).

community as an “employer” of the artist.¹¹⁸ However, all present drawbacks that make them hard to apply in an Indigenous context.

Do TCEs Ever “Fall” into the Public Domain?

In order to preserve a balance between, on the one hand, the need to provide to authors incentives and rewards for creativity and, on the other hand, the interests of users and the public in general to access and use authors’ creations, copyright law relies on the bedrock principle that protection eventually lapses and that works fall into the public domain (at least as far as economic rights are concerned).¹¹⁹ For example, in the United States, the importance afforded to a strong public domain in promoting the progress of science and the arts is such that the Constitution expressly states that works may only be protected for *limited* times.¹²⁰ France, by contrast, does offer perpetual moral rights protection (the rights never expire), but stands among a select group of countries that do so, as this is far from being the international standard.¹²¹

This temporally finite protection and the concept of the public domain appear incompatible with the needs, wishes and aims of Indigenous peoples whose TCEs are rooted in many thousands of years of history and are meant to be further transmitted to generations to come, indefinitely, without ever escaping the control of their holders.¹²²

Is Moral Rights Protection Absolute?

The copyright system is premised upon an equilibrium between the rights of creators and the interests of users and the public at large, *inter alia*, freedom of expression and access to information, knowledge and cultural heritage. Hence, copyright (including moral rights) does not provide strict and perfect control over works. A balance is struck through the operation of exceptions and limitations. This balancing act between moral rights and diverging, yet legitimate, interests is not straightforward.

In the United States, the concept of fair use as a broad, general exception is said to be at loggerheads with moral rights, with some commentators pointing to the impossibility to attune the freedom to alter, modify and build upon works as an exercise of creative freedom recognized under the fair use doctrine with the obligation to respect the integrity of a work.¹²³ Furthermore, some jurisdictions provide exceptions to moral rights specifically, such as reasonableness¹²⁴ and the author’s genuine written consent,¹²⁵ as well as exceptions to allow a work’s destruction and alterations for restoration or preservation in good faith.¹²⁶ In France, the courts apply a general public interest rule coupled with the abuse of rights doctrine¹²⁷ as a justification for allowing the destruction of works.¹²⁸

118 Sahara F Farzaneh, “Cultural Appropriation of Traditional Garment Designs in the Post-Star Athletica Era” (2019) 37 Cardozo Arts & Ent LJ 415 at 426–27.

119 Article 7(1) of the Berne Convention, *supra* note 35, read in conjunction with article 7(6) prescribes that the general term of protection is the life of the author, plus 50 years after their death, but that countries may provide for a longer term. The Berne Convention does not prescribe that protection be finite in time.

120 US Const art I, § 8, cl 8. See US Copyright Office, “Study on Moral Rights”, *supra* note 42.

121 Countries that grant perpetual moral rights protection include France, Belgium, Brazil, Greece, Italy, Mexico, Portugal and Spain. See Francina Cantatore & Jane Johnston, “Moral Rights: Exploring the Myths, Meanings and Misunderstandings in Australian Copyright Law” (2016) 21:1 Deakin L Rev 71.

122 Vézina, “Are they in?”, *supra* note 67; Matlon, *supra* note 24 at 216. See also Ruth L Okediji, “Traditional Knowledge and the Public Domain” CIGI, CIGI Papers No 176, 15 June 2018, online: <www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf>.

123 For views on the tension between moral rights, freedom of expression and fair use in the United States, see US Copyright Office, *Authors*, *supra* note 61 at 31; Cathay Smith, “Creative Destruction: Copyright’s Fair Use Doctrine and the Moral Right of Integrity” (2019) Pepp L Rev 47.

124 For instance, Australia has a legislative defence of reasonableness: see (Copyright Act 1968, *supra* note 44), s 195AR–AS. See also Adeney, *supra* note 103 at 316. In France, reasonableness has been successfully invoked in a case involving a restaurant built in a historic building. The restaurant on the roof of a Paris theatre was justified on the basis of economic needs. The court referred to a balance between the indispensable protection of artistic creation and the necessary adaptation of a building through time and space and in view of society’s evolving needs (see TGI Paris, 4 avril 1990, Perret, RIDA, 1990 at 386).

125 In Australia, see Copyright Act, s 195AW–AWA (Copyright Act 1968, *supra* note 44).

126 In Australia: *ibid*, s 195AT; in Canada: Copyright Act, *supra* note 49, art 30.5(a).

127 For the application of the doctrine of abuse of the right of disclosure, see CA Versailles, 3 March 1987, Affaire Foujita, Cour de cassation, (1989), 141 RIDA, 257.

128 See e.g. Affaire Chemetov (CA Paris, 2 December 2016, no. 16/04867).

Moral Rights: National Initiatives to Protect TCEs

In view of moral rights' failings in affording suitable protection to TCEs, some countries (notably in Latin America¹²⁹ and Africa¹³⁰) and regions (the South Pacific¹³¹ and the African Regional Intellectual Property Organization [ARIPO]¹³²) have explored the opportunity to draw from the principles that lie at the foundation of moral rights, implant Indigenous concepts into IP law and devise moral rights-type protection regimes fit for TCEs. These initiatives have been met with varying success, regrettably leaving many issues unresolved. However, two national initiatives in Australia and New Zealand stand out from the crowd and deserve further attention.

Australia and the Indigenous Communal Moral Rights Bill

In 2003, following a series of cases involving Aboriginal art (namely, *Yumbulul*, *Bulun Bulun* and *Milpururru*) that had made evident the inadequacies of copyright law to provide a solution to misuse of TCEs, the Government of Australia issued a draft of the Copyright Amendment

(Indigenous Communal Moral Rights [ICMR]) Bill.¹³³ The ICMR Bill's objective was to recognize Indigenous communal moral rights to protect the cultural interests of communities, not just individual artists, especially community ownership over TCEs.¹³⁴ The bill offered Indigenous groups the moral rights of attribution and integrity in relation to creative works drawing on or embodying their traditions, customs, beliefs, knowledge and wisdom. With those rights, Indigenous peoples would be able to take legal action to protect their TCEs against inappropriate, derogatory or culturally insensitive use.¹³⁵

The bill underwent a process of consultation with a view to testing its practicability and to finding an appropriate calibration with the rights of third parties.¹³⁶ During that process, numerous features of the bill were criticized by Indigenous peoples and other advocacy groups. Patricia Adjei, former WIPO Indigenous Fellow and an advocate for Indigenous cultural rights, described it as unfavourable and onerous for communities, who were required to satisfy many confusing requirements to benefit from protection.¹³⁷ Indeed, several stringent conditions needed to be met for communities to secure these rights, including the signing of an agreement, which was inconsistent with moral rights' automatic protection under conventional copyright law.¹³⁸ Regarding subject matter, literary, artistic, dramatic and musical works, and films in which copyright subsists were to be subject to protection. In other words, the bill did not protect works where copyright had expired, nor did it protect elements of Indigenous culture in which copyright did not exist. As such, the bill would not have provided protection to ancient rock paintings or unrecorded oral histories. Duration of moral rights was linked

129 See e.g. WIPO, *Mexico, Federal Law on Copyright (consolidated text published in the Official Journal of the Federation on June 15, 2018)*, art 158, online: <<https://wipolex.wipo.int/en/legislation/details/18077>>.

130 For an overview of moral rights protection of TCEs in Africa, see Nwauche, *Protection of Traditional Cultural Expressions*, *supra* note 64; Enyinna S Nwauche, "The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa" (2014) 17:5-6 *J World Intellectual Property* 191, online: <www.kiip.re.kr/webzine/1501/library/pdf/4.pdf>.

131 WIPO, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (Secretariat of the Pacific Community, 2002), online: <www.wipo.int/edocs/lexdocs/laws/en/spc/spc002en.pdf>. The framework was established under the auspices of the Secretariat of the Pacific Community, the Pacific Islands Forum Secretariat and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Pacific Regional Office. It creates rights for traditional owners in their expressions of culture. Moral rights include the right of attribution, the right against false attribution and the right of integrity. Moral rights do not depend on formalities, continue in force in perpetuity, are inalienable and cannot be waived or transferred (section 13).

132 The African Regional Intellectual Property Organization (ARIPO) 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore provides moral rights to TCEs. See ARIPO, *Swakopmund Protocol on the Protection of Traditional Knowledge & Expressions of Folklore*, 9 August 2010, online: <www.aripo.org/wp-content/uploads/2019/06/Swakopmund-Protocol-on-the-Protection-of-Traditional-Knowledge-and-Expressions-of-Folklore-2019.pdf>. For more information, see ARIPO, online: <www.aripo.org/index.php?lng=en>.

133 Blakeney, "Protecting Cultural Expressions", *supra* note 116 at 152.

134 Anderson, *supra* note 112 at 587.

135 Torsen & Anderson, *supra* note 64 at 40.

136 Molly Torsen, "Inside Views: Indigenous Communal Moral Rights", *Intellectual Property Watch* (4 December 2006), online: <www.ip-watch.org/2006/12/04/inside-views-indigenous-communal-moral-rights/>.

137 Patricia Adjei, "IP Australia and Traditional knowledge consultation process", online: <www.ipaustralia.gov.au/sites/g/files/net856/ff/submission_-_patricia_adjei.pdf>.

138 For details on the Arts Law organization's criticism of the bill, see Samantha Joseph & Erin Mackay, "Moral Rights and Indigenous Communities", Arts Law Centre of Australia (30 September 2006), online: <www.artslaw.com.au/article/moral-rights-and-indigenous-communities/>.

to the duration of copyright; exceptions and limitations were deemed unclear and unrealistic.

Eventually, due to a change in government, the bill did not proceed to law.¹³⁹ In 2006, the Federal Attorney General confirmed the government's commitment to introduce a new version of the bill in parliamentary sittings but failed to follow through. While the idea of the bill remains active, to this day, it has not been passed.¹⁴⁰

New Zealand and the Haka Ka Mate Attribution Act

In the aftermath of the Fiat commercial and other offensive uses of the iconic haka Ka Mate, the Ngāti Toa people, guardians of the haka Ka Mate, vigorously sought to regain control over it through IP law, to no avail. The group was unsuccessful in securing trademark protection. Copyright protection was not available, for the author had passed away in 1849.¹⁴¹

The Ngāti Toa thus brought their concerns to the New Zealand government as part of the Wai 262 claim to the Waitangi Tribunal, a body that inquires into and makes recommendations on Māori claims against the Crown stemming from breaches of the Treaty of Waitangi of 1840. The concerns related to the control and use of *taonga* (treasures) including *mātauranga Māori* (traditional Māori knowledge and values). The Ngāti Toa sought the right to control the commercial exploitation of the haka and to ensure its culturally appropriate performance.¹⁴² After years of negotiations, in 2011, the New Zealand government issued its report on the Wai 262 claim.¹⁴³ One year later, the government agreed, in a deed of settlement with Ngāti Toa, to recognize Ngāti Toa's connection with the haka,¹⁴⁴ and in 2014, it enacted the Haka

Ka Mate Attribution Act 2014,¹⁴⁵ a *sui generis* form of moral rights protection for the haka Ka Mate.

With the passing of the act, the Government of New Zealand acknowledges the importance of the haka to Ngāti Toa. The law requires appropriate attribution in certain circumstances, including commercial uses, such as communication to the public or inclusion in a film that is shown or issued to the public. In particular, the law obliges certain uses of the haka Ka Mate to be accompanied by a statement identifying Te Rauparaha as the composer of the haka Ka Mate and a chief of Ngāti Toa. It also acknowledges the haka Ka Mate as a *taonga*, and Ngāti Toa as its *kaitiaki* (guardian). The right of attribution is subject to any written agreement entered into by the haka's rights representative. Exceptions apply for performances, such as by Māori dance performance groups, and its use for educational purposes, criticism, review or reporting current events, and non-commercial communications to the public. Ngāti Toa have stated publicly that they do not mind respectful non-commercial uses of the haka.¹⁴⁶

The act is limited legislation applicable to a discrete form of TCE: the haka Ka Mate. It nonetheless demonstrates that *sui generis* protection of Indigenous cultures can be compatible with Western IP rights and shows that *sui generis* moral rights protection of TCEs at the international level is within the realm of the possible.¹⁴⁷

139 WIPO, *Protection of TCEs*, *supra* note 16.

140 Education Standards Authority, New South Wales Government, "Indigenous Communal Moral Rights (ICMR)", online: <<https://ab-ed.nesa.nsw.edu.au/go/aboriginal-art/protecting-australian-indigenous-art/background-information/proposals-for-change/indigenous-communal-moral-rights-icmr>>.

141 Frankel, *supra* note 1 at 10.

142 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (2011) at 41 [Waitangi Tribunal, *Ko Aotearoa Tēnei*].

143 Waitangi Tribunal, "Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released" (2 July 2011), online: <www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released/>.

144 Ngāti Toa Deed of Settlement, 7 December 2012.

145 *Haka Ka Mate Attribution Act 2014* (NZ), 2014 No 18, online: <www.legislation.govt.nz/act/public/2014/0018/latest/DLM5954403.html>. For application guidelines, see Ministry of Business, Innovation & Employment, *Haka Ka Mate Attribution Act 2014 Guidelines*, online: <www.ngatitoa.iwi.nz/sitecontent/images/Folders/General/HAKA-KA-MATE-GUIDELINES.pdf>.

146 Frankel, *supra* note 1 at 9. In 2011, the Ngāti Toa tribe officially gave permission to the All Blacks to perform the haka. See Michelle Duff, "NZRU signs All Blacks haka deal with Ngāti Toa", *Stuff* (18 March 2011), online: <www.stuff.co.nz/sport/4781743/NZRU-signs-All-Blacks-haka-deal-with-Ngati-Toa>.

147 Earl Gray, "How Indigenous Rights and Intellectual Property Can Work Together", *INTA Bulletin* (15 April 2019), online: <www.inta.org/INTABulletin/Pages/Indigenous_Rights_and_Intellectual_Property_7407.aspx>.

Moral Rights: Proposal for an International Protection Regime

Relying on existing law as a scheme and thanks to the lessons learned from two national experiences, the international community is equipped to extrapolate concepts, transmute principles and make the necessary adjustments to create a suitable international *sui generis* regime for the moral rights-like protection of TCEs.¹⁴⁸

The WIPO Negotiation Process

Against the backdrop of UNDRIP, the international norm-setting process addressing the IP protection of TCEs takes place at WIPO, within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Owing to the relative dearth of national and regional policies and laws, the IGC is called upon to act as a trailblazer in developing international standards and to craft an international agreement following a top-down approach.¹⁴⁹

The nucleus of the IGC's discussions on TCEs are the Draft Articles on the Protection of Traditional Cultural Expressions, a negotiating text that forms the basis of an eventual international legal instrument.¹⁵⁰ The text contemplates a system of protection specifically designed for TCEs, inspired by copyright and other IP principles, and features a number of moral rights-like elements. The Draft Articles are framed by policy objectives that clarify that the type of protection envisaged is of an IP nature. Paragraph 7 of the Preamble is steeped in a moral rights ethos and relates to the promotion of "respect for traditional cultural expressions, and for the dignity, cultural integrity and spiritual values of the traditional cultural expression holders who maintain those expressions." Truth be told,

a kind of collective moral right for TCEs has been on the table for nearly four decades at WIPO.¹⁵¹

Currently, the provision on the scope of protection (article 5) is at the core of the instrument and sets out the types of protection and the extent and context in which protection can be accorded to TCEs. Over the years, member states have arrived at the idea of a "tiered approach" to protection (also referred to as "differentiated protection").¹⁵² According to this approach, different kinds or levels of rights (or measures) would be attached to TCEs, depending on a particular TCE's nature and characteristics, the level of control retained by the beneficiaries over the TCE and its degree of diffusion, along a spectrum ranging from widely diffused/available to the general public to TCEs that are secret, sacred or not known outside the community and controlled by the holders. This approach offers an opportunity to reflect the IP system's balance between the interests of right holders and the general public, including users and reusers.¹⁵³

The tiered approach implies that exclusive economic rights could be appropriate for some forms of TCEs (for instance, secret and/or sacred TCEs), whereas a moral rights-based model could be suitable for TCEs that are publicly available or widely known but still linked to specific holders. Thus, alongside economic rights (as well as rights inspired by trademark law and other IP laws), the tiered approach places great value on moral rights. In fact, moral rights protection is currently the only

148 Many scholars have warned against blindly distorting the copyright system to protect TCEs. See Stephen R Munzer & Kal Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge" (2009) 27 Cardozo Arts & Ent LJ 37.

149 Frankel, *supra* note 1 at 3.

150 WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GTRKF/IC/40/19 (2019), online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=439151>.

151 UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* (1982), online: <www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf>. Articles 5(1) and 6(4) require the origin of folklore to be acknowledged in printed publications and other communications to the public by mentioning the community or geographic location from where the expression was derived. The requirement, however, did not apply to creations of original works inspired by expressions of folklore or to incidental uses of expressions of folklore.

152 A tiered approach was embodied in the first versions of the TCEs text: see WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO/GTRKF/IC/9/4 (2009), online: <www.wipo.int/meetings/en/doc_details.jsp?doc_id=129914>.

153 Ian Goss, "Information Note on Traditional Knowledge/Traditional Cultural Expressions for IGC 40", online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chairs_information_note.pdf>. See also Chidi Oguamanam, "Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept" CIGI, CIGI Papers No 185, 15 August 2018, online: <www.cigionline.org/sites/default/files/documents/Paper%20no.185web.pdf>; Ruth L Okediji, "A Tiered Approach to Rights in Traditional Knowledge" (2019) 58 Washburn LJ 271; Oguamanam, "WIPO IGC 39", *supra* note 64.

protection envisaged for almost all types of TCEs, whether they be sacred, secret or diffused; due to the many textual options under consideration, references to moral rights are peppered throughout the document (with varying levels of elegance).¹⁵⁴ In the main, they express obligations for users to acknowledge the community whose TCEs are used as a source of inspiration, as well as to respect the integrity of the underlying traditions used. The following section considers the necessary features of a *sui generis* moral rights framework of protection for TCEs within the Draft Articles.

Features of a *Sui Generis* Moral Rights-type Framework

Subject Matter and Beneficiaries

TCEs that maintain a current and significant relationship with the Indigenous peoples who hold them would be protected. As long as a community, as a whole and by virtue of its own internal cultural rules, identifies with a specific form of expression and can establish a particular relationship with it, it can claim protection over it. As Susy Frankel points out, the key rationale in favour of protecting TCEs is the *guardianship* relationship, from which proportionate moral rights flow.¹⁵⁵ Guardianship is to be contrasted with ownership, which is the concept buttressing most IP law systems, with the notable exception of moral rights. To wit, the Waitangi Tribunal did not recommend that TCEs be treated as *owned*, lest that would amount to building a legal wall around TCEs and end up choking culture.¹⁵⁶ At any rate, cultural boundaries are porous and fluid, and it follows

that blending, intermixing, hybridization or even “contamination” of cultures can be promoted.¹⁵⁷

Obviously, cultures are seldom unique to a people. TCEs might be shared among different Indigenous groups that all identify and hold a guardianship relationship with them. In such cases, procedures should be in place to facilitate cooperation and settlement of disputes. What is more, no people are monolithic, a reality that is rendered in one illustrative phrase: “The Sámi people are one, but multiple.”¹⁵⁸ Some communities might have distinct TCEs that have been part of their culture for a long time, with little or no outside influence. Others might have experienced contact with other cultures and incorporated various elements over the generations that have substantially modified previous iterations. For example, in the case of Mixe huipil at stake in the Isabel Marant case, some were quick to point out that the embroideries had, in the upshot of the Spanish conquest, incorporated European elements.¹⁵⁹ Hence, when considering a relationship between a TCE and its holder, one should not exact uniqueness or exclusiveness, but embrace the fact that a group can identify with TCEs that are dynamic and kaleidoscopic, all the while remaining authentic.

Beneficiaries of protection should be TCE-holding Indigenous communities as a whole, such that moral rights would be afforded to the entire community as group rights. Recognition of beneficiaries as well as determination of the authority to exercise the rights would have to be done from within the community, by way of application of customary law¹⁶⁰ or be captured under the legal constructs of trusts, associations, or other legal entities holding the rights.¹⁶¹ Indigenous communities need to have the autonomy to exercise control over

154 Examples include article 5, alt 2, 5.1(a)(ii) and (b)(ii): “Beneficiaries have the moral right of attribution and the moral right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions”; article 5, alt 3, 5.2(a): “attribute and acknowledge the beneficiaries as the source of the ...[protected traditional cultural expressions, [unless the beneficiaries decide otherwise], or the ...[protected traditional cultural expressions] is not attributable to a specific indigenous [people] or local community”; article 5, alt 3, 5.3: “Where the ...[protected traditional cultural expressions] is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, [Member States]...[should]/[shall]...[encourage] users of said...[traditional cultural expressions] [to], in accordance with national law: (a) attribute said...[protected traditional cultural expressions] to the beneficiaries; (b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the...[protected traditional cultural expressions]].”

155 Frankel, *supra* note 1 at 13, 16.

156 Waitangi Tribunal, *Ko Aotearoa Tēnei*, *supra* note 142 at 92, as quoted in Frankel, *supra* note 1 at 16.

157 Kwame Anthony Appiah, “The Case for Contamination”, *New York Times Magazine* (1 January 2006); Jeremy Waldron, “Settlement, Return, and the Supersession Thesis” (2004) 5 *Theor Inq L* 237 at 239, both quoted in Munzer & Raustiala, *supra* note 148 at 72.

158 Kramvig & Flemmen, *supra* note 21 at 72.

159 Daisy Almonte, “Stitches of History”, *The Bridge* (26 August 2017), online: <www.thebridgeis.com/what-we-think/2017/8/26/stitches-of-history>.

160 Frankel, *supra* note 1 at 15.

161 Paolo D Farah & Riccardo Tremolada, “Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage” (2015) 94:1 *Or L Rev* 125 at 162.

and make their own decisions regarding the management of their moral rights in their TCEs.¹⁶²

Scope of Protection

At first glance, it is difficult to reconcile the notion of personhood, the cornerstone of moral rights, with the pluralistic conception of a community, by definition made up of several persons with their own individual personalities. In response, some scholars have wrought the concept of “peoplehood” to encapsulate the personality of a people in its entirety and provide a justification for granting a personality right to a group.¹⁶³ As mentioned, TCEs often encompass cultural elements that are integral to Indigenous peoples’ sense of identity, that bear the distinct mark of their holders and, indeed, that reflect their peoplehood. Moral rights can therefore fulfill the duty, arising out of human rights law, to protect the identity of Indigenous peoples.¹⁶⁴

Forasmuch as TCEs are collectively and communally held, so too must the moral rights of Indigenous peoples be communal.¹⁶⁵ In fact, even conventional moral rights are not purely individualistic, and there has been a recognition of a “socially-informed view of the author” and “the social gestation of authorship... the social womb from which authors brought forth their works.”¹⁶⁶ This strand of moral rights theory might be more congruent to accepting a group right for a community than the classic individual theory underpinning moral rights.¹⁶⁷

Moral rights would only regulate the relationship between the community and the outside world; use in a traditional and customary context would not be affected. Just as moral rights vest automatically in the author (without any need for registration or any other form of assertion), so too would *sui generis* moral rights vest in the community.

Communal moral rights would include, at a minimum, the right of attribution, including false attribution (to ensure proper recognition of the community as the source and to prevent others from falsely claiming a guardianship over a TCE) and integrity (to protect TCEs against inappropriate, derogatory, or culturally insensitive use). It could be considered to also include the rights of disclosure (to make, where desired, TCEs known to the world and to retain the power to keep TCEs out of “public” reach, for example, in the case of sacred or secret TCEs) and withdrawal (to allow TCE holders to remove from circulation the TCEs that they no longer wish to make publicly available).

In most national laws, moral rights are inalienable or non-transferable. In other words, they cannot be divested from the author — they cannot be assigned, licensed or given away. As mentioned, if an author transfers all their economic rights to a third party, the author retains their moral rights in the work.¹⁶⁸ As such, *sui generis* moral rights in TCEs would be independent from any economic rights that might arise and be held and exercised separately, regardless of who might hold these economic rights (in cases, for example, where communities would commercialize their TCEs and grant licences) or who might have physical ownership of a TCE (such as a cultural institution). However, in some jurisdictions, such as Canada, the United States and the United Kingdom (but not Australia and France), moral rights can be waived, irreversibly, in whole or in part, explicitly, by contract, at the discretion of the author. In order to ensure flexible protection to TCEs, it could be envisaged that *sui generis* moral rights be made waivable.

When applying the right of integrity, the determination of what is offensive should not be narrowly prescribed but based on the facts at hand. Assessment should be done both subjectively, from the point of view of the community that claims violation, and objectively, by the court, within the framework of guidelines to be developed legislatively or through case law, as informed by Indigenous customary laws, practices and protocols. Reliance on particular facts may be

162 Spangler, *supra* note 29 at 715.

163 Carpenter, Katyal & Riley, *supra* note 19 at 1022; Margaret Jane Radin, “Property and Personhood” (1982) 34 *Stan L Rev* 957.

164 Rebecca Tsosie, “Indigenous Identity, Cultural Harm, and the Politics of Cultural Production: A Commentary on Riley and Carpenter’s ‘Owning Red’” (2016) 94 *Tex L Rev* 250 at 251.

165 Anderson, *supra* note 112 at 590.

166 Munzer & Raustiala, *supra* note 148 at 69 [citations omitted].

167 Robert N Clinton, “The Rights of Indigenous Peoples as Collective Group Rights” (1990) 32:4 *Ariz L Rev* 739.

168 For example, in France, an author’s moral rights may never be given or sold to another party; they remain with the author (art L 121-1 CPI); in Canada, the Copyright Act stipulates that moral rights cannot be transferred during the lifetime of the owner; in the United States, 17 USC § 106A(e)(1) stipulates that “the rights conferred...may not be transferred.”

difficult to reconcile with the need for certainty and predictability, but flexibility trumps these concerns, as no use should be considered offensive per se.

Exceptions and Limitations

Given the many competing interests at stake, moral rights protection of TCEs cannot be absolute. For one, there might be IP right owners who have vested interests in TCEs at the time moral rights protection enters into force, and these rights, to the extent possible, should be preserved.¹⁶⁹

Second, the general public and certain users might have legitimate interests in using certain TCEs. Several fundamental tenets of copyright policy, including freedom of expression and access to knowledge (which give rise to exceptions that allow reporting, commentary, quotation, parody, research and study, and cultural preservation,¹⁷⁰ as well as broader exceptions such as “fair use” or “fair dealing”), must be taken into consideration, not only to maintain the central balance at the core of the IP system allowing the public to access culture and knowledge, but also to allow Indigenous cultures’ survival through constant evolution.¹⁷¹

Be that as it may, users’ and society’s interests should not be interpreted in a way that diminishes the moral rights of TCE holders or unduly restrict their application. Case in point: the quotation exception enshrined in the Berne Convention (article 10) is conditioned upon the attribution of the source and of the author’s name. Likewise, parody is a well-established exception in EU countries, and the Court of Justice of the European Union recognized the need to balance it with the moral right of integrity.¹⁷² In order to define

exceptions that reflect the need for balance to safeguard the public interest, one should rely on an adaptation of the Berne Convention’s three-step test to the characteristics of TCEs.¹⁷³ Doubtless, a calibration exercise will need to be conducted and tensions resolved over time.

Term of Protection

Because of the intergenerational nature of TCEs and the fact that customary laws often prescribe that they be held in perpetuity, submitting TCEs to the prospect of eventually entering the public domain is daunting.¹⁷⁴ That is not to say that protection should be everlasting, perpetual or unlimited in time.¹⁷⁵ Indeed, it would be futile to seek to protect TCEs that have been discarded by their holders or those with which no community identifies. Hence, moral rights protection should inure with proactive and continuous use.¹⁷⁶ Duration, if it is to be finite, should be linked to the group maintaining a relationship (guardianship) with a TCE. In other words, protection should subsist until such a time as no person acts as a guardian of the TCE.

Sanctions and Remedies

To compensate for the harm suffered, to restore the community to its former position and to prevent any recurrence of the infringing activities, TCE holders should be able to rely on several enforceable means of redress: a declaratory judgment officially recognizing the violation; damages (order to pay a sum of money as financial compensation); an injunction to make the harm stop; or remedies inspired from customary laws, including an

¹⁶⁹ To see how the Waitangi Tribunal dealt with such issues, see Frankel, *supra* note 1 at 12.

¹⁷⁰ For example, some cultural institutions, such as libraries and archives, are concerned that protection of TCEs might impede their ability to perform their mission of making information available to the public and are in conflict with their role to preserve cultural heritage. See US Library Copyright Alliance, “Comments of the Library Copyright Alliance on the February 18, 2011, Draft Articles on the Protection of Traditional Cultural Expression”, online: <www.librarycopyrightalliance.org/documents/international-treaties-and-trade-agreements/world-intellectual-property-organization-wipo/lca-submits-comments-to-wipo-on-draft-articles-related-to-protecting-traditional-cultural-expressions/>. See also Mathiesen, *supra* note 13; Terri Janke & Livia Iacovino, “Keeping cultures alive: archives and Indigenous cultural and intellectual property rights” (2012) 12:2 Archival Science 151 at 157; Vézina, “Cultural Institutions”, *supra* note 39.

¹⁷¹ On this last point, see Frankel, *supra* note 1 at 16, 19–20.

¹⁷² Court of Justice of the European Union (CJEU) Case C-201/13 Deckmyn.

¹⁷³ The “three-step” test for defining copyright exceptions is found in article 9(2) of the Berne Convention, article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights and in article 5.5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001. The IGC’s Draft Articles on TCEs currently provide for this possibility under article 7.

¹⁷⁴ Matlon, *supra* note 24 at 216; Skelton, *supra* note 27.

¹⁷⁵ For a discussion of the US constitutional tenet of limited duration, see Farah & Tremolada, *supra* note 161. For contrasting views, see Alexander Bussey, “Traditional Cultural Expressions and the U.S. Constitution” (2014) 10 Buff Intell Prop LJ 1 at 28; Ashley Packard, “Copyright Term Extensions, the Public Domain and Intertextuality Intertwined” (2002) 10:1 J Intell Prop L 1 at 8.

¹⁷⁶ Lenjo, *supra* note 20.

order for a public apology or non-monetary compensation, such as the gifting of a song.¹⁷⁷

Conclusion

“Indigenous peoples today,” according to the United Nations, “are arguably among the most disadvantaged and vulnerable groups of people in the world.”¹⁷⁸ Deprived of their land, their resources, their history and dignity, many are relying on what little is left of their culture in an effort to maintain their identity and sustain their threatened ways of life. Offensive and disrespectful uses of TCEs by outsiders severely undercut these endeavours. Jessica Deer, a Kanien'kehá:ka journalist from Kahnawake, now based in Montreal, poignantly lays bare this predicament: “Even during a time of reconciliation, Indigenous people are still faced with having to defend their identities from being mocked or used as a form of entertainment every single day.”¹⁷⁹

For that reason, commentators have, for decades, stated that protection of TCEs against distortion, discredit and plain disrespect is imperative.¹⁸⁰ Despite these admonishments, few steps have been taken, and much remains to be achieved for Indigenous peoples to be able to exercise effective control over their TCEs. Nowadays, in the absence of legal protection, TCE holders can only rely on awareness and education efforts to

bring attention to their woes. And while social media has been a potent tool to voice concerns and call out misusers, it can only go so far and falls short of providing effective redress. What is more, social media can be a double-edged sword, as Indigenous artist and designer Jamie Okuma explains: “No one is going to listen to constant shaming and belittling, we can’t expect people to support our work if we are constantly bashing or calling them out.”¹⁸¹ In this context, a sense of urgency is palpable: the longer the international community drags its feet to bestow upon TCE holders some form of protection (even if imperfect), the less there will be left to protect. Soon enough, Indigenous cultures will have been irredeemably hollowed. Arguably, the granting of moral rights in TCEs is a prodigious leap in the right direction.

That said, moral rights are not the panacea to every ailment of a cultural nature, and many needs and expectations of Indigenous peoples are likely to remain unanswered by the application of such rights. Nevertheless, moral rights will come to bolster the recognition of a primary human right: the right to dignity and respect as enshrined in article 15 of UNDRIP and at the foundation of the UN Universal Declaration of Human Rights.

Conceivably, introducing a new form of moral rights for TCEs in international law will not be plain sailing. Worldwide, there is strong opposition to protecting TCEs, and the IGC is, after almost 20 years, extremely polarized on fundamental issues such as the definition of TCEs and beneficiaries, not to mention the contentious scope of protection provision under which a moral rights-type regime would fall. This is hardly surprising, for *sui generis* protection is bound to dramatically change the status quo of how the world has grown accustomed to interacting with TCEs and is likely to force many actors in various sectors of the economy, and in society in general, to radically change their behaviour. Yet, in the face of existing legal mechanisms’ bald-faced inefficiency to prevent the disrespectful and offensive use of TCEs, national policy and legislative inaction is tantamount to condonement.

With so much evidence of the crucial knowledge about land management and protection of the environment as embedded, expressed and manifested in the TCEs of Indigenous peoples,

177 Vézina, “Curbing Cultural Appropriation”, *supra* note 11 at 11. For example, in Kenyan law, a public apology can be ordered by a court to assuage the infringement of the moral rights of communities; see Nwauche, *Protection of Traditional Cultural Expressions*, *supra* note 64 at 61–62.

178 United Nations, Department of Economic and Social Affairs, Indigenous Peoples, “Indigenous Peoples at the United Nations”, online: <www.un.org/development/desa/indigenouspeoples/about-us.html> (last visited 10 January 2020).

179 Jessica Deer, “Cue the eye rolls: this is a piece about cultural appropriation”, *CBC News* (18 May 2017), online: <www.cbc.ca/news/opinion/cultural-appropriation-1.4119849>.

180 Puri, “Cultural Ownership”, *supra* note 15 at 332; Haight Farley, *supra* note 15 at 48. For arguments in the context of intangible cultural heritage, see Berryman, *supra* note 15 at 333; Paul Kuruk, *Proposals for Consideration in the Preliminary Draft of the Convention for the Safeguarding of Intangible Cultural Heritage*, UNESCO, UN Doc GRR2/CH/2002/WD/7 (2001); Paul Kuruk, “Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage” (2004) 1 *Macq J Intl & Comp Envtl L* 111.

181 Lewis, *supra* note 81.

the protection of TCEs doubtlessly goes well beyond their cultural worth and is likely to help counter natural resources depletion, global warming and other environmental calamities, as well as to support the sustainable development of Indigenous peoples.¹⁸² Recognizing the role of TCEs in ensuring not only their holders' survival but also that of our planet, the time has come to give credit where credit is due and to show the holders of TCEs the respect they rightfully deserve.

Author's Note

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¹⁸² Oonagh E Fitzgerald & Kathleen Mahoney, "Environmental Challenges on Indigenous Lands" CIGI, Environmental Challenges on Indigenous Lands Series, 27 June 2019, online: <www.cigionline.org/articles/environmental-challenges-indigenous-lands>.

