



THE APPROPRIATION OF ABORIGINAL CULTURAL HERITAGE: EXAMINING THE USES AND PITFALLS OF THE CANADIAN INTELLECTUAL PROPERTY REGIME

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Appropriation¹ of Aboriginal cultural heritage first became a popular subject of mainstream Canadian opinion journalism in the 1990s, starting with a series of letters to the editor in the *Globe and Mail*. In 1991, readers wrote impassioned letters to the editor, arguing whether it was appropriate for a non-Aboriginal author to use elements of Aboriginal culture as a source of inspiration for his literary works. Almost 25 years later, cultural appropriation continues to be a much discussed subject. Last year, the fashion brand Chanel was criticized for featuring models sauntering down the catwalk in war bonnets for its “cowboys and Indians”-themed Paris-Dallas Métiers d'Art 2013/2014 collection. This past summer, British Columbia's Bass Coast festival was the first Canadian music festival to ban the popular practice of wearing headdresses. Also this year, the cover of the July edition of *Elle UK Magazine*, featuring popular R&B artist Pharell Williams wearing a feathered headdress, generated a significant amount of backlash, causing the artist to issue an apology (although he later went on to don some questionable war paint for British *GQ's* October 2014 cover).

The aim of this article is to analyze the appropriation of Aboriginal culture in Canada and the legal remedies available to Aboriginal peoples under Canada's intellectual property laws. The article will describe the notion of cultural appropriation and explain how it threatens the cultural survival of Aboriginal peoples. The article will then examine the usefulness and limitations of Canadian intellectual property laws as a tool to assist Aboriginal peoples in the fight against cultural appropriation.

While the scope of this article is limited to "intellectual property laws", other areas of law, such as constitutional law, the law of contracts, and extra-contractual liability and torts, may also be of assistance to Aboriginal peoples in fighting cultural appropriation.

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^{*}From ROBIC, LLP, a multidisciplinary firm of Lawyers, and Patent and Trade-mark Agents. Published in (2014) 19:4 *Intellectual Property* 1254(Federated Press). Publication 173.031.

¹ The author wishes to thank Professor David Newhouse of Trent University (Associate Professor, Business Administration Chair, Indigenous Studies) for his gracious feedback on this article.

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Cultural Heritage and Cultural Appropriation

a. What is "cultural heritage"?

UNESCO has defined cultural heritage as "the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity [...]".²

The expressions of cultural heritage can be intangible, including scientific, agricultural, technical and ecological knowledge (also called "traditional knowledge") and verbal, musical and active expressions (such as performances); or they may be tangible expressions such as plastic arts, architectural forms, human remains and land. Expressions of cultural heritage are more than just property: they express the way of life and thought of a particular society, which are evidence of its intellectual and spiritual achievements.³

Cultural heritage transcends the individual. The word "heritage" itself suggests that a practice must be maintained and passed on by more than one generation.⁴ Among Canada's Aboriginal peoples, cultural heritage is usually communally owned. Sometimes, custody is assigned to an association or individuals who have been specially taught or initiated to be its custodians.⁵ The custodian and members of the community have a responsibility to preserve, use, develop and transmit such traditional cultural expression in accordance with the customary laws and protocols of that community.⁶ Preservation is achieved through patterns of behaviour and knowledge embodied in skills, ceremonies, rituals.⁷ Aboriginal peoples transfer their cultural heritage primarily through intangible means, such as songs, symbols,

² *Recommendations on the Safeguarding of Traditional Culture and Folklore*, UNESCO, 25th Sess, Vol. 1, Annex I, (1990) at 231.

³ Lyndel V. Prott & Patrick J. O'Keefe, "'Cultural Heritage' or 'Cultural Property'", (1992) 1:2 *International Journal of Cultural Property* 307 at 307.

⁴ *Ibid*; Rosemary J. Coombe, "First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law" in Catherine Bell & Robert Patterson, eds, *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver, BC : University of British Columbia Press, 2009) 247 at 267 ["Coombe, First Nations Intangible Cultural Heritage Concerns"]; UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples*, UN ECOSOC, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/26, Ann. I (2000).

⁵ UN Sub-Commission on the Promotion and Protection of Human Rights, *Study on the protection of the cultural and intellectual property of indigenous peoples*, UN ECOSOC, 45th Sess, UN Doc E/CN.4/Sub.2/1993/28 (1993).

⁶ *Supra* note 3 at 307.

⁷ *Ibid* at 308.

legends and ways of life, and in a manner that reflects their history, culture, ethics and creativity.⁸

b. A (short!) history of the suppression of Canadian Aboriginal culture

The outrage expressed by Aboriginal people in the face of cultural appropriation cannot be understood outside of the historical context of colonialism in which the loss of culture began.

Throughout the 19th and 20th centuries, Canada's Aboriginal policy was one of aggressive assimilation, based on the false assumption that Aboriginal peoples are doomed to extinction, lest they be "saved" from their primitive culture and savage ways.⁹ The ultimate goal of this policy was the assimilation of Aboriginal people into the dominant white culture and the disappearance of their traditional culture.¹⁰

Residential schools cut Aboriginal children off from their culture, interrupting and preventing the transfer of traditional values and practices to new generations. The removal of children from their families continued in the 1960s, when child welfare agencies were given broad powers to apprehend Aboriginal children. Almost all the children of that generation were sent to white foster homes.¹¹

Most ceremonial expressions of Aboriginal culture were banned in the late 19th century by the *Indian Act*. For decades, the potlatch, sweat lodges and sun dances were banned. The wearing of traditional regalia was made subject to the permission of government officials, which was often arbitrarily withheld. The penalty for failure to comply with these restrictions was jail time and the confiscation of ceremonial objects.¹²

Forced displacement of Aboriginal peoples also played a role in the suppression of Aboriginal cultural heritage. Though some relocation took place in the 19th and early 20th centuries, Aboriginal peoples were displaced *en masse* as of the 1940s to make

⁸ Simon Brascoupé and Karin Endemann, "Intellectual Property and Aboriginal People: A working paper" (1999) Minister of Indian Affairs and Northern Development, Working Paper, No R32-204/19991E, online: < <http://publications.gc.ca/collections/Collection/R32-204-1999E.pdf>> at 1 ["Brascoupé & Endemann"].

⁹ Thomas King, *The Inconvenient Indian: A curious account of native people in North America* (Toronto, ON : Anchor Canada & Random House of Canada Ltd, 2012) at 79 ["King"].

¹⁰ Superintendent-General Campbell Scott, head of the Department of Indian Affairs (1913-1932), said of his policies: "I want to get rid of the Indian problem. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no question, and no Indian Department": King, *ibid* at 72.

¹¹ This practice was also referred to as "the '60s scoop": Rosemary J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy", (1993) VI:1 Canadian Journal of Law & Jurisprudence 249 at 275 ["Coombe, The Properties of Culture and the Politics of Possessing Identity"].

¹² *Ibid* at 276.

way for hydroelectric dams and other industrial projects.¹³ Relocations contributed to the loss of cultural practices by severing the ties between Aboriginal peoples and the lands to which their traditional knowledge related.¹⁴

c. Continued endangerment of Aboriginal culture through cultural appropriation

Today, cultural appropriation and negative stereotypes pose a significant threat to the cultural survival of Aboriginal peoples.¹⁵ It is part of a pattern of injustice that allows the perpetuation of inequalities.

Cultural appropriation is defined as the unauthorized 'borrowing' of expressions, artistic styles, symbolism, myths or know-how from a dominated culture by a member of the dominant culture.¹⁶ Appropriation also occurs when a person of the dominant culture purports to be an expert on the experience of the dominated culture¹⁷ or trivializes the experiences of a member of the dominated culture.¹⁸

It is a very real phenomenon: according to a 1997 study, 81% of Aboriginal artisans had experienced some form of misappropriation or use of traditional Aboriginal designs.¹⁹ Aboriginal words and imagery are used by people and companies having no link to the communities from which they borrow (to name but a few: Eskimo Pie, Ookpik coats, Cherokee Jeeps). Native spiritual practices such as sweat lodges are commodified and commercialized by new age gurus.²⁰ Despite recent controversy, concertgoers still regularly wear war bonnets to music festivals.

In the public forum, Aboriginal identity has been defined almost exclusively by the dominant culture,²¹ often in ways that misrepresent or disparage Aboriginal peoples. Aboriginal people have experienced difficulty in making their voices heard in order to

¹³ King, *supra* note **Erreur ! Signet non défini.** at 92-96.

¹⁴ *Ibid* at 90.

¹⁵ Lorie Graham & Stephen McJohn, "Indigenous Peoples and Intellectual Property", (2005) 19 *Journal of Law & Policy* 313 at 327.

¹⁶ Jean-François Gaudreault-Desbiens, "La critique autochtone de l'appropriation culturelle comme défi à la conception occidentale de la propriété intellectuelle : Le cas de l'appropriation artistique" (1999) 11:2 *C.P.I.* 401 at 2 ["Gaudreault-Desbiens"].

¹⁷ L. Todd, "Notes on Appropriation" (1990) 16 *Parellelogramme* 24 at 24, cited in Coombe, *The Properties of Culture and the Politics of Possessing Identity*, *supra* note 11 at 279.

¹⁸ Coombe, *The Properties of Culture and the Politics of Possessing Identity*, *ibid* at 282.

¹⁹ Philip Bird, "Intellectual property rights and the Inuit Amauti : a case study" (Paper delivered at the World Summit on Sustainable Development, July 2002), [unpublished] at 2 ["Bird"].

²⁰ King describes these "unique experiences" as "an impossible mix of Taoism, Buddhism, Druidism, science fiction, and general nonsense, tied together with Dead Indian ceremony and sinew to give their product provenance and validity, along with a patina of exoticism.": King, *supra* note 9 at 58.

²¹ *Supra* note 16 at 4.

correct the situation.²² Publishing and production houses show little interest in Aboriginal content that is not "authentic" (a euphemism for "stereotyped").²³ In this manner, negative stereotypes operate as a means of social control. Stereotypes reinforce negative views of the dominated cultural group and serve as grounds to exclude its members from cultural and political discourse. Consequently, the dominant cultural group continues to wield a disproportionate amount of political power, much as it did in colonial times.²⁴

The assimilatory effects of colonial policies and cultural appropriation are also similar.²⁵ Cultural appropriation dispossesses people of their identity. Due to the denigration of their values and the omnipresence of the dominant culture in education and media (which, in Canada, reflect a mostly urban, non-Aboriginal lifestyle²⁶), members of a dominated culture will eschew their own culture in favour of the dominant culture.

Whether or not one accepts that cultural appropriation is a form of neocolonialism, its negative impacts on the health, wellbeing and capacity for economic self-sustenance of Aboriginal peoples cannot be ignored.

Cultural appropriation is linked to mental health issues. The inappropriate use of sacred traditional knowledge has destroyed its sacredness and twisted its meaning, weakening it in the eyes of all.²⁷ Aboriginal youth suffer from low self-esteem due to a negative view of their own culture, supported by a belief in negative stereotypes.²⁸ Culture stress is a major factor driving Aboriginal youth to self-destructive behaviour and suicide.²⁹

Cultural appropriation also threatens Aboriginal peoples' economic self-sustenance. Traditional knowledge represents an interesting source for the development of new medicines and technologies. However, in the past, some Aboriginal groups have lost control of their traditional knowledge by disclosing it to Western researchers who then used such information for culturally inappropriate purposes. In some instances, non-Aboriginal companies have commercialized products based on traditional knowledge or expressions of culture, without sharing the profits with the community from which such knowledge originated.³⁰ For example, the Hudson's Bay Company came under

²² Royal Commission on Aboriginal Peoples, Report, *Volume 3 Gathering Strength*, 1996 at 583 ["RCAP Report"]; Coombe, *The Properties of Culture and the Politics of Possessing Identity*, *supra* note 11 at 275.

²³ Coombe, *The Properties of Culture and the Politics of Possessing Identity*, *ibid* at 258.

²⁴ *Supra* note 16 at 4.

²⁵ *Supra* note 15 at 327.

²⁶ *Supra* note 22 at 547.

²⁷ *Ibid* at 558.

²⁸ *Supra* note 16 at 5.

²⁹ *Supra* note 22 at 547.

³⁰ Famous cases include the patenting of Ayahuasca (Tonina Simeone, "Indigenous Traditional Knowledge and Intellectual Property Rights" (2004) Library of Parliament of Canada, Working Paper, No PRB 03-38E, online: < <http://www.parl.gc.ca/content/lop/researchpublications/prb0338-e.htm> > at 3

fire during the 2010 Vancouver Olympic Games for its decision to market non-authentic Cowichan-style sweaters to commemorate the event. The Bay had initially entered into negotiations with the Cowichan First Nation to produce authentic Cowichan sweaters, which are hand-knit in a distinctive style from natural, undyed wool. The deal fell through, as the Nation did not have the capacity to produce the quantities of product required in the allotted time. The Bay's subsequently outsourced manufacturing to a third party who had access to mechanized knitting equipment and cheaper materials. The sweaters produced by the manufacturer bore a striking resemblance to authentic Cowichan sweaters and were referred to as "knock-offs" in the media. Members of the Nation were upset by the loss of a potential source of income to a non Aboriginal company whose products might be confused with their own. The Bay eventually agreed to a last-minute licensing deal, allowing the Nation to sell their own sweaters at the Four Host First Nations Pavilion (a temporary pavilion located in downtown Vancouver) and at the Bay's flagship store in Vancouver. No profit sharing arrangement has been reported.³¹

The fear of misappropriation of Aboriginal traditional knowledge, cultural expressions and genetic and biological resources and has created a chilling effect: the Chiefs of Ontario and the Nishnawbe Aski Nation have declared a moratorium on the commercialization of plants and animals.³² Aboriginal communities' capacity to profit from their own knowledge is therefore limited as they are rarely equipped to engage in complex and expensive R&D without recourse to external resources or expertise.³³ Out-licensing would be an accessible way for these communities to develop and profit from their knowledge, but distrust has created an obstacle to the sharing of knowledge with outsiders.

Intellectual Property as a Tool for the Protection of Aboriginal Culture

a. Success stories

["Simeone"]) and of genetically modified cotton (Joseph Githaiga, "Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge" (1998) 5:2 Murdoch University Electronic Journal of Law at para 79 ["Githaiga"]); and the commercialization of hoodia as a weight-loss supplement (UN DESA, *State of the World's Indigenous Peoples* (New York, 2009) at 75 (UN Doc. ST/ESA/328), online: <http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf>).

³¹ Courtney Doagoo, "Navajo Nation Sues Urban Outfitters Inc.", IP Osgoode (June 7, 2012), online : <<http://www.iposgoode.ca/2012/06/navajo-nation-sues-urban-outfitters-inc/>>.

³² Lorrilee McGregor, Ontario First Nations Perspectives on Traditional Knowledge: A Diagnostic and Discussion Paper Prepared for the Chiefs in Ontario, June 7, 2009 <http://www.chiefs-of-ontario.org/sites/default/files/files/TK_Draft_Discussion_Paper_-_June_7_LOGO.pdf>.

³³ 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. of Intl & Comp. Law 633 at 645 ["Paterson & Karjala"].

Given the intangible nature of cultural heritage, it would seem natural to seek its protection through the use intellectual property laws.³⁴ Indeed, some efforts to use trade-mark laws have been met with success.

The "igloo tag" and the "Genuine Cowichan Approved" certification marks are interesting examples of the use of intellectual property rights to promote Aboriginal culture. These marks were developed in order to help Aboriginal artists promote their wares and distinguish them from counterfeit goods.³⁵ The igloo tag was developed by Indian and Northern Affairs Canada in 1959 and is available to Inuit artists only. It certifies that their work is a true piece of Inuit art.³⁶ The Cowichan Band Council of B.C. registered its certification mark in relation to clothing, particularly the heavy woollen Cowichan sweaters, which are hand-dyed and knit using traditional techniques.

Though several first nations have registered official marks for crests and flags, the Snuneymuxw First Nation in B.C. has found a particularly innovative use for this type of mark. They have registered the symbols depicted in ancient petroglyphs found in the Nanaimo River Estuary. Not only has this helped protect the sacred symbols from culturally inappropriate use, it has also helped prevent the erosion of the petroglyphs themselves. Tourists used to transfer the symbols by rubbing them onto paper, but by registering an official mark, the Snuneymuxw were able to curb this practice.³⁷

b. Challenges due to fundamental differences in theory

Despite these successes, not all components of cultural heritage can be protected by intellectual property laws due in part to fundamental differences between the underlying philosophy of intellectual property law and Aboriginal ethics in respect of cultural heritage.

The main goal underlying the law of patents and of copyright is to promote and protect innovation and originality by awarding the inventor, author or owner with a bundle of economic rights.³⁸ Traditional knowledge does not typically meet the criteria of novelty or originality, as it has been handed down for generations and is

³⁴ *Supra* note 33 at 638.

³⁵ *Supra* note 8 at 20.

³⁶ Howard Mann, "Indigenous peoples and the use of intellectual property rights in Canada: Case studies relating to the intellectual property rights and the protection of biodiversity" (1999) Intellectual Property Policy Directorate – Corporate Governance Branch – Industry Canada, Working Paper at 45 ["Mann"].

³⁷ Michael F. Brown, *Who owns native culture?* (Cambridge, MA: Harvard University Press, 2003) at 83-84.

³⁸ Mohsen al Attar, Nicole Aylwin & Rosemary J. Coombe, "Indigenous Cultural Heritage Rights in International Human Rights Law" in Catherine Bell & Robert Patterson, eds, *Protection of First Nations' Cultural Heritage: Laws, Policy and Reform* (Vancouver, BC : University of British Columbia Press, 2009) 311 at 320; Brascoupé & Endemann, *supra* note 8 at 2, 25.

widely held by members of the community.³⁹ Moreover, Aboriginal ethics do not attach exclusive economic rights to cultural heritage. Knowledge is not a commodity that can be purchased and exploited at will.⁴⁰ People must handle and transmit knowledge responsibly, as it carries the power to do good or ill to the knower, the community and, in certain cases, the environment.⁴¹ Aboriginal ethics and spirituality are focused on the development and preservation of group identity and survival through respect and balance between all things, rather than the promotion of individual economic gain.⁴²

The communal values inherent in Aboriginal ethics are another aspect that conflicts with intellectual property law. As discussed, cultural heritage belongs to the community, with ownership sometimes vested in a custodian.⁴³ Conversely, the ownership of copyright or of a patent is usually assigned to the individual creator or inventor.⁴⁴ Though co-ownership is possible, it is often viewed as undesirable and fraught with complications.

Aboriginal ethics and intellectual property laws also differ in their definition of the object deserving of protection. Under copyright law, the work that is protected is the expression which the author gives to the idea, not the ideas contained in it.⁴⁵ For example, copyright protects the sculpture by Bill Reid displayed in the Vancouver International Airport⁴⁶ from unauthorized reproduction, but it does not prevent a non-Aboriginal third party from painting a Haida-style picture depicting a similar scenario of a canoe filled with animals or from carving a totem pole with the same characters. This is precisely what Aboriginal artists wish to prevent. They are seeking to gain a certain amount of control over the ideas, legends, symbols or artistic styles which are appropriated from their cultures.⁴⁷

Copyright laws also require that the expression of an idea be "fixed" in order to benefit from protection. Aboriginal intellectual and spiritual life has manifested itself through folklore, rituals and traditional skills, preserved and transmitted by oral tradition, which is not copyrightable as it is not fixed in writing, film or art.⁴⁸

³⁹ Brascoupe & Endemann, *ibid* at 9.

⁴⁰ Marlene Brant Castellano, "Ethics of Aboriginal Research" (2004) 1:1 Journal of Aboriginal Health 98 at 104 ["Brant Castellano"]; Lou-Ann Neel & Dianne Biin, "By Design: The Protection of Intellectual and Creative Rights" (Conference delivered at the UBCIC Protection Knowledge-Traditional Resources Rights in the New Millennium Conference, February 2000) [unpublished] at 5 ["Neel & Biin"].

⁴¹ Brant Castellano, *ibid* at 104.

⁴² Simeone, *supra* note 30 at 5; Brascoupe & Endemann, *supra* note 8 at 2, 14; Coombe, The Properties of Culture and the Politics of Possessing Identity, *supra* note 11 at 279.

⁴³ Githaiga, *supra* note 30 at para 14.

⁴⁴ *Supra* note 8 at 15.

⁴⁵ Coombe, The Properties of Culture and the Politics of Possessing Identity, *supra* note 11 at 259.

⁴⁶ The sculpture in question is *The Spirit of Haida Gwaii: The Jade Canoe* by Bill Reid.

⁴⁷ Robert Mainville, "Survol de l'état du droit autochtone en matière de protection du patrimoine culturel" (2007) 19:1 C.P.I. 183 at 191 ["Mainville"].

⁴⁸ *Supra* note 3 at 312; Brascoupe & Endemann, *supra* note 8 at 14; Paterson & Karjala, *supra* note 33 at 639.

Finally, whereas Aboriginal ethics support a temporally unlimited protection of knowledge and cultural expressions,⁴⁹ the scope of protection accorded by intellectual property laws is limited in time, with the exception of trade-marks, which, in theory, can be registered and renewed indefinitely. In order to balance the incentive for innovation with the maintenance of a public domain on which artists and inventors may draw for inspiration, Canadian intellectual property rights are limited in time.⁵⁰

Not only are Aboriginal ethics and the theories underpinning most intellectual property laws at odds, but their application can lead to different results. In some cases, intellectual property laws sanction practices which would otherwise be prohibited under customary law.⁵¹

Since copyright laws only protect the expression of an idea and not styles or themes, non-Aboriginal artists are free to appropriate Aboriginal styles and use them in a fashion that is contrary to the strict customs of the Aboriginal community of origin.⁵² If, for example, a non-Aboriginal author documents Aboriginal legends and publishes them in a book, he enjoys the protection of copyright in the work and the exclusive economic rights that come with it. If the author learned of the legends from the Aboriginal community, publication would constitute an infringement of Aboriginal cultural norms but would be sanctioned by intellectual property laws.

Intellectual property laws may also be used to reinforce negative stereotypes. For example, many sports teams have trade-marked names which make reference to Aboriginal people, sometimes using racial slurs, such as the Redskins and the Redmen, ultimately reducing Aboriginal identity to the image of a happy mascot or a savage warrior. The rights conferred on the holders of these trade-marks are often the basis of lucrative product franchising arrangements, the profits of which are not shared with Aboriginal communities.

c. Practical issues

Differing circumstances (including knowledge, wealth, power and ability) render some people better able than others to exploit legal rights.⁵³ Aboriginal peoples experience issues with access to justice more than the average population due to differences in culture (as explained above) and a lack of resources and education.

⁴⁹ Brascoupé & Endemann, *ibid* at 10; Paterson & Karjala, *ibid* at 640.

⁵⁰ Between 10 years from registration (for industrial property) to 50 years after the death of the author (for copyright).

⁵¹ RCAP Report, *supra* note 22 at 554; Coombe, First Nations Intangible Cultural Heritage Concerns, *supra* note 4 at 252; Brascoupé, *supra* note 8 at 11; King, *supra* note 9 at 97.

⁵² *Supra* note 16 at 13.

⁵³ Anupam Chander & Madhavi Sunder, "The Romance of the Public Domain" (2004) 92 Cal L Rev 1331 at 1341.

There has been a marked absence of significant enforcement actions by Canadian Aboriginal groups largely due to the cost of registration and/or enforcement of intellectual property rights.⁵⁴ If the costs of registration and enforcement are prohibitive, the cost of opposing offensive trade-mark registrations with a view to halting the propagation of negative stereotypes, for example, would be viewed as astronomical.

In some cases, the government has stepped in to oppose or prevent offensive registrations. The "Redskins" trade-mark was cancelled by the USPTO as it was deemed to be disparaging to Native Americans. Had the dispute over the "Redskins" name arose in Canada, the outcome might have been similar, as scandalous, obscene or immoral marks are prohibited.⁵⁵ However, if a registered mark uses a word that, following a shift in public mores, becomes offensive, it is not automatically cancelled. A search of the CIPO database reveals that the "Redskins" trade-mark is still registered in Canada. Moreover, trade-marks that make use of ethnic slurs are prevalent, including "Red Indian" and the controversial "Redmen". Many other trade-marks using Indian head designs or other names or designs relating to Aboriginal culture have been registered by non-Aboriginal businesses to market firearms, alcohol, axes and tobacco, thus contributing to the perpetuation of negative stereotypes.⁵⁶ For example, the registered trade-mark "Savage" is used in connection with firearms. Out of context, the mark would not appear offensive, but in this case it is used in combination with the unregistered logo of an Indian chief wearing a headdress.⁵⁷

A further challenge is that cancellation of an offensive mark does not prohibit the owner of the mark from continuing to benefit from common law protection of the mark. As such, cancellation of offensive registered trade-marks is, at best, an incomplete solution.

A second factor which limits access to justice is a lack of educational materials aimed at informing Aboriginal people of their intellectual property rights.⁵⁸ Studies show that, despite public awareness campaigns, Aboriginal people either aren't aware of their intellectual property rights or misunderstand them. For example, one study noted that it was unclear to some participants that enforcement of intellectual property is the responsibility of the individual rights-holder, not the government.⁵⁹

⁵⁴ Neel & Biin, *supra* note 40 at 8; Brascoupé & Endemann, *supra* note 8 at 10.

⁵⁵ *Trade-marks Act*, RSC 1985, c T-13, s 9.

⁵⁶ *Supra* note 8 at 22.

⁵⁷ Trade-marks using disparaging terms or imagery in reference to other ethnic groups were found, as well.

⁵⁸ Bird, *supra* note 19 at 14; Mann, *supra* note 33 at 24, 43, 46; Paterson & Karjala, *supra* note 33 at 663.

⁵⁹ *Supra* note 8 at 10. There are penal provisions in certain intellectual property statutes, but they are rarely enforced.

Closely connected to this challenge is the language barrier. Though Aboriginal languages are on the decline, a linguistic barrier remains, even for Aboriginal people who speak English. Differences between Standard English and the dialects spoken by Aboriginal people are such that publicly available materials on intellectual property may not be fully understood by the average Aboriginal person.⁶⁰ Even Aboriginal people who speak Standard English (or non-Aboriginal persons, for that matter) may experience difficulty in understanding such materials, as "[i]ntellectual property laws use terms and concepts that are not a part of everyday life for most people anywhere, let alone in the Arctic."⁶¹

The practical inability of Aboriginal people to enforce their rights renders Canadian intellectual property laws less viable as a tool for the protection of Aboriginal cultural heritage.⁶² Intellectual property laws currently only offer an incomplete solution to the complex problems which pose cultural appropriation and negative stereotypes.⁶³

Conclusion: the path forward

The use of Canadian intellectual property laws as a tool for the protection of Aboriginal cultural heritage against cultural appropriation leads to confusion and adverse consequences. This is due to the fact that these laws were not developed to meet the aim of cultural heritage protection, but for other economic purposes.⁶⁴ "The challenges that postcolonial struggles pose for Canadian society cannot be met by our traditional reliance upon categories of thought interested from a colonial era. The conceptual tools of modernity are ill equipped to deal with the conditions of postmodernity in which we all now live."⁶⁵

New concepts of ownership and control over cultural heritage must be created to deal with and protect existing and emerging expressions of Aboriginal cultural identity."⁶⁶ According to Vine Deloria, Jr., "[w]hat we need is a cultural leave-us-alone agreement, in spirit and in fact."⁶⁷ Most scholars, however, have reached a more optimistic conclusion. There is a consensus that existing intellectual property laws should be supplemented by *sui generis* legislation that addresses the specific needs

⁶⁰ Naghmeh Babae, "Language Challenges of Aboriginal Students in Canadian Public Schools" (2011) 4:1 First Nations Perspectives 110.

⁶¹ *Supra* note 19 at 11.

⁶² *Supra* note 33 at 50.

⁶³ *Ibid* at 4.

⁶⁴ *Supra* note 3 at 310; Ysolde Gendreau, "Rejuvenating Moral Rights through Immemorial Claims" (2005) 19 I.P.J. 227 at 235

⁶⁵ Coombe, First Nations Intangible Cultural Heritage Concerns, *supra* note 4 at 255.

⁶⁶ Coombe, First Nations Intangible Cultural Heritage Concerns, *supra* note 4 at 262.

⁶⁷ Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman, OK: University of Oklahoma Press, 1998).

of Aboriginal groups and the characteristics of cultural heritage which differ from traditional intellectual property.⁶⁸

The Federal Government has already committed itself to legislating the matter through many international instruments.⁶⁹ Moreover, it has a constitutional fiduciary obligation toward Aboriginal peoples which could arguably imply a positive duty to protect Aboriginal culture.⁷⁰ New laws should take into account lessons learned in the drafting of international instruments⁷¹ and other national laws⁷² which aim to protect the cultural heritage of indigenous peoples. Also, if we truly want to move past the grave errors of our colonial history, we should ensure that Aboriginal peoples are involved as much as possible in all steps of the legislative and judicial process, from drafting the laws to enforcing them. If Canadian and Aboriginal rules or mores come into conflict, common understandings and shared interests can and should be negotiated.⁷³ Finally, a complete solution must address the access to justice issues outlined above.



⁶⁸ Coombe, First Nations Intangible Cultural Heritage Concerns, *supra* note 4 at 262; Gaudreault-Desbiens, *supra* note 16 at 2

⁶⁹ See for example: *UN Declaration on the rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/RES/61/295 (2007), art. 29; *Convention on Biological diversity*, 5 June 1992, 1760 U.N.T.S. 142 (entered into force 29 December 1993); *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 1994; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 15 (entered into force 3 January 1976).

⁷⁰ Mainville, *supra* note 47 at 204; Brant Castellano, *supra* note 40 at 110

⁷¹ See for example: UNESCO & WIPO, *Tunis Model Law on Copyright for Developing Countries*, 1976; UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action*, 1985; First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, Commission on Human Rights Sub-Commission of Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, *Maatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 1993; South Pacific Commission, *Model Law on the Protection of Traditional Knowledge and Expressions of Culture*, 2002; WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection Of Traditional Knowledge: Revised Objectives And Principles*, WIPO/GRTKF/IC/8/5, 2005; UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people*, UN ECOSOC, 52nd Sess, UN Doc E/CN.4/Sub.2/2000/26 (2000); Inuit Circumpolar Conference, *Principles and Elements for a Comprehensive Arctic Policy*, 1991; WIPO, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*, WIPO/GRTKF/IC/5/INF/3, 2003.

⁷² These countries include Panama, Peru, Costa Rica, New Zealand.

⁷³ Brant Castellano, *supra* note 40 at 103

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