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Discussion Paper on Protocols

Prepared by

Dr. Jane Anderson and Dr. Gregory Younging

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ABSTRACT

The last ten years has seen the development of intellectual property protocols for Indigenous knowledge protection. These protocols cover a matrix of interests and audiences and range from the specific to the more general. Protocols are context driven policy and provide guidelines for behavior. In this sense they function to change people's understanding of an issue, and in this context they seek to encourage reflective behavior when it comes to Indigenous knowledge use and misuse. This paper will explore the pragmatic utility of protocols. As protocols are not dependent upon the adoption of new legislation, it is possible for them to be driven by contextual needs as well as responsive to changing expectations of law. Protocols provide one innovative tool for the protection of Indigenous knowledge. The paper will discuss this current trend; considering what works, and what doesn't, and why protocols offer a practical possibility for protecting contextual and community generated knowledge and knowledge practice.

INTRODUCTION

There is now wide national and international recognition that Indigenous knowledge and/or 'Indigenous Cultural Expressions' have historically been misrepresented and misused.[1] In a myriad of contexts, indigenous knowledge has been subject to enlightenment and scientific logics of decontextualization and classification, reduced into component parts and disassociated from the source communities from which significant meaning derives. In other contexts, indigenous knowledge has been romanticized, fetishized and commodified through its institutional positioning. Through multiple (international, national, personal, political, cultural) networks, indigenous knowledge has entered into the complex value systems of late capitalism.

With the recognition of this history and its ongoing contemporary effects, significant contests over access, control and ownership of indigenous knowledge have arisen. Too numerous to document here these contests range from the philosophical to the economic to the legal. Part of the problem is that the terms of the debate are unclear, and this seriously effects the viability of policy and legislative. While discussion and disagreement continue (and indeed increase), often in reified contexts of international fora and the Academy, indigenous communities continue to find themselves subject to the demands of researchers, tourists, governmental agencies and institutions – very few of whom have negotiated ethical and collaborative forms of engagement around the collection, recording and use of indigenous knowledge within an indigenous context. For individuals at the frontier of these knowledge exchange/sharing encounters, there remain limited tools and advice. What is at stake and for whom, remain critical questions. The answers necessarily require recognizing the unequal nature of these knowledge exchanges, and actively finding means to counter these historically embedded practices.

As the waiting period for any meaningful policy and legislative initiatives in this area continues to grow, there remains an urgent need for alternative strategies that are able to

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[1] The regular gatherings at international forums like the World Intellectual Property Organization as well as a glance at the expanding academic literature illustrate the extent that this subject has become one of intense focus.

incorporate present needs, as well as being flexible as these change into the future. As in other areas of emergent (and contested) policy, or in areas where there lies little hope for international consensus in creating norms and standards, protocols offer themselves as useful vehicles for articulating needs and reorienting positions. As either formal or informal devices, protocols span a spectrum of potential sites of intervention. What makes them useful in this context of indigenous knowledge use and exchange, is that they do not require governments or institutions for administration. They can be locally produced and thus responsive to immediate needs.

In their most basic form, and following from their own genealogy [*protokollen* from the Greek meaning 'table of contents' or 'first sheet'] protocols are first and foremost instructional.[2] Following from this, and in keeping with how protocols have developed and been utilized in a diverse range of contexts, from regulating conduct in the internet, to providing additional human rights instruments, to providing adjunctive international law standards, protocols provide guidelines for behavior. They can function as a means for changing people's understanding of an issue, and thus, how they act in relation to it. In the context of the sharing, usage and storage of Indigenous knowledge, protocols are being utilized as a strategic way of increasing reflective behavior around Indigenous rights in cultural knowledge. One clear advantage of protocols is that they can be flexible and adaptable to specific contexts and local interests. This makes them ideal tools for guidance on appropriate and/or ethical behavior and practice. In the absence of formal legal intellectual property mechanisms for recognizing and protecting rights in Indigenous cultural knowledge, and in ever increasing contexts where relationships with Indigenous peoples are sought, or where Indigenous knowledge is used, protocols are providing a productive tool for negotiating new kinds of equitable relationships.

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[2] *Protokollen* can also be interpreted as the first sheet glued in a book to help direct or provide guidance to the reader in interpreting the document.

PROTOCOLS

The possibility of using protocols in this context emerged out of the problems that Indigenous and local communities have with intellectual property law. In short, intellectual property and copyright in particular, demands that Indigenous knowledge and Indigenous people are identified and categorized in ways that do not necessarily reflect Indigenous laws, epistemology, ontology, systems of governance or personhood. For example, copyright law requires both an (individual) author and a work in order to provide copyright protection. A work is a tangible expression of an idea in the form of a book, or a photograph etc. Indigenous knowledge systems do not necessarily mark the transition from intangible knowledge to tangible property in the same way. The cultural specificity of intellectual property law, especially its western emergence and development, creates frameworks that do not map easily onto Indigenous knowledge systems or structures for knowledge governance. This has produced a range of problems – including the misuse and appropriation of diverse Indigenous knowledge's for non-indigenous use.

While intellectual property law has been slow to develop new frameworks that can incorporate Indigenous needs and expectations around knowledge use, access and control, questions about what practical alternatives exist for protecting Indigenous knowledge use, that are not dependent upon a specific legislative remedy, have emerged. It is in this context, and in responding to a lack within current national and international legislation and intellectual property norms, that the possibility of protocols have been raised, developed and utilized. Protocols have become a useful alternative for various interested parties – especially and initially in the arts and within the museum and cultural institutional sector. In the main, their development spans the domains and institutions that have had historical and long-term intersections in Indigenous knowledge access and use – for instance those involving (anthropological and other) research and the collections that have developed from this historical and contemporary research focus. The development of protocols reflects a critical attention to the initial conditions of incorporating and utilizing Indigenous knowledge, as well as how these old practices can be de-colonized and re-interrogated to include Indigenous people as leaders and as active collaborators with legitimate perspectives.

But what are protocols? What do they do? How do they work? What do they seek to achieve? And to what extent are they successful?

Protocols remain perceived as relatively neutral cultural forms – but they are a strategic response to the legal dynamics that they have been set against. They are not made up counter to legal experience, but are informed by and respond to formal legal failings or inadequacies. In this sense, protocols are a practical adjunct to law making processes, and demonstrate a shift to a postmodern ordering of the relations between society and legal networks. The shift to protocols is itself illustrative of current trends in intellectual property towards private law making, for example through agreements and consents.[3]

Protocols are guidelines for conduct. They provide information about ways for dealing with a particular problem or issue. There is an inherent power to protocols – for the adoption of protocols is in order to achieve certain ends, for example respecting rights or alerting attention to alternative ways of social and cultural engagement. They offer informed instructions about direction and action. But how do they do this (particularly given their often non-binding nature)? Why would anyone follow protocols – does there need to be some kind of investment in them in order for them to be followed? Or do they need to become inscribed in social and cultural contexts, where not following them becomes an act sanctioned socially rather than legally?

Protocols should be understood as context driven policy.[4] They are produced through a complex matrix of relations exercised through ongoing and changing cultural engagement that is always already invested with politics. Protocols are not neutral forms. They are prescriptive – they prescribe particular types of behavior. Like guidelines, codes of conduct and policy they have the capacity to convey a mode of behavior that individuals are presumed to follow.[5] Protocols work precisely through the self-governing capacity of individuals. Protocols prescribe modes of conduct through emphasizing or normalizing

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[3] See also the use of protocols in other areas offering resistance to IP law – for example open source and copyleft.

[4] These ideas were initially explored in J. Anderson, 'The Pragmatic Politics of Protocols' AIATSIS Bi-annual Conference 25 November 2005 (unpublished).

[5] See also K. Bowrey, 'Alternative intellectual property?: Indigenous protocols, copyleft and new juridifications of customary practices', 6 *Macquarie Law Journal* 65-95, 2006.

particular forms of cultural engagement. The presumption is that we read a protocol, we take on the advice, and we act accordingly. Whilst this effect is not given, overtime protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs. However a key point of interest for protocols is that they offer choice as their differential – an individual, or even an institution either chooses to follow them or not. Overtime, the adoption and usage of protocols can establish cultural standards the lead to more binding forms of enforcement, such as policy, legislation and law.

Protocols are not value neutral but enhance or consolidate systems of value that may be emerging or may already be socially circulated within a particular context. In this sense they provide the possibility for accounting for changing cultural values and norms, and that these may vary from context to context, community to community. Thus they can be a site for the active re-negotiation of cultural values in ways that make legitimate or elevate expectations of behavior that have been reduced or rendered previously irrelevant.

The proliferation of protocols in the area of intellectual property and Indigenous knowledge is very important but not necessarily surprising. Other areas of intellectual property law, challenged by various social, bureaucratic or governmental values and demands, have also found themselves co-existing with a body of protocols that draw from law and further imbue social relationships with legal mechanisms. An easy example is to point to the variety of protocols relating to digital and communicative technologies. For example, the internet is made possible and governed by a series of protocols.[6] These work to regulate a range of systems and interconnections including network behavior and the communication of data. The Internet Protocol is a series of protocols and together they constitute the largest and most extensive network of non-legal regulatory regimes that govern not only the very make up of the internet, but also its capacity to work across multiple jurisdictions. Given the significance of the internet in our contemporary moment, that its internal and external governance is maintained through a system of protocols speaks to the power of protocols to direct behavior in ways akin to legal regimes but without top-down governmentally dependent administration or intervention.

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[6] Also see A. Galloway, *Protocol: How Control Exits After Decentralization* (2004) and L. Denardis, *Protocol Politics: The Globalization of Internet Governance* (2009)

The increase in the development of protocols dealing with Indigenous knowledge protection suggests a particular movement and direction relating to Indigenous rights and the protection of Indigenous knowledge. The turn to protocols is certainly representative of activity that is occurring throughout IP law, where protocols offer an opportunity to reposition certain agendas. The practical utility of protocols is that they are playing a crucial role in changing attitudes and perspectives about how certain industries deal with Indigenous knowledge and with Indigenous individuals and communities. The hidden power of protocols is that they effect change by encouraging actors to make deliberate decisions about how they behave in relation to a particular issue. This is as an alternative to more stringent court based methods.

It is useful to consider protocols as a very specific instrument for pushing the limits of law in terms of providing specific, context driven approaches that incorporate useful elements of IP law, as well as bridging the sizable gap between what the law says, and how it actually works in contexts that require new forms of knowledge management.

AUSTRALIAN EXAMPLES OF PROTOCOLS

There are certain elements of protocols that have been or are currently in circulation, and several others that are currently being developed. Many of these protocols have been developed in Australia and draw significantly from the work of the Indigenous lawyer Terri Janke. What follows is an outline of the most prominent of these as well as a short reading of their effect in the context that they have been designed for.

1. Aboriginal and Torres Strait Islander Library and Archive Protocols

The Aboriginal and Torres Strait Islander Library and Archive Protocols were developed in 1994 and 1995.[7] They sought to provide a guide to libraries, archives and information services about the interaction with Aboriginal and Torres Strait Islander people and communities who were increasingly becoming key users of these services. Importantly,

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[7] In conjunction with the Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN).

these Protocols sought to create frameworks for how to handle material with Aboriginal and Torres Strait Islander content. Specifically the protocols encouraged:

1. the recognition of moral rights of Aboriginal and Torres Strait Islander peoples 'as the owners of their knowledge'
2. the need to address issues arising from Indigenous content and perspectives in documentary materials, media and traditional cultural property;
3. the need to address issues of access to libraries, archives and information resources amongst other things.

The Protocol sought to chart a path for new best practices that acknowledged and respected Indigenous cultural rights. This was a significant moment in an area haunted by colonial pasts and practices – where Indigenous people featured as subjects of the archive rather than active participants in interpreting past and present cultural production.

Moreover in a context also governed by copyright law, (which practically means that Indigenous people legally own very little of the material found in such institutions), the protocol began a process of recognizing serious inequity and the need for new standard setting.[8] It began to address certain historical power imbalances that law has been unable to deal with. The protocol prescribed a change of behavior – that Aboriginal and Torres Strait Islander people did have rights in relation to the material, and while these would not be recognized legally, the institutions themselves could be proactive in recognizing these. Institutions could choose to break with past exclusionary practices and to begin new negotiated processes and practices that would involve acknowledging differing (and not necessarily legal) rights. Whilst the exact nature of 'Indigenous intellectual property' remained an ambiguous and complicated concept, the step of encouraging reflection about rights and interests previously excluded because they were not legally recognizable and hence enforceable, was the explicit purpose of the protocol. The protocol has been foundational in raising the level of expectation about the actions and responsibilities of libraries, archives and information services in relation to Indigenous cultural material.

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[8] See J. Anderson, '(Colonial) Archives and (Copyright) Law' *Nomorepotlucks* 4, 2009.

2. National Association for the Visual Arts Protocols

With similar intentions about raising the profile of Indigenous rights in the Arts, the National Association for the Visual Arts developed the NAVA Protocols for Working with the Australian Indigenous Visual Arts and Craft Sector in 2001.[9] With a hint of purpose in the title, *Valuing Art, Respecting Culture,* the protocols positioned themselves within a field of similarly intentioned protocols from other sectors like those above for museums, galleries and libraries.

Drawing authority from the Draft Declaration on the Rights of Indigenous Peoples,[10] the NAVA protocols endorsed a series of principles regarding Indigenous rights to retain control of their cultural heritage and to regard these rights as akin to intellectual property rights. In making this comparison, the protocol posited that elements not traditionally associated as intellectual property, should be recognized as such. The NAVA protocol explained that:

> Protocols provide a means of complying with the customs and cultural value systems of a particular situation, group or culture, in order to acknowledge and respect the situation or people involved, and to ensure that negotiations and transactions are able to be undertaken in a spirit of co-operation and goodwill. The importance of respecting the protocol requirements of every cultural group involved in collaboration and transactions should be acknowledged.[11]

Here we get a good idea about the nature of these protocols: what they seek to achieve and realize is an increase in understanding certain cultural nuances that have not historically been easily accessible. The Protocol explicitly aims to bring certain principles and guidelines for more engaged and appropriate conduct into a public and visible space.

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[9] D. Mellor, and T. Janke, *Valuing Art, Respecting Culture. Protocols for Working With the Australian Visual Arts and Crafts Sector,* National Association for the Visual Arts, 2001.

[10] The first Draft was finished in 1993. It was refined and edited through multiple meetings, and in response to Member States concerns about certain provisions (namely notions of sovereignty and self-determination and land rights) and was finally presented and adopted by the Human Rights Council in 2006. It was adopted by the UN General Assembly in 2007 with 143 states voting in favour, four states (US, Australia Canada and New Zealand) voting against, and 12 abstentions.

[11] D. Mellor, and T. Janke, *Valuing Art, Respecting Culture. Protocols for Working With the Australian Visual Arts and Crafts Sector,* National Association for the Visual Arts, 2001 at 43.

In compiling these general principles the Protocol prescribes how the art sector should begin to engage with Indigenous artists, and deliberately marks Indigenous artists as a different category of artists requiring specific and specialized attention.

It is worth noting that the audiences for these protocols are not Indigenous people, but rather those non-Indigenous people working in fields where Indigenous interests are either directly involved or intersect. That is to say that the protocols have not been about finding ways to translate already recognized legal intellectual property rights into Indigenous contexts. Rather the point of the protocols have been about translating a range of Indigenous knowledge management structures, often utilizing the language of intellectual property and rights, into frameworks perceived to be lacking in understanding and/or at risk of bad behavior.

3. The Australia Council Protocols

Following closely behind the NAVA Protocols, the Australia Council launched a series of protocols that were designed to translate Indigenous rights through an already existing intellectual property legal framework.[12] This is evidenced in the way in which the protocols are separated into intellectual property classificatory rubrics, art, song, dance, performance, digital technology. Constituting divisions in copyright, the protocols prioritize an explanation of copyright law and include a range of examples when certain uses of works might arise that involve copyright issues.

The Australia Council Protocols are general guides. They contain diverse information about principles governing good conduct in relation to respecting Indigenous heritage. The five separately produced documents (for example for visual artists, new media, writing, literature and music) dovetail each other in information and direction. As a whole, they are seen as a kind of kit – instructive in the different divisions of copyright law as this relates to Indigenous arts.

The extensive circulation of the Australia Council Protocols are illustrative of the way in which protocols have been perceived as a mechanism in pushing for the recognition

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[12] See: T. Janke *New Media Cultures: protocols for producing Indigenous Australian new media* The Australia Council: Sydney, 2002; T. Janke, *Visual Cultures: protocols for producing Indigenous Australian visual arts and craft*s The Australia Council: Sydney, 2002; T. Janke, *Writing Cultures: protocols for producing Indigenous literature* The Australia Council: Sydney 2002.

of previously excluded Indigenous perceptions and rights. Protocols continue to be widely developed in Australia. For example: through the Ara Iritja Archive, Federation of Aboriginal and Torres Strait Islander Languages (FATSIL) and the State Library of Queensland. These are being produced to respond to quite site specific and contextual needs. They are also, importantly, being seen as tools for communities – in that they are conversant with community needs in this area, and are driven from the specific needs of the locale, rather than providing a general interpretive grid. These new protocols are both explanatory about intellectual property law and increasingly enable communities to set the terms of the engagement, legitimizing cultural practices that remain meaningful within specific contexts, for example, allowing the different tiers of knowledge access and restriction within a community to be formally asserted to visitors to the community, many of whom come with liberal logics of knowledge accessibility and use.

FURTHER THINGS TO THINK ABOUT

One difficulty with protocols is their accessibility. Traditionally they have had a very specific audience, one that is predominately educated and literate. The utility of protocols has been to alter perspectives about the legitimacy of Indigenous concerns and expectations around rights, but it has not necessarily been to alter perspectives or create educative frameworks within communities about existing laws and rights – and find space where the contests between knowledge systems and structures can be articulated. One effect of this missing dimension of protocols is that a perspective about the incommensurability of intellectual property law for Indigenous knowledge is maintained. This perspective rests on specific narratives of what intellectual property is, does and means. While intellectual property is certainly not a panacea, and intellectual property law is not designed to adequately function as a tool for reconciliation, there are moments when IP law offers Indigenous communities important entitlements and protections that are legally recognizable and enforceable. That many communities still retain very limited access to information about intellectual property, both in terms of when it could be useful, and when it is disruptive and potentially destructive, is a major concern that does require innovative forms of informational resources, ones that are beyond the scope of protocols.

Protocols function most effectively when the nature of the problem that the protocol is seeking to address is clear. It also helps when the audience for the protocol has been clarified. Incorporating already existing conditions for sharing and using knowledge can be very helpful for the targeted audience. As protocols offer themselves as devices for expanding understanding about local practice, the inclusion of this kind of information also works to enhance the legitimacy of already operating community and tribal community practice.

CANADIAN CONTEXT FOR PROTOCOLS

In the late 1980s and early 1990s, the Indigenous arts community in Canada was instrumental in bringing the issues of cultural appropriation and repatriation to the forefront of the national consciousness. The mobilization of Indigenous artists at the 1987 "Telling Our Own Story" Conference in Vancouver, protests by Indigenous artists against *The Spirit Sings* exhibit at the Glenbow Museum and the National Gallery of Canada in 1986-1987, and the lobbying effort of Indigenous members in the Writers Union of Canada in 1988, all contributed to an increased awareness among progressive elements in Canada. These efforts have led to increased recognition of the importance of respect and protection for Indigenous cultural expressions.

The Creator's Rights Alliance (CRA) was formed in 2002 to represent the intellectual property interests of artists in Canada at a national and international level, and, therefore also, has an interest in 'TK' (traditional knowledge) issues and how this effects Indigenous artists. The CRA's Indigenous Peoples Caucus (IPC) has maintained an effort to hold ongoing discussions on related issues within the Indigenous artists community and government departments and agencies in Canada. Significantly this includes actively lobbying for Indigenous rights in controlling their cultural expressions at World Intellectual Property Organization (WIPO) and other UN forums. The Intellectual Property Policy Directorate (IPPD) of Industry Canada also has a domestic policy development work program on Traditional Knowledge (TK) issues.

Indigenous Artist Research Project

The CRA approached representatives of the IPPD in 2004 for funding assistance to conduct three regional symposia dealing with TK related issues, as well as a national conference coinciding with the CRA annual meetings in Montreal in June 2005. The entire project was named the Indigenous Artist Research Project (IARP). Throughout the symposia conducted for the IARP participants pointed out that TK raises serious challenges for the intellectual property system. Many argued that current intellectual property law does not respond to the concerns of TK holders. One overarching problem identified is that the intellectual property system is designed to eventually release all intellectual property into the 'public domain' after time periods of protection expire. Many participants insisted that Indigenous protocols dictate that certain aspects of TK should be regulated and protected in perpetuity. In each region, artists and others indicated the need for support from the Federal Government for organization around these issues at the local level. This was in order to allow them to better contribute to these discussions. The IARP managed to bring together a wide range of individuals, Federal Government departments and organizations interested in finding answers to the complex and sensitive issues related to TK, in a positive and productive manner. It is hoped that the information gathered will be a useful contribution to current work on TK underway within federal government and Indigenous communities and that collaboration will continue to take place in the future.[13]

The National Gatherings on Indigenous Knowledge

Traditions: National Gatherings on Indigenous Knowledge (NGIK) was the third in a series of national gatherings organized by the Department of Canadian Heritage (DCH) with the goal of 'continuing engagement with Aboriginal communities across Canada on areas of mutual interest.' DCH proposes that 'the findings of *Traditions* will help to build and enhance policies, programs and services that are supportive of Indigenous peoples in Canada and are relevant to their needs.'[14]

The preamble to the Draft Report states that:

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[13] Indigenous Artist Research Project, *Final Report*, 2004.
[14] National Gatherings on Indigenous Knowledge, *Draft Final Report*, 2006.

Dialogues with First Nations, Inuit and Métis identified the need for all Canadians to recognize these contributions and acknowledge the unique challenges faced by communities in the three areas of Indigenous knowledge targeted for discussion: languages and cultures; intellectual and cultural property; and artistic expression.

The Gatherings provided a forum in which DCH came together with Indigenous communities and representatives from other government sectors to discuss a framework for the recognition, respect, protection and celebration of Indigenous knowledge in all the ways it is used and expressed. The NGIK allowed delegates to share information about best practices and support available from Federal Departments and agencies, and they encouraged open and relevant discussions of key issues and brainstorming on opportunities and strategies for change.

During the months of May and June 2005, the national gatherings on Indigenous knowledge were held in eight communities across Canada: Rankin Inlet, Edmonton, Penticton, Wanuskewin, Yellowknife, Wendake, Eskasoni and Six Nations. They brought together over 400 representatives of Indigenous communities with DCH and other government representatives. Each gathering took place over three days and involved approximately fifty invited delegates. Gatherings consisted of small break-out circles and plenary discussions focused on the following themes:

1) Indigenous Knowledge and Languages and Cultures;
2) Indigenous Knowledge and Intellectual and Cultural Property; and,
3) Indigenous Knowledge and Artistic Expression.

Within each of the three themes, delegates were asked to consider: what issues should be considered priorities and what were the main vulnerabilities; the possibilities for action; and the roles and responsibilities for addressing the issues in diverse communities. The process of engagement used by the National Gatherings Secretariat is founded on key principles that have guided the DCH in coming together with federal departments, provincial and territorial governments, Aboriginal governments and leaders, and communities alike. According to the NGIK Draft Report, 'these principles were not just for

the national Gatherings, but will continue to guide the Department of Canadian Heritage in future processes of engagement.'

Although each Gathering, and indeed each circle discussion, had its own unique conception of Elders' Councils, the underlying message was that guidance and advice from Elders is essential because traditional laws and protocols govern virtually all aspects of community life, including finding solutions and strategies to address critical issues. The NGIK process was an example of a National government inviting Indigenous communities to take part in a process and express their views. It remains to be seen if the NGIK will have any significant impact of DCH and Canadian Government policy on TK.[15]

Canada has the benefit of learning from the Australian examples and the opportunity to build on recent initiatives. The 2010 Olympic Games in Vancouver, including the controversial appropriated Inukshuk in the Olympic logo, illustrated both the need, as well as how far education and reciprocal recognition of rights needs to be made.

In comparison, Canada appears to be at a similar stage that Australia was at over a decade ago. In this sense, after about two decades of Indigenous people insisting on the importance of TK issues, the State has slowly begun to acknowledge the problem. Perhaps the IARP, the NGIK, and other grassroots initiatives among Indigenous artists and communities, could lead to the beginning of a movement to act on TK issues more substantively in Canada. However, as with the Australian example, this work requires substantial support from institutions, from Government and from national arts agency funding.

INTERNATIONAL CONTEXT

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between intellectual property and TK, genetic resources and

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[15] At the time of this writing of this discussion paper the NGIK Final Report is held up in the Prime Minster's Office awaiting approval.

traditional cultural expressions (historically called 'folklore'). The WIPO Intergovernmental Committee has developed draft provisions for the protection of Traditional Cultural Expressions (TCEs). Objectives of the draft provisions are to: 'Prevent the misappropriation of traditional cultural expressions/expressions of folklore' and 'provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions...'

UNESCOs third convention, *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), is intended to be the last in UNESCOs trilogy of Conventions to protect the world's 'culture'. TK is not specifically mentioned in the Articles in the Convention, although it is in the part of the preamble text that reads: "Recognizing the importance of traditional knowledge as a source of intangible and material wealth, in particular the knowledge systems of indigenous peoples, and its positive contributions to sustainable development, as well as the need for its adequate protection and promotion."

Notwithstanding that Canada remains one of the original four UN member States opposed to the Declaration on the Rights of Indigenous Peoples (2007), with the Declarations adoption, all national and international standards on Indigenous knowledge issues should conform to Article 31 of the Declaration which states:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
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> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[16]

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[16] United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 31.

CONCLUSION

Protocols that address the rights that Indigenous people have in relation to protecting and maintaining Indigenous knowledge systems and practices have been built upon over a ten year period. The utility of protocols and, indeed their pragmatics, derives from their positioning between law and the social, thus drawing legitimacy and authority from both domains. They can be informative, educational, and convey new meaning about an issue to that which previously existed. To date, many of these protocols function to inform a disparate public about differing Indigenous expectations of intellectual property law and how indigenous knowledge systems and structures can be respected and managed. However, this has also been done without necessarily translating key elements of intellectual property law back into communities. The flow has been relatively mono-directional. The development of protocols needs to occur both in collaboration and also at the community or tribal level – the only way they can be effective is if communities and tribes are involved in drafting their own, and changing them over time as is needed.

Given the influence and increased circulation of protocols it seems inevitable that they will continue to proliferate – as new needs develop. For example, it is highly likely that protocols regarding biodiversity, carbon trading and access sharing will be developed before any legislative measures are developed that address Indigenous rights in these areas. It will be important to make these protocols useful for communities as well as for industry groups. For in making them only relevant to industry and other interested groups, Indigenous people and communities remain marginalized from information that will be useful to make decisions regarding access, use and the regulation of natural and genetic resources. This should be one of the lessons learned from a reflexive look at protocols and their utility.

The challenge for the next wave of protocols is to make them practically accessible. For the utility of protocols is that they can entertain cultural specificity and context in ways that law can't. Whilst they are still dependent upon people choosing to follow their direction, they do maintain the capacity to exert influence in a variety of domains. Significantly they are instructive – providing guidelines for possible modes of engagement. In this sense they hold the capacity to respond to contextual needs in a given locale. Whilst

protocols offer a practical possibility for protecting Indigenous knowledge, they can also be unintelligible, general and useless. This means that in making decisions to use and develop protocols, there is an urgent need to reflect upon who they are being designed for, what perspectives they are presenting and for what purpose.

BIOGRAPHY

Dr Greg Younging is Assistant Director of Research for the Truth and Reconciliation Commission (Canada), Professor of Indigenous Studies Program and the University of British Columbia and Member of the Opsakwayak Cree Nation. He has a Masters Degree from the Institute of Canadian Studies at Carleton University and a Masters of Publishing Degree from the Canadian Centre for Studies in Writing and Publishing from Simon Fraser University. Greg has a PhD from the Department of Educational Studies at the University of British Columbia. He has worked for the Royal Commission on Aboriginal Peoples, Assembly of First Nations, Committee of Inquiry into Indian Education, Native Women's Association of Canada and from 1990-2003 was the Managing Editor of Theytus Books. He is a former Member of the Canadian Council Aboriginal Peoples Committee in the Arts (1997-2001) and the British Columbia Arts Council (1999-2001) and is currently Chair of the Indigenous Peoples Caucus of Creators Rights Alliance (appointed May 2002).

Dr Jane Anderson is Assistant Professor in the Centre for Heritage and Society, Department of Anthropology, University of Massachusetts and Adjunct Professor of Law at New York University School of Law. Jane has a PhD from the Law School at University of New South Wales in Australia. Her work is focused on the philosophical and practical problems for intellectual property law and the protection of Indigenous/traditional knowledge resources and cultural heritage. Between 2000 and 2006 Jane was a Visiting Research Scholar at the Australian Institute of Aboriginal and Torres Strait Islander Studies. Jane has worked as an Expert Consultant for the World Intellectual Property Organization on a number of policy proposals for the protection of traditional knowledge

and cultural expressions. These include developing a framework for an international alternative dispute resolution/mediation service for intellectual property and Indigenous knowledge disputes, international guidelines for cultural institutions with collections of Indigenous cultural material and the development of site-specific intellectual property protocols that help local communities enhance and support already existing knowledge management practices. Her most recent publications include *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law*, Edward Elgar Press, 2009 and the *Indigenous/Traditional Knowledge and Intellectual Property Issues Paper*, Centre for the Study of the Public Domain, Duke University, 2010. Email: janea@anthro.umass.edu

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Internet Resources for Protocols

Aboriginal and Torres Strait Islander Library and Information Resources Network
http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index0c51.html?option=com_frontpage&Itemid=1
Australian Arts Council – Indigenous Arts Protocols
http://www.australiacouncil.gov.au/research/aboriginal_and_torres_strait_islander_arts
Australian Broadcasting Commission – Cultural Protocol
http://www.abc.net.au/indigenous/education/cultural_protocol.htm
Biocultural Community Protocols
http://www.unep.org/communityprotocols/PDF/communityprotocols.pdf
Development of a Protocol Framework for Meaningful Consultation with Canada's Aboriginal People on Forest Management
http://www.cec.org/grants/projects/details/index.cfm?varl an=ENGLISH&ID=108

Hopi Cultural Protocols

http://www.nau.edu/~hcpo-p/hcpo/index.html

Indigenous Knowledge: Place, People and Protocol

http://www.pch.gc.ca/pc-ch/org/sectr/cp-ch/aa/trd/ppr-eng.cfm

Protocols for Native American Archival Materials

http://www2.nau.edu/libnap-p/protocols.html