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Centre for International  
Governance Innovation

CIGI Papers No. 198 – November 2018

# Toward Global Protection for Traditional Knowledge

William Fisher





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## About the Author

**William Fisher** is the Wilmer Hale Professor of Intellectual Property Law at Harvard University. He has taught at Harvard Law School since 1984. Between 1982 and 1984, he served as a law clerk to Judge Harry T. Edwards of the US Court of Appeals for the DC Circuit and then to Justice Thurgood Marshall of the US Supreme Court. He received his undergraduate degree (in American studies) from Amherst College and his graduate degrees (J.D. and Ph.D. in the history of American civilization) from Harvard University.

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## About the Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## Executive Summary

This paper contends that the proper role of law in managing uses of traditional knowledge is highly contextual. In some settings, distributive justice, cultural diversity and group identity formation would be promoted by according Indigenous groups more power to control or to benefit from uses of knowledge developed and sustained by their members, while in other settings, respect for individual autonomy and the promotion of semiotic democracy counsel against providing the groups that power. The paper then outlines two alternative legal frameworks, either of which could accommodate this complex combination of competing values. The first would incorporate, in a multilateral treaty, a set of provisions that, by increasing the risk that the unauthorized use of traditional knowledge would result in forfeiture of intellectual property rights, would put pressure on private firms to accede to reasonable requests made by the governments of developing countries and by representatives of Indigenous groups. The second would augment and harness public discourse concerning the morality of particular uses of traditional knowledge by creating a disclosure obligation, disconnected from intellectual property law, analogous to the labelling requirements commonly imposed on the producers of food, clothing and drugs.

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## Introduction

Traditional knowledge may be defined as the understanding or skill developed and preserved by members of an Indigenous group concerning either actual or potential socially beneficial uses of natural resources (such as plants, animals or components thereof) or cultural practices (such as rituals, narratives, poems, images, designs,

clothing, fabrics, music or dances).<sup>1</sup> To what extent, if any, should the groups responsible for the generation of such knowledge be empowered to control or to benefit from its uses?

Currently, the ways in which the countries of the world answer that question vary enormously. At one extreme, some countries expressly repudiate legal protection for traditional knowledge. For example, the copyright act of Lithuania provides: “Copyright shall not apply to...works of folk art.”<sup>2</sup>

In a second group of countries, courts have construed existing intellectual property laws to establish modest limitations on uses of traditional knowledge. In perhaps the most famous example, Australian courts ruled that the importation and sale of carpets bearing images derived from motifs developed by Aboriginal groups violated Australian copyright law.<sup>3</sup>

In a third group, legislators have modified existing intellectual property statutes to reach traditional knowledge. For example, in Cameroon, Lesotho, Mali, Senegal and Uganda, folklore is now by statute expressly included in the ambit of copyright law — and in some of these countries is given extensive protection.<sup>4</sup>

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1 This definition is a modified version of the one developed by Stephen Munzer and Kal Raustiala. See Stephen R Munzer & Kal Raustiala, “The Uneasy Case for Intellectual Property Rights in Traditional Knowledge” (2009) 27 *Cardozo Arts & Ent LJ* 37 at 38. For examples of other definitions in the same vein, see David R Hansen, “Protection of Traditional Knowledge: Trade Barriers and the Public Domain” (2010–2011) 58 *J Copyright Soc’y* 757 at 759; World Intellectual Property Organization (WIPO), “Towards the Establishment of a Regional Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in the Caribbean Region” (2009), online: <[www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtk\\_kin\\_08/wipo\\_grtk\\_kin\\_08\\_caribbean\\_brochure.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_kin_08/wipo_grtk_kin_08_caribbean_brochure.pdf)>. For reasons that will become apparent, the definition employed here intentionally lumps together kinds of knowledge that many scholars now differentiate. See e.g. Justin Hughes, “Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property” (2013) 49 *San Diego L Rev* 1215 (examining the differences between the terms “[t]raditional knowledge” and “traditional cultural expression” at 1216–18).

2 *Law on Copyright and Related Rights of 2000*, c II, s 1, art 5 (Lithuania).

3 *Milpurruru v Indofurn Pty Ltd*, [1994] 54 FCR 240 (FCA) [*Milpurruru*], online: <<https://jade.io/article/195477>>.

4 See e.g. *Law No 2000/011 of December 19, 2000 on Copyright and Neighboring Rights Law*, s 5 (Cameroon), online: <[www.wipo.int/edocs/lexdocs/laws/en/cm/cm001en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cm/cm001en.pdf)>; *Order No 13 of 1989, Copyright Order*, ss 18–23 (Lesotho), online: <[www.wipo.int/edocs/lexdocs/laws/en/ls/ls003en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/ls/ls003en.pdf)>; *Loi no 08-024 du 23 juillet 2008, Fixant le Régime de la Propriété Littéraire et Artistique en République du Mali*, c 3, art 110 (Mali), online: <[www.wipo.int/edocs/lexdocs/laws/fr/ml/ml015fr.pdf](http://www.wipo.int/edocs/lexdocs/laws/fr/ml/ml015fr.pdf)>; *Law 2008-09 of January 25, 2008 on Copyright and Neighboring Rights*, pt 4, arts 156–60 (Senegal), online: <[www.wipo.int/edocs/lexdocs/laws/en/sn/sn004en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/sn/sn004en.pdf)>.

Finally, lawmakers in a few countries have created *sui generis* regimes governing traditional knowledge. Examples include the Indigenous Peoples Rights Act of the Philippines and Guatemala's law for the protection of the nation's cultural heritage.<sup>5</sup>

For the most part, these rules only apply within the countries setting them. The net result is that, globally, the treatment of traditional knowledge varies radically by jurisdiction, and the governments of nations from which traditional knowledge is taken have little or no power to control uses of that knowledge in other nations.

During the past 40 years, advocates of enhanced legal protection for traditional knowledge have frequently sought, through regional or multilateral agreements, to strengthen and harmonize the rights of Indigenous groups and to expand the geographic reach of those rights.<sup>6</sup> The principal outcomes of those efforts are: section 15(4) of the Berne Convention;<sup>7</sup> the Tunis Model Law on Copyright for Developing Countries;<sup>8</sup> the Bangui Agreement (adopted under the auspices of the Organisation Africaine de la Propriété Intellectuelle);<sup>9</sup> the Model Provisions for the Protection of Expressions of Folklore;<sup>10</sup> the Universal Declaration on Cultural

Diversity;<sup>11</sup> the United Nations Declaration on the Rights of Indigenous Peoples;<sup>12</sup> the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (adopted under the auspices of the African Regional Intellectual Property Organization);<sup>13</sup> and the Nagoya Protocol on Access and Benefit-Sharing.<sup>14</sup> With the notable exception of the Nagoya Protocol,<sup>15</sup> all of these documents fell well short of the ambitions of their sponsors — and currently do little to limit each country's discretion to permit or to limit uses of traditional knowledge within its jurisdiction.

There is widespread agreement that this state of affairs is unsatisfactory, but no agreement on how best to improve it. Among the causes of the cacophony are that several powerful competing values are implicated by most controversies involving traditional knowledge, and the strength of each of those values varies sharply by context. This makes it difficult to design a legal regime that will deal sensibly with all situations.

This paper attempts to advance discussion of this issue in two related ways: first, by augmenting appreciation of the diversity and variability of the values at stake; and, second, by sketching two possible legal reforms, either of which could do a better job of reconciling those values than any of the proposals currently on the negotiating table.

5 *The Indigenous Peoples Rights Act of 1997*, Republic Act No 8371 (Philippines); *Decreto Numero 26-97 y sus reformas, Ley para la Protección del Patrimonio Cultural de la Nación* (Guatemala), online: <[www.wipo.int/wipolex/en/text.jsp?file\\_id=235791](http://www.wipo.int/wipolex/en/text.jsp?file_id=235791)>.

6 In some respects, these initiatives echo the late-nineteenth-century efforts to harmonize (partially) the laws governing copyrights and patents — efforts that generated the *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/wipolex/en/details.jsp?id=12214](http://www.wipo.int/wipolex/en/details.jsp?id=12214)> and the *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 UNTS 305 (as revised at Stockholm, 14 July 1967).

7 *Berne Convention*, *supra* note 6, s 15(4).

8 United Nations Educational, Scientific and Cultural Organization (UNESCO) & WIPO, *Tunis Model Law on Copyright for Developing Countries* (1976), online: <[ftp://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/TunisModellawOnCopyright/TunisModellawOnCopyright.pdf](http://ftp.wipo.int/pub/library/ebooks/historical-ipbooks/TunisModellawOnCopyright/TunisModellawOnCopyright.pdf)>.

9 *Bangui Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property (Bangui [Central African Republic], March 2, 1977)*, art 46 (Bangui), online: <[www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=227](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227)>; *Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization*, Feb. 24, 1999 (Bangui), online: <[www.wipo.int/wipolex/en/other\\_treaties/text.jsp?doc\\_id=13288\\_2&file\\_id=181151](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=13288_2&file_id=181151)>.

10 UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1982), online: <[www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001.en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001.en.pdf)>.

11 *UNESCO Universal Declaration on Cultural Diversity*, 2 November 2001, UNESCO 31 C/Res. 25, annex I, art 9, online: <<http://unesdoc.unesco.org/images/0012/001246/124687e.pdf#page=67>>.

12 *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), online: <[www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)>.

13 African Regional Intellectual Property Organization, *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (2010) [*Swakopmund Protocol*], online: <[www.wipo.int/edocs/trtdocs/en/ap010/trt\\_ap010.pdf](http://www.wipo.int/edocs/trtdocs/en/ap010/trt_ap010.pdf)>.

14 *2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the 1992 Convention on Biological Diversity*, 29 October 2010 (Montreal: Secretariat of the Convention on Biological Diversity, 2011) (entered into force 12 October 2014) [*Nagoya Protocol*]; see also *Convention on Biological Diversity, The Nagoya Protocol on Access and Benefit-Sharing*, online: <[www.cbd.int/abs/](http://www.cbd.int/abs/)> (explaining the Nagoya Protocol).

15 For a discussion of the content and increasing impact of the Nagoya Protocol, see David Smith et al, "Explanation of the Nagoya Protocol on Access and Benefit Sharing and its Implication for Microbiology" (2017) 163 *Microbiology* 289 at 290.

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## Representative Controversies

### *Quassia Amara*

Each year, roughly 200 million people suffer from malaria and roughly 500,000 die from it.<sup>16</sup> Currently, the standard treatment for malaria is artemisinin combination therapy, which is usually effective in treating the disease.<sup>17</sup> Unfortunately, for various reasons, the resistance of malaria parasites to artemisinin is increasing.<sup>18</sup> Partly as a result, scientists and pharmaceutical companies have begun exploring alternative therapies with greater urgency.

One promising source of such alternatives is the set of herbal remedies that have been used for centuries by Indigenous groups to combat malaria. A wide variety of plants are employed in such remedies. One recent survey identified 102 species in use in Nigeria alone;<sup>19</sup> another identified 99 in use in a single state in northern Brazil.<sup>20</sup> Among those plants is *quassia amara* — sometimes known as bitterroot.<sup>21</sup>

For a biochemist, determining which of the plants employed in traditional remedies have some therapeutic benefits with respect to malaria is relatively straightforward.<sup>22</sup> Determining which is *most* efficacious — or, more precisely, which contain compounds that could be most efficacious — is more difficult and time consuming. Some assistance in determining which of the many

extant traditional remedies are worth investigating can be obtained by consulting the current members of the Indigenous groups that developed, refined and maintained those remedies.<sup>23</sup>

French Guiana is an especially attractive place to conduct a study of this sort, partly because the endemic prevalence of malaria there is very high<sup>24</sup> and partly because several Indigenous groups in the country have developed traditional plant-based preventive and therapeutic systems for controlling the disease. (Perhaps for those reasons, although the infection rate is high, the death rate in Guiana from malaria is remarkably low — fewer than five cases a year.) Attracted by these conditions, in 2003 a group of researchers associated with the Institut de Recherche pour le Développement (IRD),<sup>25</sup> based in Marseille, France, conducted a study of the “knowledge[,] attitudes and practices” in four carefully selected villages to ascertain how the residents dealt with malaria.<sup>26</sup>

The researchers interviewed a total of 117 adults. Thirty-five identified themselves as Palikur; 14 self-identified as Galibi; seven were European by background; 14 were Brazilian; one was Hmong; and 46 were Creole. The first two of these clusters are members of Indigenous groups.<sup>27</sup>

From their interviews, the IRD researchers concluded the following: most residents of the four villages employed a combination of traditional and modern medicines to treat malaria; 27 different plants were used in the traditional medicines; and, of those plants, *quassia amara* (alone or in combination with other plants) was used most often and thought to be the most effective.

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16 World Health Organization (WHO), “Global Health Observatory (GHO) Data: Malaria”, online: <[www.who.int/gho/malaria/en/](http://www.who.int/gho/malaria/en/)>.

17 WHO, “Overview of Malaria Treatment” (18 March 2017), online: <[www.who.int/malaria/areas/treatment/overview/en/](http://www.who.int/malaria/areas/treatment/overview/en/)>.

18 For discussion of the causes and implications of this trend, see William W Fisher III & Talha Syed, *Infection: The Health Crisis in the Developing World and What We Should Do About It* [forthcoming in 2018], online: <<https://cyber.harvard.edu/people/ffisher/Infection.htm>>.

19 See Joseph O Adebayo & Antoniana U Krettli, “Potential Antimalarials from Nigerian Plants: A Review” (2011) 133 *J Ethnopharmacology* 289 at 292–94.

20 See William Milliken, “Traditional Antimalarial Medicine in Roraima, Brazil” (1997) 51 *Econ Botany* 212 at 217.

21 The history of this plant is summarized in John Uri Lloyd, *Quassia Amara* (Chicago: Western Druggist, 1897) at 7–8.

22 See Antoniana U Krettli, Joseph O Adebayo & Luisa G Krettli, “Testing of Natural Products and Synthetic Molecules Aiming at New Antimalarials” (2009) 10 *Current Drug Targets* 261 at 269.

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23 See generally Merlin Willcox et al, eds, *Traditional Medicinal Plants and Malaria* (Boca Raton: CRC Press, 2004) (exploring traditional medicines).

24 B Carme & C Venturin, “Le paludisme dans les Ameriques” (1999) 59 *Médecine Tropicale* 298; WHO, “World Health Statistics 2011: Global Health Indicator Tables and Footnotes” (2011), online: <[www.who.int/whosis/whostat/2011/en/](http://www.who.int/whosis/whostat/2011/en/)>.

25 For information concerning the IRD, see IRD (27 November 2017), online: <<https://en.ird.fr/>>.

26 See Muriel Vigneron et al, “Antimalarial Remedies in French Guiana: A Knowledge Attitudes and Practices Study” (2005) 98 *J Ethnopharmacology* 351 at 351–52.

27 For information concerning the groups, see Artionka Capiberibe, “Palikur: Introduction” (February 2012), online: Povoos Indígenas No Brasil <<https://pib.socioambiental.org/en/povo/palikur>>; Lux Vidal, “Galibi do Oiapoque: Introduction” (January 2000), online: Povoos Indígenas No Brasil <<https://pib.socioambiental.org/en/povo/galibi-do-oiapoque>>.

These findings encouraged the same researchers — and others aware of their work — to try to isolate the compound within *quassia amara* that had proven so effective. Discovery of the active ingredient occurred in stages. The first wave of research concluded that the key compound was simalikalactone D.<sup>28</sup> A second wave, however, found that simalikalactone D was less effective or more toxic than previously thought and that the decisive ingredient was a close cousin, simalikalactone E.<sup>29</sup>

The latter discovery prompted the researchers to obtain patent protection for the compound. A US patent was issued in 2013, and a European Patent Office patent followed in 2015.<sup>30</sup>

Why exactly did the researchers seek legal control over the molecule and its use? They subsequently explained their motives as follows:

National research and innovation policies in most countries, including France, have strong expectations concerning knowledge transfer activities by universities and research institutes. Performance on these matters is usually measured by indicators such as the number of patents filed and license agreements signed, and the overall royalties and contract research collaboration revenues. These indicators are also commonly used by funding agencies as a measure of the overall quality of the applicant. Furthermore, concerning medical innovation, it is generally accepted that strong intellectual property protection is a mandatory warranty in order to obtain a return on the investments necessary to launch new drugs on the market. With this in mind, SkE [simalikalactone E] was patented in 2009 in the hope that a pharmaceutical company could support the expensive toxicological studies and

preclinical evaluations necessary for the development of a new antimalarial.<sup>31</sup>

Both in the publications reporting the fruits of their research and in their patent applications, the researchers made clear the extent to which they had relied on the findings of the ethnopharmaceutical investigation in Guiana.<sup>32</sup> (Their transparency in this respect was unusual.) However, they made no provision for compensating the individuals they had interviewed, the Indigenous groups to which those individuals belonged, the government of Guiana or the government of France (of which Guiana is formally a part) for the benefit the researchers had obtained from the study.

The combination of the patent grants to the IRD and the absence of any provision for the individuals or groups that the researchers had interviewed came to the attention of Thomas Burelli, a legal scholar at the University of Ottawa, and France Libertés — Fondation Danielle Mitterrand, a non-governmental organization (NGO) devoted to the defence of human rights. In October 2015, Burelli and France Libertés accused the IRD of “biopiraterie.”<sup>33</sup> The IRD’s conduct, they claimed, perpetuated colonial practices and was “both immoral and in conflict with intellectual property regulations.” That accusation led to considerable public criticism of the IRD.<sup>34</sup> Among the sharpest critics were Rodolphe Alexandre, president of the Regional Council of French Guiana and the Organization of Indigenous Nations in Guiana. A statement from the latter denounced the IRD’s

28 See Stéphane Bertani et al, “Simalikalactone D is Responsible for the Antimalarial Properties of an Amazonian Traditional Remedy Made with *Quassia Amara* L. (Simaroubaceae)” (2006) 108 J Ethnopharmacology 155 at 156.

29 See Nadja Cachet et al, “Antimalarial Activity of Simalikalactone E, a New Quassinoid from *Quassia Amara* L. (Simaroubaceae)” (2009) 53 Antimicrobial Agents & Chemotherapy 4393 at 4393.

30 “Isolation of Simalikalactone E and use thereof as a medicament, in the treatment of malaria”, US Patent No 8604220 (18 June 2009) [Patent 8604220]; “Simalikalactone e and use thereof as a medicament”, Europe Patent No 2443126 (18 June 2009).

31 Geneviève Bourdy et al, “Quassia ‘Biopiracy’ Case and the Nagoya Protocol: A Researcher’s Perspective” (2017) 206 J Ethnopharmacology 290 at 292.

32 The recitation of the “Background of the Invention” in US Patent No. 8,604,220 states, “[a]n ethnopharmacological investigation and biological tests had made it possible to identify preparations based on mature leaves of *Quassia amara* as advantageous for treating malaria”; Patent 8604220, *supra* note 30. See also Cachet et al, *supra* note 29.

33 France Libertés & Thomas Burelli, “Des Chercheurs Français S’approprient Des Avoirs Guyanais Ancestraux” (25 January 2016), online: France Libertés — Fondation Danielle Mitterrand <[www.france-libertes.org/fr/des-chercheurs-francais-sapproprient-des-savoirs-guyanais-ancestraux/](http://www.france-libertes.org/fr/des-chercheurs-francais-sapproprient-des-savoirs-guyanais-ancestraux/)>.

34 See e.g. Jade Lindgaard, “Des Chercheurs Français Sur Le Paludisme Accusés De Biopiraterie” (25 January 2016), online: Mediapart <[www.mediapart.fr/journal/france/250116/des-chercheurs-francais-sur-le-paludisme-accuses-de-biopiraterie](http://www.mediapart.fr/journal/france/250116/des-chercheurs-francais-sur-le-paludisme-accuses-de-biopiraterie)> (criticizing the IRD).

conduct, concluding simply: “l’IRD a abusé des connaissances de la population guyanaise.”<sup>35</sup>

The IRD leadership and researchers resented these attacks and initially resisted demands that they attend in some way to the interests of the people and groups whose knowledge originally helped shape their research. In the end, however, the researchers capitulated. In February 2016, they issued a statement indicating that the IRD would work with “authorities” in Guiana to develop a protocol that would guarantee a fair division of the benefits of any commercialization of the IRD’s patents and ensure that the people of Guiana could obtain any drugs that grew out of the research at an affordable price.<sup>36</sup> As of this writing, no details concerning the promised agreement are publicly available.

## Wandjina Spirit Images

The Mowanjum community is a group of Australian Aborigines who live in the Kimberley region, near the town of Derby in the northwest corner of the continent.<sup>37</sup> Within the community are three language groups: the Wororra, the Ngarinyin and the Wunambal. Most members of all three groups live in poverty.

The Mowanjum believe all life on earth was created by spirits who long ago descended from the skies and undertook journeys across the world. They refer to the period of creation as the “Dreamtime” and call the spirits the Wandjina.

For thousands of years, the Mowanjum have been drawing representations of the Wandjina on the walls and ceilings of caves. The images vary, but all have the following features:

Their faces have eyes and nose but never a mouth. Their anthropomorphic forms are frontal and often imposing in scale,

sometimes extending up to 5 metres across the walls or ceiling of shelters; however, very small examples also occur. Their heads are surrounded by a semicircular band of solid colour or radiating or dotted lines that give the impression that they are wearing a helmet or headdress. The radiating lines from the head are said to represent the lightning that foreshadows the wet season rains. Wandjina are often shown as a full body, or at least head, shoulders and torso, but some have only the head and shoulders represented. The body lacks anatomical detail and is filled with visually powerful decorative designs such as dotted and striped lines over solid pigment. An oval shape on the chest placed centrally beneath the shoulders is said to represent the ‘Wanjin’s heart, in others its breastbone, and in yet others, a pearl-shell pendant.’ ...Most significantly, Wandjina are luminous and imposing, their dark eyes gazing out from their white face mesmerise, appearing to rise out from the rock surface.<sup>38</sup>

To the Mowanjum, these images are not merely pictures of the Wandjina; they embody the Wandjina. Partly as a result, the Mowanjum believe that elders within the group have a responsibility to maintain the images. Periodically (typically annually) they repaint the images, or at least the more important among them.<sup>39</sup> As a result, layers of paint have gradually accumulated on the cave walls. In the process, the images have evolved.<sup>40</sup>

Exactly how long this practice has been maintained is disputed. Some archaeologists suggest that it began around 3800 BC, others assert that the start was more recent. There seems to be little doubt that the practice is at

35 S Erwann, “Les Populations Autochtones S’agacent de la Biopiraterie” (29 January 2016), online: <http://lequotidien.fr/2016/01/29/les-populations-autochtones/>. The English translation of the French quote above states, “The IRD has abused the knowledge of the Guyanese population.”

36 See “l’IRD va proposer aux autorités guyanaises un protocole d’accord conjoint pour le partage des avantages issus du brevet SkE” (5 February 2016), online: [www.ird.fr/toute-l-actualite/actualites/communiqués-et-dossiers-de-presse/cp-2016/lird-va-proposer-aux-autorites-guyanaises-un-protocole-d-accord-conjoint-pour-le-partage-des-avantages-issus-du-brevet-ske/\(language\)/fre-FR](http://www.ird.fr/toute-l-actualite/actualites/communiqués-et-dossiers-de-presse/cp-2016/lird-va-proposer-aux-autorites-guyanaises-un-protocole-d-accord-conjoint-pour-le-partage-des-avantages-issus-du-brevet-ske/(language)/fre-FR).

37 See “Mowanjum”, online: [Winun Ngari Aboriginal Corporation <http://winunnngari.org.au/community/mowanjum/>](http://winunnngari.org.au/community/mowanjum/).

38 Ursula Frederick & Sue O’Connor, “Wandjina, Graffiti and Heritage: The Power and Politics of Enduring Imagery” (2009) 15 *Humanities Research* 153 at 160. Photographs of examples of the Wandjina can be found in *Los Wandjinas, Las Misteriosas Pinturas Rupestres de Australia* (4 September 2014), online: [http://orgonitascanarias.blogspot.com/2014/09/los-wandjinas-las-misteriosas-pinturas.html?>](http://orgonitascanarias.blogspot.com/2014/09/los-wandjinas-las-misteriosas-pinturas.html?).

39 Valda Blundell & Donny Woolagoodja, *Keeping the Wanjinās Fresh: Sam Woolagoodja and the enduring power of Lalai* (Freemantle, AU: Freemantle Arts Centre Press, 2005).

40 Alan Watchman, “Repainting or Periodic-Painting at Australian Aboriginal Sites: Evidence from Rock-Surface Crusts” in Graeme K Ward, ed, *Retouch: Maintenance and Conservation of Aboriginal Rock Imagery* (Melbourne: Australian Rock Art Research Association, 1992) 26 at 26–30.

least 1,500 years old and thus substantially predates the arrival of the British colonists.

Starting in the 1930s, some members of the Mowanjum began drawing Wandjina images on portable media — bark, shells and so forth. Some of these representations were intended for use in rituals and thus may be understood as supplements to the cave paintings, but others were intended for sale to European consumers. Paintings of Wandjina continue to be produced in modest numbers by Mowanjum artists and sold through the Mowanjum Aboriginal Arts and Culture Centre.<sup>41</sup>

Until recently, it was rare for persons other than members of the Mowanjum to create representations of Wandjina. That changed in 2006, when an anonymous graffiti artist (or artists) began drawing images of Wandjina on walls, bridges and other outdoor structures in Perth — roughly 1,300 km south of the Mowanjum settlements and the associated cave paintings.<sup>42</sup>

The appearance of these images in public spaces in Perth triggered a secondary phenomenon, which came to be known as “Wandjina watching.” Residents of Perth began to take photographs of the graffiti images and then post them to websites, usually along with indications of their locations.

Some members of the Mowanjum were untroubled by the graffiti and the online distribution of copies thereof. Most, however, expressed outrage. An example: “As an Aboriginal, I am upset at the way my choice to greet and respect the Wandjina (law) has been taken from me. You aren’t supposed to just walk up to Wandjina and take a photo. You aren’t supposed to look at him unless the correct rites have been conducted. It’s disrespectful.”<sup>43</sup>

Under increasing pressure, the anonymous graffiti artist agreed to stop making the drawings, and they gradually deteriorated.

In 2010, the controversy was revived when Vesna Tenodi, a gallery owner in Katoomba, Australia, commissioned a sculpture featuring representations of Wandjina, which she then placed outdoors in public view at the edge of her property.<sup>44</sup>

The objections of many Mowanjum and their supporters to the public display of the sculpture prompted the Blue Mountains City Council and Commissioner Annelise Tuor of the Land and Environment Court to entertain a request that it be removed.<sup>45</sup> The testimony of Donny Woolagoodja at one of the hearings on the petition captures many dimensions of the Mowanjum’s objections:

I am an elder and senior lawman of the Worrorra Aboriginal people of the Western Kimberley region....I write this as the representative of the Worrorra people. I am authorised to speak on their behalf.

The term “Wandjina” or “Wanjina” or “Ounjina” refers to the spiritual creator and source of Law for the Worrorra Aboriginal people. The “Wandjina” have been artistically depicted by the Worrorra people for thousands of years in a uniquely distinctive form (for example as images on bark). The paintings of “Wandjina” in ancient rock art in our country are there because Wandjina have “left” their images at these sites as paintings. For us, these images are not “paintings” in the Western sense. For us, they are living, sentient spirits. They visit us in our dreams; they instruct us in our dreams; and we interact with them when we visit their paintings at rock art sites. We reproduce these images in our contemporary art where they are distinguished by their large heads, large black eyes, and typically by halo-like rings that encircle their heads.

41 See Mowanjum Aboriginal Arts & Culture Centre, “Artists”, online: <<http://mowanjumarts.com/portfolio>>; cf Japingka Aboriginal Art, “Mowanjum Paintings”, online: <<https://japingkaaboriginalart.com/collections/mowanjum>>; Art House Broome, “Wandjina Paintings”, online: <[www.arthousebroome.com.au/on-line-store/Kimberley-Art/kimberley-fine-art/wandjina-paintings](http://www.arthousebroome.com.au/on-line-store/Kimberley-Art/kimberley-fine-art/wandjina-paintings)>.

42 For examples, see Stu Rapley, “Wandjina alley”, online: <[www.flickr.com/photos/yelpar/347482246/](http://www.flickr.com/photos/yelpar/347482246/)>; Mark Roy, “Wandjina”, online: <[www.flickr.com/photos/electricnerve/406563276/](http://www.flickr.com/photos/electricnerve/406563276/)>.

43 Creative Spirits, “What are Wandjinas?”, online: <[www.creativespirits.info/aboriginalculture/arts/what-are-wandjinas](http://www.creativespirits.info/aboriginalculture/arts/what-are-wandjinas)>; see also Taryne Laffar, “Who Paintin’ Dis Wandjina? & Director Interview with Taryne Laffar” (8 November 2014), online: <[www.youtube.com/watch?v=PXTuwPDsvDM](http://www.youtube.com/watch?v=PXTuwPDsvDM)>.

44 For thorough discussions of the context of the sculpture, see Tim Elliott, “Kimberley Sacred Wandjina Image Misused”, *Sydney Morning Herald* (20 March 2010), online: <[www.smh.com.au/entertainment/art-and-design/art-battle-turns-ugly-as-aborigines-condemn-sculptures-sacred-image-20100319-qm1g.html](http://www.smh.com.au/entertainment/art-and-design/art-battle-turns-ugly-as-aborigines-condemn-sculptures-sacred-image-20100319-qm1g.html)>; “Law Report: Wading Into the Wandjina Controversy”, Australian Broadcasting Corporation (29 June 2010), online: <[www.abc.net.au/radionational/programs/lawreport/wading-into-the-wandjina-controversy/3032658](http://www.abc.net.au/radionational/programs/lawreport/wading-into-the-wandjina-controversy/3032658)>.

45 See Vanessa Mills, “Stony Response to Wandjina Sculpture”, *ABC Kimberley* (20 October 2010), online: <[www.abc.net.au/local/stories/2010/10/20/3043661.htm](http://www.abc.net.au/local/stories/2010/10/20/3043661.htm)>.

The “Wandjina” have a spiritual or religious significance to the Worrora people. Images of “Wandjina” are religious symbols and are depicted by us respectfully and in accordance with our Law.

All Worrora people whether living in the Western Kimberley or elsewhere are offended and distressed by the prominent public display of the sculpture.<sup>46</sup>

Tenodi’s responses to these arguments are best expressed in an interview she provided midway through the litigation process:

There is no copyright on prehistoric imagery, and no-one can prohibit any artist to explore the design, or to express themselves or to be influenced or inspired, and this happens all the time. And I can recognise in contemporary art or sculpture, the work, I can recognise exactly the prehistoric figurine that they’re inspired by, it’s so obvious, and I would never hold it against them that they draw inspiration from Egyptian tradition, or Greek mythology, or Roman gods. I mean like cave paintings in Europe, Altamira or Lascaux, or the beautiful cave art that belongs to let’s say the same time as Australian art. They are listed on UNESCO’s World Heritage List, and that makes sense in my mind, because it does belong to the world, and to claim ownership, any individual or group or nation to claim ownership of those is simply ludicrous.<sup>47</sup>

The city council was unpersuaded by these analogies, granted the request that the sculpture be removed, and ultimately rejected Tenodi’s appeal.<sup>48</sup> In November 2011, the sculpture was taken away.<sup>49</sup>

## Tibetan Rugs

In the nineteenth century, weavers in central Tibet developed a distinctive style of carpet.<sup>50</sup> Many of these carpets were meant to be used for prayer and other spiritual purposes (such as wrapping the pillars of temples), while others were used in secular contexts, such as padding saddles or as seating mats indoors. The patterns of the rugs typically alluded in some way to the lives of the Buddha or of Buddhist monks. In developing them, the weavers were influenced by aesthetic traditions in East Turkestan, Central Asia, China and India. The material most often employed to weave the rugs was a distinctive wool, known as Changpel, taken from Tibetan highland sheep. Changpel is unusually thick, strong and high in lanolin — and thus has a distinctive texture. The most unusual aspect of these carpets was the method by which they were woven, which dramatically affected their appearance. Tom O’Neill explains:

Generally, the piles of other Oriental hand-knotted carpets are formed by wool threads looped around the warp and weft one at a time and then cut to length. The pile of Tibetan carpets is formed instead around a metal gauge rod which is tied to the warp, and the wool is looped continuously around both the warp and the gauge rod until there is a colour change, when the wool is cut and the new colour tied in. When the gauge rod has been completely covered by a row of loops, it is driven down to the previously knotted rows and then a flat knife is slid across the face of the cylindrical rod, cutting the loops to form the pile. This technique of “cutting loops” was thought by Denwood and other historians of the Tibetan carpets to be an archaic method which adapted South-East to Central Asian styles of weaving, and was not found anywhere but in Tibet.<sup>51</sup>

46 Arts Law Centre of Australia, “Protecting the Sacred Wandjina: The Land and Environment Court Goes to the Blue Mountains” (22 June 2011), online: <[www.artslaw.com.au/art-law/entry/protecting-the-sacred-wandjina-the-land-and-environment-court-goes-to-the-b](http://www.artslaw.com.au/art-law/entry/protecting-the-sacred-wandjina-the-land-and-environment-court-goes-to-the-b)>.

47 “Wading into the Wandjina Controversy”, ABC (29 June 2010), online: <[www.abc.net.au/radionational/programs/lawreport/wading-into-the-wandjina-controversy/3032658#transcript](http://www.abc.net.au/radionational/programs/lawreport/wading-into-the-wandjina-controversy/3032658#transcript)>. In a later interview, Tenodi elaborated on these arguments. An audio recording of the later interview is available at Mills, *supra* note 45.

48 *Tenodi v Blue Mountains City Council*, [2011] NSWLEC 1183.

49 The Ipkat, “Katoomba Kataclysm, or Hands Off Our Wandjina!” (3 January 2012), online: <<http://ipkitten.blogspot.com/2012/01/katoomba-kataclysm-or-hands-off-our.html>>.

50 Photographs of traditional carpets of this sort may be found in Tom Rutherford et al, *Woven Jewels: Tibetan Rugs from Southern Californian Collections* (Pasadena: Pacific Asia Museum, 1992) and John Page & Serina Page, *The Woven Mystery: Old Tibetan Rugs*, 2nd ed (Bangkok: White Orchid Books, 1994). Exactly when this aesthetic tradition began is not altogether clear. For views on the subject, see Page & Page (*ibid* at 2, 8).

51 Tom O’Neill, “The Lives of the Tibeto-Nepalese Carpet” (1999) 4 *J Material Culture* 21 at 27–28 (quoting Thomas Guta, “The Tibetan Carpet, by Philip Denwood [Book Review]” [1978] 6 *Kailash* 285 at 287); see also Tom Rutherford et al, *supra* note 50 at 11.

Most of these carpets were woven in individual households, typically by women.<sup>52</sup> By the late nineteenth century, some of the weaving seems to have been done in larger workplaces, which were financially supported by feudal landlords.<sup>53</sup>

In the nineteenth century, for the first time, the British Empire in India facilitated sales of Tibetan rugs to European consumers. However, the number of carpets that found their way out of Tibet was small.

In 1959, the occupation of Tibet by the People's Republic of China prompted the Dalai Lama and approximately 100,000 other Tibetans to flee their country. Among the group were many of the Tibetan weavers. Most settled in Nepal, although a minority settled in the Indian provinces of Dharamsala, Ladakh or Sikkim.

At the time, Nepal was desperately impoverished, and most of the Tibetan refugees were also living in poverty. In 1961, leaders of the Swiss Aid and Technical Assistance (SATA) organization, one of the various agencies trying to help the refugees, decided that an export market for Tibetan rugs might be cultivated and that exploiting that market could provide the refugees with a long-term source of income. Accordingly, SATA funded the creation of weaving workshops in Nepal, hired some of the Tibetan master weavers to create the carpets and provide training to others, and educated European consumers concerning the merits of these carpets. The success of the plan prompted other organizations, such as the World Bank, to lend their assistance as well. Tibetan and Nepalese entrepreneurs then gradually took their place.<sup>54</sup>

Between 1961 and the 1990s, exports of Tibetan carpets from Nepal to Europe rose steadily, except for a brief lull in 1984. In the process, the design of the carpets evolved to match the changing tastes of European (especially German) consumers. Religious themes were used less often, abstract patterns more often. Traditional Tibetan carpets are small; the exported carpets became larger, facilitating their use as floor coverings. The intricate central areas of the traditional carpets were sometimes

replaced with so-called “open fields,” containing a single colour. Tibetan wool was sometimes blended with wool from New Zealand. Increased quality control made the rugs more homogenous.

From an economic standpoint, the net result of the process initiated by SATA was a remarkable success; by the end of the twentieth century, the export of Tibetan carpets had become the largest source of revenue in Nepal, enabling large numbers of Tibetan weavers to escape poverty.<sup>55</sup> From a cultural standpoint, the fruits were more mixed. Many observers lamented the atrophy of some aspects of the traditional rugs.<sup>56</sup> Most carpets sold in Europe and the United States as “Tibetan” continued to be made in Nepal, using the traditional Tibetan methods, either by Tibetans or by Nepalese weavers. However, most of the rugs differed sharply in appearance from those that had been common in Tibet before the Chinese Revolution.<sup>57</sup>

In the twenty-first century, some of these aesthetic trends were reversed. A growing group of consumers, particularly in the United States, expressed interest in more authentic Tibetan carpets, and a subset of high-end American and European importers began to fulfill this demand. These carpets featured the traditional Buddhist images and themes — for example, “the dragon, snow lion, lotus flower, the Buddhist knot or the phoenix”<sup>58</sup> — and eschewed weaving techniques that foster homogenization. The result is that, today, a significant subset of the carpet exports looks more like the original Tibetan rugs — and typically sells at a premium.<sup>59</sup>

The degree to which the aesthetic shift has benefited the Tibetan refugees (and their descendants) varies. Some of the newer rugs are designed by American or European artists and are

52 See Ugen Gombo, *Tibetan Refugees in the Kathmandu Valley: Adaptation of a Population in Exile* (Ph.D. dissertation, State University of New York at Stony Brook, 1985) [unpublished] at 96.

53 See Page & Page, *supra* note 50 at 2.

54 See O'Neill, *supra* note 51 at 26–27.

55 Barbara Crossette, “Tibetan Carpets of Nepal”, *New York Times* (4 July 1993), online: <[www.nytimes.com/1993/07/04/travel/tibetan-carpets-of-nepal.html?pagewanted=all](http://www.nytimes.com/1993/07/04/travel/tibetan-carpets-of-nepal.html?pagewanted=all)>.

56 See e.g. Jacobsen Rugs, “Oriental Rugs and Rug Weaving in Nepal and Tibet” (13 July 2015), online: <<https://jacobsenrugs.com/blog/oriental-rugs-and-rug-weaving-in-nepal-and-tibet>>.

57 See Rutherford et al, *supra* note 50 at 9.

58 See e.g. Artelino, “Tibetan Carpets from Nepal” (3 November 2010) [Artelino, “Tibetan Carpets”], online: <[www.artelino.eu/en/articles/tibetan-rugs/61-tibetan-carpets-nepal.html](http://www.artelino.eu/en/articles/tibetan-rugs/61-tibetan-carpets-nepal.html)>.

59 See e.g. Artelino, “Dragons and Clouds” [Artelino, “Dragons and Clouds”], online: <[www.artelino.eu/en/traditional-tibetan-rugs.html?page=shop.product\\_details&flypage=flypage.tpl&product\\_id=132&category\\_id=6](http://www.artelino.eu/en/traditional-tibetan-rugs.html?page=shop.product_details&flypage=flypage.tpl&product_id=132&category_id=6)>.

merely manufactured in Nepal. The importers most concerned with authenticity, however, typically employ business practices intended to benefit Tibetans more directly and substantially. They are more likely to rely on Tibetan designers, and the terms on which their workers are employed in Nepal are fairer than average. Last, but not least, these importers typically contribute a portion of their profits to educational or cultural institutions that benefit Tibetans. The stores and websites of these importers trumpet these practices.<sup>60</sup> Adherence to these principles seems to contribute to the importers' ability to charge atypically high prices for their carpets.<sup>61</sup> A portion of that premium ultimately helps the Tibetans.

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## Values

Several arguments have been advanced for enhancing the power of Indigenous groups in situations of these sorts to control uses of the bodies of knowledge they have created. The arguments include that the members of a group are morally entitled to a reward for the effort their ancestors and they devoted to developing and preserving a body of useful information; that according Indigenous groups enhanced protection for their traditional knowledge is necessary to compensate the Indigenous groups (at least partially) for the injustice with which they were treated during the period of colonial conquest and exploitation; and that enhanced protection is necessary to give the current members of Indigenous groups socially optimal incentives to commercialize or preserve the knowledge they inherited. Stephen Munzer, Kal Raustiala and Justin Hughes have argued persuasively that many of these arguments, closely examined, prove hollow.<sup>62</sup> However, three important values associated with legal protection for traditional knowledge survive scrutiny.

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60 See e.g. Doris Leslie Blau, "Tibetan Rugs", online: <[www.dorislestieblau.com/articles/tibetan-rugs-at-doris-leslie-blau](http://www.dorislestieblau.com/articles/tibetan-rugs-at-doris-leslie-blau)>; Artelino, "Tibetan Carpets", *supra* note 58.

61 For example, "Dragons and Clouds," the carpet identified in Artelino, "Dragons and Clouds", *supra* note 59, although modest in size (95 cm x 195 cm) is offered for sale at €480. Many of the rugs offered by Doris Leslie Blau cost more than US\$10,000; at least one is listed for US\$50,000; see Blau, *supra* note 60.

62 See Munzer & Raustiala, *supra* note 1; Hughes, *supra* note 1.

The first value is group identity. Controversies such as the struggle over the right to replicate Wandjina Spirit images make clear that traditional knowledge is sometimes central to the identities of Indigenous groups and that unauthorized use of that knowledge by outsiders corrodes those identities. Situations of this sort are most likely to arise when the traditional knowledge in question is religious or artistic. It is unsurprising that most Mowanjum were "offended and distressed" by the public display of representations of Wandjina; those representations violated their traditions and beliefs. Threats to group identity (and the associated pain of members of the group) also sometimes result from unauthorized uses of knowledge pertaining to socially beneficial harnessing of natural resources. A possible example is "local and traditional knowledge" concerning sustainable fishing practices and other ways of engaging marine ecological environments.<sup>63</sup>

The second consideration is distributive justice. Enhanced protection of traditional knowledge could mitigate the severe economic and social disadvantages from which most Indigenous groups in the world currently suffer. Those disadvantages derive, in part, from the relative poverty of people in the regions where Indigenous groups are overrepresented, in particular, Central and South America, Sub-Saharan Africa and eastern Asia.<sup>64</sup>

This global source of inequality is compounded at the national level. Within virtually every country, members of Indigenous groups fare worse than the rest of the population with respect to income, employment, educational attainment and opportunity, access to safe drinking water, vaccination rates and life expectancy.<sup>65</sup> In some countries, the positions of these groups (both relative and absolute) are improving, but in others they are declining.<sup>66</sup>

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63 See Thomas F Thornton & Adela Maciejewski Scheer, "Collaborative Engagement of Local and Traditional Knowledge and Science in Marine Environments: A Review" (2012) 17 *Ecology & Soc'y* 8 at 8.

64 This geographic concentration is most easily seen by comparing two maps: Public Broadcasting Service, "Global Map of Indigenous Peoples", online: <[www.pbs.org/newshour/extra/app/uploads/2014/11/A-global-map-of-indigenous-peoples.pdf](http://www.pbs.org/newshour/extra/app/uploads/2014/11/A-global-map-of-indigenous-peoples.pdf)> and World Bank Group, "World Development Indicators 2017 Maps", online: <<https://data.worldbank.org/products/wdi-maps>>.

65 See Gillette Hall & Harry Patrinos, eds, *Indigenous Peoples, Poverty and Development* (Cambridge, UK: Cambridge University Press, 2010).

66 *Ibid.*

These generalizations are confirmed by case studies of the status of Indigenous groups in specific countries. For example, the Australian Bureau of Statistics reports that “[i]n 2006, the mean (average) equivalized gross household income for Indigenous people was \$460 per week, compared with \$740 for non-Indigenous people.”<sup>67</sup> Furthermore, large gaps were evident in all parts of the country, ranging from major cities to “very remote areas.”<sup>68</sup> The situation in the United States is similar. Roughly three million people living in the United States are Native Americans. On almost all measures pertaining to quality of life, they fare worse than members of other racial or ethnic groups. For example, the poverty rate among Native Americans living on reservations is 39 percent; among Native Americans living off reservations, the poverty rate is 26 percent. By comparison, the rate for white people is nine percent; for African Americans, 25 percent; for Latinos, 23 percent; and for Asian Americans, 13 percent.<sup>69</sup>

In sum, Indigenous groups are economically and socially disadvantaged. To mitigate these disadvantages, one of the few resources upon which these groups might draw is their traditional knowledge, and their ability to do so might be enhanced through better legal protections. How exactly? It is widely assumed that the most effective and efficient mechanism involves benefit sharing, typically achieved through licence agreements between Indigenous groups and the companies that wish to put the knowledge of those groups to commercial use. Some such agreements have worked well, but, unfortunately, the relationship between the IRD and the Palikur and Kalina in French Guiana is more typical. Thus far, those groups have reaped no benefit whatsoever from the benefit-sharing commitment grudgingly made by the IRD; whether they will ever do so remains uncertain. The same is true of the deservedly famous commitment made (similarly under pressure) by South Africa’s Council for Scientific and Industrial Research to the San people in return for permission to commercialize their knowledge of

the appetite-suppressing power of Hoodia, a plant common in the southern countries of Africa.<sup>70</sup>

More promising, when feasible, is a strategy under which the Indigenous group capitalizes on its knowledge by producing and selling goods or services embodying that knowledge. The recent history of Tibetan carpets provides a good illustration. For the most part, Tibetan and Nepalese weavers do not license the rights to manufacture carpets using their traditional techniques and designs to Western companies; instead, as seen in the first section of this paper, they continue to make the carpets themselves and to sell them for a premium to European and American consumers. As Madhavi Sunder shows in her study of the impact of geographical indications on traditional handicrafts in India, legal rights can powerfully reinforce the capacity of Indigenous groups to pursue this strategy.<sup>71</sup> Not only has this approach proven more reliable than licensing, it has the important ancillary benefit of providing long-term employment for the members of the group.<sup>72</sup>

A third advantage of enhanced protection of traditional knowledge would be augmentation of global cultural diversity — a benefit to all persons, not merely the members of Indigenous groups. The distinctiveness and localism of traditional cultural expressions mitigate to some degree the increasing homogenization of most art forms throughout the globe. Legal impediments to unauthorized use of such expressions, if successful in slowing the pace at which these expressions are swallowed by dominant artistic traditions, can benefit everyone.

If this were the end of the story, the case for strengthening the legal rights of Indigenous groups would be powerful. Unfortunately, doing so would sometimes threaten one or both of two other values. The first is the classic liberal virtue

67 Australia Bureau of Statistics, “Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006” (28 July 2011), online: <[www.abs.gov.au/ausstats/abs@.nsf/Lookup/B9FFFE0FCF1E37147CA2578DB00283CCD?opendocument](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/B9FFFE0FCF1E37147CA2578DB00283CCD?opendocument)>.

68 *Ibid.*

69 Harvard Project on American Indian Economic Development, *The State of the Native Nations* (Oxford: Oxford University Press, 2007) at 115.

70 See Roger Chennells, “Strengthening Partnership Between States and Indigenous Peoples: Treaties, Agreements and Other Constructive Arrangements” (2012) at 3–5, online: <[www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/RogerChennells.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/RogerChennells.pdf)>.

71 Madhavi Sunder, “The Invention of Traditional Knowledge” (2007) 70 *Law & Contemp Probs* 103 at 123.

72 That intellectual property laws can and should be adjusted to enhance the employment opportunities available to low-income people, rather than to provide them flows of money, finds strong support in the intellectual property policy recently adopted by South Africa. See Republic of South Africa, Department of Trade and Industry, “Draft Intellectual Property Policy of the Republic of South Africa Phase I 2017” at 3, online: <[www.dti.gov.za/gazettes/IP\\_Policy.pdf](http://www.dti.gov.za/gazettes/IP_Policy.pdf)> (stating that intellectual property policy is a core element in generating sustainable and decent jobs).

of autonomy. Restrictions on uses of traditional knowledge do or could limit the range of options available to non-members of Indigenous groups to shape and express their identities. Consider, for example, the potential implications of tighter limits on unauthorized uses or adaptations of Tibetan rugs. For many Westerners, identity is expressed in and sustained by the homes they select and shape.<sup>73</sup> The centerpiece of the aesthetic of many Western homes is the living room rug. Freedom to choose among extant cultural forms — or to modify and blend them — when selecting the focal point of one’s living space enhances opportunities for self-creation.

A better known (and perhaps more appealing) example of the same phenomenon involves recent adaptations of Kente cloth in the United States. Kente, a distinctively coloured cloth featuring bold geometric patterns, was developed by the Ewe and Ashanti peoples in the part of western Africa currently occupied by Ghana and Togo.

Originally, it was worn only by male rulers.<sup>74</sup> During the 1980s and 1990s, however, young African Americans of both genders began wearing Kente cloth — initially in ceremonial settings, such as college convocations and graduations, and later in more casual contexts.<sup>75</sup> Regina Austin, writing in the early 1990s, explained the cultural significance of this trend: “[M]ore and more blacks are dressing in whole or in part in African garb as an expression of their identity and racial solidarity or their adherence to the ideology of Afrocentricity.”<sup>76</sup> That many of these uses were inconsistent with the restrictions traditionally placed upon permissible uses of Kente cloth by the Ewe and Ashanti peoples is at least partially justified by the large social and psychic

benefits to the appropriators. Enhanced legal impediments to such appropriation would limit the catalogue of symbols and materials from which non-Indigenous people could fashion identities.

A related value that tilts in the same direction is semiotic democracy — an increasingly important form of engagement in which people actively participate in the shaping of their cultural environments.<sup>77</sup> A good illustration is provided by the history of the tango. In the eighteenth century, many Africans from the Bantu region — in the eastern and central portions of the continent — were captured and brought as slaves to the region of South America near the mouth of the Rio Plata. They retained and continued to practise many dance traditions, the diversity of which reflected their many ethnicities. Over time, those dances gradually changed (in part, because they became increasingly expressive of anger and resistance) and to some extent melded into a composite form, which became known as candombe. Variants of candombe remained popular among black Uruguayans through national independence and the gradual abolition of slavery. In the late-nineteenth century, the former slaves and their descendants began to practice candombe less often, but low-income white people living in the slums in the outskirts of Montevideo picked it up and combined it with aspects of the polka from central Europe and the habanera from Cuba. This new blend, which came to be known as canyengue, is widely considered the first form of the dance now known as tango. Canyengue, in turn, faded in the 1930s, but by then more wealthy white Uruguayans had developed yet another version, known as tango de salon, in which the dancers assumed a more upright posture and minimized their vertical movements. In 1912, that dance became fashionable in London; the following year, it flourished in New York. During the remainder of the twentieth century, the popularity of this type of tango in the United States was sustained by its incorporation in the instructional programs of the Arthur Murray Dance Studios and by its depiction in many mainstream films. Meanwhile, in Uruguay and Argentina, an altered form of candombe was revived

73 See Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 1 (exploring personality theory, which argues that ownership is bound up with self-constitution).

74 See e.g. Patrick Boehler, “African Crown Jewels Stolen in Norway”, *Time* (12 October 2012), online: <<http://newsfeed.time.com/2012/10/12/african-crown-jewels-stolen-in-norway>>.

75 For illustrations, see James Padilioni Jr, “The History and Significance of Kente Cloth in the Black Diaspora”, *Black Perspectives* (22 May 2017), online: <[www.aaihs.org/the-history-and-significance-of-kente-cloth-in-the-black-diaspora](http://www.aaihs.org/the-history-and-significance-of-kente-cloth-in-the-black-diaspora)>; “Africandimebeautyinside”, online: <<http://africandimebeautyinside.tumblr.com/post/22162499844>>.

76 Regina Austin, “A Nation of Thieves: Securing Black People’s Right To Shop and To Sell in White America” 1994 Utah L Rev 147 at 162; see also Algernon Austin, *Achieving Blackness: Race, Black Nationalism, and Afrocentrism in the Twentieth Century* (New York: NYU Press, 2006) (“In the Afrocentric era, black Americans adopted [Kente cloth] for a wide range of uses” at 155).

77 For an explanation of the origin of this concept, see William Fisher, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford: Stanford University Press, 2004) at 30–31.

**Table 1: Values Implicated by Selected Examples of Traditional Knowledge**

|                      | <i>Quassia Amara</i> | Wandjina | Tibetan Carpets | Kente Cloth | Candombe |
|----------------------|----------------------|----------|-----------------|-------------|----------|
| Group Identity       |                      |          |                 |             |          |
| Distributive Justice |                      |          |                 |             |          |
| Cultural Diversity   |                      |          |                 |             |          |
| Autonomy             |                      |          |                 |             |          |
| Semiotic Democracy   |                      |          |                 |             |          |

Source: Author

and remains popular to this day in celebrations of Carnival and more forms of the tango emerged.<sup>78</sup>

Some aspects of this story are tragic, but two are both encouraging and relevant to this paper. First, the dances generated through this process are beautiful and have given many people great pleasure. Second, the process itself has been highly democratic; many members of many groups have contributed to successive and divergent modifications of a cultural form first developed by an Indigenous group. When considering enhanced legal restrictions on unauthorized uses of traditional knowledge, care should be taken not to erect barriers to similar processes of democratic cultural hybridization.

Does identification of these competing considerations leave us in equipoise? Not necessarily. That struggles over traditional knowledge implicate

many competing values does not mean that those values are equally salient in all contexts. In some settings, the potential benefits of shielding community identities, promoting distributive justice and increasing global cultural diversity seem stronger than the potential benefits of maintaining opportunities for self-definition through cultural appropriation or facilitating semiotic democracy. In others, the reverse seems true.

Table 1 above suggests, roughly, the relative strength of these values in the principal controversies discussed thus far. Each of the five controversies is assigned a column; each of the five values is assigned a row. Values that support enhanced legal protection for traditional knowledge are coloured red; values that oppose enhanced protection are coloured grey. Cells left blank indicate that the value at issue has little salience in the controversy at issue. Cells that are coloured indicate that the value at issue has significant salience in the controversy at issue. The darker the colour, the greater the salience.

The challenge, thus, is to devise a legal system capable of responding sensitively to the patterns of values affected by different instances of non-permissive use of traditional knowledge. To that task, this paper now turns.

<sup>78</sup> The sources from which this narrative is distilled are Simon Collier et al, *Tango: The Dance, The Song, The Story* (London: Thames and Hudson, 1995); Robert Farris Thompson, *Tango: The Art History of Love* (New York: Vintage Books, 2005) (exploring tango's evolution and expression through its global representations); Paulo de Carvalho Neto, "The Candombe, a Dramatic Dance from Afro-Uruguayan Folklore" (1962) 6 *Ethnomusicology* 164 (examining candombe's survival and deformation); Tango Voice, "Canyengue, Candombe and Tango Orillero: Extinct or Non-existent Tango Styles?" (19 March 2010), online: <<https://tangovoice.wordpress.com/2010/03/19/canyengue-candombe-and-tango-orillero-extinct-or-non-existent-tango-styles>> (examining the extent to which historical styles of tango are represented in contemporary social tango dancing).

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## Solutions

For decades, activists have sought to establish, through a new multilateral agreement (or through amendment of an existing agreement), a harmonized global regime that would augment the ability of Indigenous groups to control uses of their knowledge. Most proposals of this sort have taken the form of either a property rule, under which all non-permissive uses of traditional knowledge would be forbidden, or a liability rule, under which users of traditional knowledge would be obliged to pay fees, set by a governmental official or tribunal, to the groups from which the knowledge was taken or to the nations in which those groups are located.<sup>79</sup> The principal disadvantage of both types of reform proposals is that they would fail to accommodate variations in the salience of the values implicated by different controversies. Set forth below are two alternative proposals that might do a better job.

## Delegation

To the Agreement on Trade-related Aspects of Intellectual Property Rights<sup>80</sup> or to another multilateral or regional intellectual property treaty, the following three provisions might be added:

- It shall be a defence to a claim of patent infringement that the inventor(s), in developing the protected product or process, relied substantially upon materials or knowledge taken from a member country in violation of that country's laws or from an Indigenous group in a member country in violation of the laws of that group.<sup>81</sup>

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79 See e.g. Jerome H Reichman & Tracy Lewis, "Using Liability Rules to Stimulate Local Innovation in Developing Countries: Application to Traditional Knowledge" in Keith Maskus & Jerome H Reichman, eds, *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge, UK: Cambridge University Press, 2005) 337.

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

81 Some years ago, Martha Field and the author of this paper proposed a reform of this general sort to deal with the problems associated with bioprospecting. See Martha Field & William W Fisher III, *Legal Reform in Central America: Dispute Resolution and Property Systems* (Cambridge, MA: Harvard University Press, 2001) at 256–57. Variants of the idea have since appeared in several settings. See e.g. Charles R McManis, "Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally" (2003) 11 *Cardozo J Intl & Comp L* 547 at 563–64.

- It shall be a defence to a claim of trademark infringement that the trademark holder, or the original developer of the mark, relied substantially upon materials or knowledge taken from a member country in violation of that country's laws or from an Indigenous group in a member country in violation of the laws of that group.
- It shall be a defence to a claim of copyright infringement that the work in which copyright is claimed constitutes a reproduction of a work registered within a member country, and that reproduction is not authorized by licences from the country in question and from the Indigenous group in question.

The effect of this reform would be to increase the leverage of countries in determining the terms on which flora, fauna, medicinal knowledge, folklore and traditional art forms are exploited by others. As indicated above, many countries already have laws that deal with such matters, but those laws have limited bite because it is so easy to violate them with impunity. Adoption of the three provisions would give the local laws teeth, not by penalizing violations directly, but by exposing violators to the sanction of the forfeiture of their own intellectual property rights.

The countries in which traditional knowledge is currently concentrated could be expected to exercise their enhanced powers in various ways. Some would likely demand greater compensation from individuals and firms using their materials. Others would insist upon attribution. Still, others would insist that the production of goods (drugs, clothing and so on) based upon traditional knowledge occur in the country where the knowledge originated. Finally, some would forbid the use of traditional knowledge altogether. Some of these responses would likely prove more effective than others, and additional rounds of legal reform would ensue.

The Indigenous groups themselves would likely engage in similar experimentation. They would have substantial leverage, because violation of their own laws would expose commercial users of their knowledge to forfeiture of the users' intellectual property rights. Some Indigenous groups would likely use that leverage to extract financial concessions, others to insist on attribution and still others to demand that derivative products be produced locally. The companies'

responses to these demands — and competition among Indigenous groups possessing similar bodies of knowledge — would likely prompt the groups to adjust their laws over time.

Two types of users of traditional knowledge would be unaffected by this proposed system: non-commercial users, such as the graffiti artists in Perth using the Wandjina Spirit images, and commercial users whose businesses do not depend on intellectual property rights, such as the manufacturers of bow ties and earrings made of Kente cloth. However, permitting users of these sorts to avoid the impact of the proposed regime seems roughly appropriate, because in such cases the balance of cultural values seems more often to tilt against the potential claims of the Indigenous groups.

The regime sketched above would differ from the Nagoya Protocol (discussed in the introduction of this paper) in three respects. First, the regime does not specify the ways in which countries would control access to and use of the knowledge held by Indigenous groups within their jurisdictions. Indeed, it would not require a member country to adopt and access restrictions at all. The regime is thus designed to accommodate greater variation in the terms of local access control. So, for example, it can easily accommodate regimes like that found in Senegal that place folklore in the category of *domaine public payant*, while the Nagoya Protocol cannot.

Second, the regime gives equal weight to the laws of the nations in which Indigenous groups are located and to the laws (whether traditional or new) of the groups themselves.<sup>82</sup> A company making use of traditional knowledge must comply with both in order to avoid sanctions.

Third, and finally, the regime relies upon a different mechanism to induce compliance. Instead of requiring member countries to adopt and implement a system of state sanctions to punish utilization of traditional knowledge in violation of the laws of the country from which it was taken, the proposed regime would rely upon a firm's competitors, most of whom will have strong incentives to act as private attorneys general. The deterrent effect of the risk of forfeiting

one's intellectual property rights is likely to be more effective than the risk of incurring a fine.

The principal hazard of a system of this sort is that it could increase the already substantial costs of patent litigation (and, to a lesser extent, trademark and copyright litigation) by providing defendants one more potential defence. That risk could be mitigated, however, through the adoption of a fee-shifting arrangement. For example, a country could require defendants who invoke the new defence unsuccessfully to pay the extra costs incurred by the plaintiff. Such costs would include attorneys' fees and increased discovery costs. The costs would be payable even if the defendant prevailed on a different ground in the infringement suit in which the defence was asserted. This would discourage frivolous invocations of the new provision, while retaining the threat it poses to companies that have indeed violated it.

## Mandatory Disclosure — Modified

Many of the initiatives seeking enhanced legal protection of traditional knowledge have included a requirement that companies that rely on traditional knowledge when developing products or services disclose that reliance. The first such proposal was advanced in 1994 by a group of researchers from Peru.<sup>83</sup> Since then, similar suggestions have been made in many fora — most notably in the long-standing debates under the auspices of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.<sup>84</sup>

Typically, such proposals take the form of suggestions for amendments to application-based intellectual property regimes. In some variants of this general approach, failure to comply with the disclosure requirement in an application for a patent or other intellectual property right would be grounds for denial or invalidation of the

<sup>82</sup> For examples of such laws, see *Milpurruru*, *supra* note 3; Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2001) at 88.

<sup>83</sup> See Brendan Tobin, *Alternativas a las Legislaciones de Propiedad Intelectual* (28–30 September 1994) (manuscript from Reunion Regional Sobre Propiedad Intelectual y Pueblos Indigenas) at 9 [unpublished], online: <[www.academia.edu/1315002](http://www.academia.edu/1315002)>.

<sup>84</sup> For a review of a wide variety of such proposals, see generally Carlos Correa & Joshua D Sarnoff, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications* (New York: United Nations, 2006); South Centre, "Mandatory Disclosure of the Source and Origin of Biological Resources and Associated Traditional Knowledge Under the TRIPS Agreement" (2007), online: <[www.southcentre.int/policy-brief-11-september-2007/](http://www.southcentre.int/policy-brief-11-september-2007/)>.

right. In others, failure to comply would trigger other sanctions, but not imperil rights granted on the basis of the incomplete application.<sup>85</sup>

Several disclosure requirements of this general sort have been adopted by individual countries as part of their national intellectual property laws.<sup>86</sup> A few have been adopted at the regional or multilateral level.<sup>87</sup> Most, however, have been rejected. Recently, for example, a proposal advanced in the forty-ninth session of the WIPO General Assembly,<sup>88</sup> which would have mandated that a voluntary disclosure principle be included in a new treaty on protections for industrial designs, was met with sufficient resistance that it contributed to the postponement of a diplomatic conference to consider such a treaty.<sup>89</sup>

As a mechanism for advancing, sensitively, the diverse considerations examined in the second part of this paper, the currently dominant version of the mandatory disclosure principle is imperfect. However, the strategy would be more promising if modified in four respects.

First, disconnect the disclosure obligation from intellectual property regimes. Instead of requiring applicants for patents, trademarks, industrial-design protection and the like to reveal the degree to which they relied on traditional knowledge in creating the products for which they are seeking protection, the law could require all sellers of products and services to make such disclosures, regardless of whether they seek intellectual property protection. This adjustment would be less radical than it might appear. In a variety of commercial contexts unrelated to applications

for intellectual property rights, sellers are already obliged to disclose aspects of their products and services. For example, in the United States, institutions offering residential mortgages must present borrowers with detailed information concerning the nature of the financial obligations they are incurring;<sup>90</sup> sellers of prescription drugs must include in their packaging and advertisements warnings concerning the risks associated with their products;<sup>91</sup> sellers of packaged food must reveal the contents thereof;<sup>92</sup> and sellers of clothes must include labels that indicate, among other things, the materials with which they were made and where they were manufactured.<sup>93</sup> The penalties for violation of these rules can be severe. A general mandatory disclosure obligation for products and services drawn from traditional knowledge would impose a modest additional regulatory burden on only a small subset of companies.

Second, add an obligation to disclose the extent to which members of the Indigenous group from which the knowledge was derived were involved in the manufacture of the product in question or the provision of the service in question. This represents an adaptation of the regulations that, in the United States, currently govern companies that manufacture and sell clothing. As indicated above, such companies must reveal, among other details, where their products were produced.<sup>94</sup> The proposed rule would require the revelation of who manufactured products

85 See WIPO, "Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge" (2004) at 8, 26–27 (examining these options).

86 For catalogues of such provisions, see David Vivas-Eugui, *Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC)* (Geneva: International Centre for Trade and Sustainable Development, 2012) at 31–32; WIPO, "Disclosure Requirements Table" (October 2017), online: <[www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic\\_resources\\_disclosure.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf)>.

87 See e.g. *Swakopmund Protocol*, *supra* note 13, ss 10, 19.3.

88 For details concerning this session, see generally WIPO General Assembly, 49th (23rd ordinary) Sess. (2–11 October 2017), online: <[www.wipo.int/meetings/en/details.jsp?meeting\\_id=43518](http://www.wipo.int/meetings/en/details.jsp?meeting_id=43518)>.

89 See Catherine Saez, "WIPO: New 2-Year Mandate For Traditional Knowledge Committee; Design Law Treaty Stalls", *Intellectual Property Watch* (10 December 2010), online: <[www.ip-watch.org/2017/10/12/wipo-new-2-year-mandate-traditional-knowledge-committee-design-law-treaty-stalls/](http://www.ip-watch.org/2017/10/12/wipo-new-2-year-mandate-traditional-knowledge-committee-design-law-treaty-stalls/)>.

90 See "Broker State Required Disclosure Matrix", online: <[https://portal.idwholesale.com/portaldocs/yoda/wholesale/State\\_Specific\\_Disclosure\\_Matrix\\_EXTERNAL.pdf](https://portal.idwholesale.com/portaldocs/yoda/wholesale/State_Specific_Disclosure_Matrix_EXTERNAL.pdf)>.

91 See Mary E Kremzner & Steven F Osborne, *An Introduction to the Improved FDA Prescription Drug Labeling*, online: <<https://perma.cc/T2CQ-UFZ2>>.

92 The relevant statutes are the *Federal Food, Drug, and Cosmetic Act*, Pub L No 75–717, 52 Stat 1040 (1938) (codified as amended at 21 USC §§ 301–399d), the *Fair Packaging and Labeling Act*, Pub L No 89–755, 80 Stat 1296 (1966) (codified as amended at 15 USC §§ 1451–1461) and the *Nutrition Labeling and Education Act of 1989*, Pub L No 101–535, 104 Stat 2353 (1990).

93 *Textile Fiber Products Identification Act*, 15 USC §§ 70–70k (2012); *Wool Products Labeling Act of 1939*, 15 USC §§ 68–68j (2012).

94 See Federal Trade Commission, "Threading Your Way Through the Labelling Requirements under the Textile and Wool Acts" (July 2014), online: <[www.ftc.gov/tips-advice/business-center/guidance/threading-your-way-through-labeling-requirements-under-textile#origin](http://www.ftc.gov/tips-advice/business-center/guidance/threading-your-way-through-labeling-requirements-under-textile#origin)>.

derived from traditional knowledge.<sup>95</sup> The objective of such a requirement, of course, is to put pressure on companies to enlist members of Indigenous groups in their production systems.

Third, supplement state-imposed sanctions for a violation of the obligation with a private right of action. A disadvantage of disconnecting the disclosure obligation from the intellectual property system is that it would sacrifice the deterrent effect of fear of loss of intellectual property rights. To be sure, punishing violations with fines could be reasonably effective. In the United States, for instance, the principal penalties for violations of the disclosure obligations associated with mortgages, food, drugs and clothing are fines, and those sanctions seem to work reasonably well. However, they would be even more efficacious if reinforced by the threat of civil actions by competitors. Other information-forcing legal regimes — for example, trademark law and false-advertising law — incorporate private rights of action.<sup>96</sup> The disclosure duty for traditional knowledge could and should do so as well.

Fourth, authorize an administrative agency to specify, through regulations, the ambit of the disclosure obligation and the method of compliance. Each of the labelling requirements outlined above is implemented by an administrative agency, which promulgates and periodically revises regulations that give companies detailed guidance in how to comply. The Federal Trade Commission bears this responsibility with respect to clothing labels,<sup>97</sup> the Food and Drug Administration does so with respect to prescription drugs and food<sup>98</sup> and agencies in state governments do so with respect to residential mortgages. A similar system could and should be used to give greater precision to a mandatory disclosure obligation

95 US law already contains a provision prohibiting false statements that goods have been produced by Native Americans. See *Cause of action for misrepresentation of Indian produced goods*, 25 USC § 305e(b) (2012). The proposal advanced in the text would raise the bar one notch by requiring truthful statements of the degree to which products were produced by members of Indigenous groups.

96 See e.g. *POM Wonderful LLC v Coca-Cola Co*, 134 S Ct 2228 at 2233 (2014).

97 Federal Trade Commission, *supra* note 94.

98 See *Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products*, 21 CFR § 201.56 (2017); Food and Drug Administration, “A Food Labeling Guide: Guidance for Industry” (January 2013), online: <[www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf](http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf)>.

with respect to traditional knowledge. Among the questions to be addressed and resolved through such regulations would be:

- What constitutes a product or service subject to the obligation?
- How substantial must have been a company’s reliance on traditional knowledge to trigger the obligation? Conversely, at what point does a company’s dependence on traditional knowledge become sufficiently attenuated that the obligation is lifted?
- How, exactly, must or may the disclosure be made?<sup>99</sup> For example, must it appear on the product packaging or would a statement on the company’s website suffice? Might companies employ a multipart disclosure, for example, a simple mark on the product or its packaging, which refers purchasers to a registry (analogous, perhaps, to the registry for the Lisbon System for the International Registration of Appellations of Origin)<sup>100</sup> where a more detailed description of the product’s provenance and the company’s employment practices could be found?

Some of the modifications outlined above are designed to address and resolve ambiguities or weaknesses that critics of mandatory disclosure regimes have long stressed. Most of the modifications reflect a fundamental difference between the aspirations that have emerged from this paper and the goals of the currently dominant type of mandatory disclosure system. The proposal offered here does not seek to prescribe or enforce

99 A growing literature, informed by empirical work associated with behavioural law and economics, seeks to identify the characteristics that maximize the effectiveness of disclosures. See e.g. Christine Jolls, “Debiasing Through Law and the First Amendment” (2015) 7 *Stan L Rev* 1411 at 1419–36; George Loewenstein, Cass R Sunstein & Russell Golman, “Disclosure: Psychology Changes Everything” (2014) 6 *Ann Rev Econ* 391 (explaining “when and why disclosure is likely to work or backfire, [and] potential improvements of disclosure policies” at 405–12); Christine Jolls, “Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation” (2013) 169 *J Inst & Theoretical Econ* 53 at 54, 58–59 (discussing the effects of health warnings required by the Family Smoking Prevention and Tobacco Control Act of 2009). The proposed agency could and should draw on that literature when framing regulations — bearing in mind, however, that the disclosure regime proposed here is unusual in two respects: first, it seeks to assist and encourage consumers to act upon their “social preferences,” rather than nudge them to avoid products and services that might be bad for their health or finances, and, second, it is aimed as much at watchdog groups (who, as have been seen, publicize uses of traditional knowledge they deem unfair) as at individual consumers.

100 See WIPO, “Lisbon – The International System of Appellations of Origin”, online: <[www.wipo.int/lisbon/en](http://www.wipo.int/lisbon/en)>.

any particular standard of fair treatment, such as the benefit-sharing principle at the heart of the Nagoya Protocol. It strives, instead, to bring into public view the kinds of information that the public at large would need in order to consider what, with respect to each idiosyncratic instance of the use of traditional knowledge, would constitute fair treatment. In that way, the proposal aspires to provoke public attention to and discussion of such matters and, ultimately, to prompt a commercially significant subset of consumers to act upon their ethical conclusions. Why? Partly because such deliberations are good in themselves, but primarily because, as seen through the examination of the case studies in the first part of this paper, the companies that sell products and services incorporating traditional knowledge are usually responsive to consumers' expressed ethical preferences. The long-term result of the adoption of this proposal will thus be to alter the companies' behaviour for the better.

Like the system outlined above in the discussion of delegation, this proposal contemplates that the nations and Indigenous groups from which traditional knowledge is taken would be active participants in the new regime, rather than mute beneficiaries. Specifically, such nations and groups can be expected to enhance and inflect the ethical debates spurred by the companies' disclosures with public statements of their own expectations of fair treatment — in much the same way that the Mowanjum representatives did with respect to the Wandjina graffiti and that the Organization of Indigenous Nations in Guiana did with respect to the IRD's use of the knowledge developed by the Galibi and Palikur concerning the medicinal value of *quassia amara*.<sup>101</sup> The stances taken by the groups will likely vary. Some might insist upon benefit-sharing arrangements, others might demand employment for current members of the group, others might insist upon respectful treatment of traditional symbols or rituals, others might request only appropriate attribution and so forth.

Of course, the groups' capacities to demand such concessions would not be unlimited. Only if the expectations of fair treatment announced by

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101 This process would be loosely analogous to the increasingly common practice by which companies involved in standard-setting organizations announce their own understandings of "fair, reasonable, and nondiscriminatory" licensing terms. See Jorge L Contreras, "From Private Ordering to Public Law: The Legal Framework Governing Standards-Essential Patents" (2017) 30 Harv JL & Tech 211.

the groups resonated with the public's evolving attitudes — and, in particular, with the views of the consumers of the products or services at issue — would companies feel obliged to comply with the groups' demands. Over time, a dialectic would likely emerge: Indigenous groups and the nations in which they are currently located would request concessions from the companies making use of their knowledge; watchdog groups, the media and consumers would respond favourably to some such requests (and thus press the companies to comply), but would respond unfavourably to others; the groups would adjust their demands accordingly; and so on. The net result would be an episodic public conversation concerning the appropriate scope and application of the values set forth and a gradual evolution of commercial practices to track the evolving views of significant subsets of consumers.

Critical to this process, of course, is the willingness of consumers not merely to express support for norms of fair treatment, but to alter their purchasing behaviour when those norms are violated. Would they? Considerable reassurance on that score can be gleaned from recent studies of consumers' responses to fair trade labels attached to products such as coffee or clothing. Such labels certify that the farmers or employees who produced the products were compensated and treated according to standards promulgated by a consortium of organizations dedicated to the farmers' or employees' protection.<sup>102</sup> Surveys in which consumers are asked whether they would be willing to pay more for (or buy more of) products that meet such standards consistently elicit strong positive responses.<sup>103</sup> The same is true

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102 See World Fair Trade Organization, "10 Principles of Fair Trade", online: <<https://perma.cc/9RAQ-L8E2>>. Although most of the companies that seek to profit by publicizing their adoption of fair labour standards use the convenient device of the fair trade label, a few adopt and pledge obedience to even higher standards. See e.g. Everlane, online: <[www.everlane.com/about](http://www.everlane.com/about)>.

103 See e.g. Shareen Hertel, Lyle Scruggs & C Patrick Heidkamp, "Human Rights and Public Opinion: From Attitudes to Action" (2009) 143 Pol Sci Q 443 (describing research indicating that people "are willing to pay more for ethically produced goods" in order to promote the right to a minimum standard of living, at 443, 448–49); Patrick De Pelsmacker, Liesbeth Driesen & Glenn Rayp, "Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee" (2005) 39 J Consumer Aff 363 at 375 (explaining results indicating that a fair trade label is almost as important to consumers as flavour); Griffin & Co, "Five Key Findings from Nielsen's Global Survey of Corporate and Social Responsibility", online: <<http://griffinco.com/5-key-findings-from-nielsens-global-survey-of-corporate-and-social-responsibility/>> (indicating the majority of people "will pay extra for products and services from companies committed to positive social and environmental impact").

of consumers' willingness to pay premiums for green products — that is, those produced in ways that minimize damage to the environment.<sup>104</sup> Skeptics have argued, plausibly, that such responses cannot be trusted, because respondents will be inclined to say what they think the questioners want to hear. Recently, however, several empirical studies have demonstrated that substantial groups of consumers do indeed behave in the predicted fashion when given the chance.<sup>105</sup> That finding strongly suggests that some consumers, if offered products or services visibly associated with unfair treatment of impoverished Indigenous groups, would balk — which, in turn, would prompt the companies to reform their ways.

That comforting finding suggests, ironically, a different objection to the proposal offered here. The fact that coffee bearing a fair trade label can be sold for more than coffee lacking such a label casts doubt upon the need for a new information-forcing legal rule. If compliance with consumers' social preferences enables companies to raise their prices, why must a disclosure requirement with respect to traditional knowledge be adopted? Why not just rely on the companies' recognition of their self-interest to prompt them to voluntarily acknowledge their indebtedness to traditional knowledge — and then to treat the relevant Indigenous group more fairly? As seen in the first part of this paper, the upscale sellers of Tibetan carpets have already

taken this tack. Perhaps companies in other lines of business will learn from their example.

Three considerations, in combination, suggest that it would be unwise to trust companies to recognize and exercise their power to do well by doing good. First, in most circumstances, it is easier for companies to conceal from both consumers and from watchdog groups their reliance on traditional knowledge than it is to conceal unfair labour practices. Second, the diversity of interests and values at stake in disputes over traditional knowledge impedes efforts by NGOs to develop a single label and an associated set of fair practices to which companies could voluntarily conform and that consumers could then recognize and reward.<sup>106</sup> Finally, the ethical questions raised by uses of traditional knowledge are much less familiar to the general public than the analogous issues presented by exploitative labour practices or disrespect for the environment. Given a choice, most companies currently making covert use of traditional knowledge would probably prefer to let sleeping dogs lie than to alert their consumers to their conduct, hoping to profit subsequently from the companies' ability to capitalize on consumers' newly energized social preferences. These generalizations are lent credence by the fact that, even after decades of academic and governmental attention to the puzzle of traditional knowledge, the sellers of Tibetan carpets are highly atypical in their willingness to acknowledge (indeed, trumpet) their fair treatment of the groups they rely upon. The bottom line is that using consumers to pressure companies to behave better is only likely to work if the law compels the companies to disclose information that will catalyze the process.

## Author's Note

This paper is a condensed version of William Fisher, "The Puzzle of Traditional Knowledge" (2018) 67 Duke LJ 1511.

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104 See e.g. Sarah Butler, "Ethical Shopping Growing in Popularity, Survey Suggests", *The Guardian* (19 August 2013), online: <[www.theguardian.com/business/2013/aug/19/ethical-shopping-growing-popularity-fairtrade](http://www.theguardian.com/business/2013/aug/19/ethical-shopping-growing-popularity-fairtrade)> (finding that ethical shopping is growing in popularity in the United Kingdom); Jessica Lyons Hardcastle, "Consumers Will Pay More Money for 'Sustainable' Products", *Environmental Leader* (17 January 2017), online: <[www.environmentalleader.com/2017/01/consumers-will-pay-more-money-for-sustainable-products/](http://www.environmentalleader.com/2017/01/consumers-will-pay-more-money-for-sustainable-products/)> ("Thirty three percent of respondents to the survey would pay \$10 more, while 40% would pay at least a \$5 premium."); Mehdi Miremadi, Christopher Musso & Ulrich Weihe, "How Much Will Consumers Pay to Go Green?", *McKinsey Quarterly* (October 2012), online: <[www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-much-will-consumers-pay-to-go-green](http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-much-will-consumers-pay-to-go-green)> (finding that many people will pay more to "go green," but only up to a certain point).

105 See e.g. Jens Hainmueller, Michael J Hiscox & Sandra Sequeira, "Consumer Demand for the Fair Trade Label: Evidence from a Multi-Store Field Experiment" (2015) 97 *Rev Econ & Stat* 242 at 242; Daniel W Elfenbein & Brian McManus, "A Greater Price for a Greater Good? Evidence that Consumers Pay More for Charity-Linked Products" (2010) 2 *Am Econ J Econ Pol* 28; Ibon Galarraga & Anil Markandya, "Economic Techniques to Estimate the Demand for Sustainable Products: A Case Study for Fair Trade and Organic Coffee in the United Kingdom" (2004) 4 *Economia Agraria y Recursos Naturales* 109; Mario F Teisl, Brian Roe & Robert L Hicks, "Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling" (2002) 43 *J Envtl Econ & Mgmt* 339 at 351–55.

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106 That diversity substantially explains the failure of the effort by the National Indigenous Arts Advocacy Association in Australia to popularize an Indigenous label of authenticity. See Peter Drahos, *Towards an International Framework for the Protection of Traditional Group Knowledge and Practice* (4–6 February 2004) at 32 [unpublished], online: <[www.anu.edu.au/fellows/pdrahos/reports/pdfs/2004Drahos\\_tkframeworkUNCTAD.pdf](http://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2004Drahos_tkframeworkUNCTAD.pdf)>.



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