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**WIPO INDIGENOUS PANEL ON THE ROLE OF THE PUBLIC DOMAIN CONCEPT:
EXPERIENCES IN THE FIELDS OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE
AND TRADITIONAL CULTURAL EXPRESSIONS: EXPERIENCES FROM CANADA**

Document prepared by

Mr. Gregory Younging

Creative Rights Alliance, Kelowna, Canada

**Gnaritas Nullius (No Ones' Knowledge):
The Public Domain and Colonization of
Traditional Knowledge**

prepared by Gregory Younging (Opaskwayak Cree Nation-Canada)

INDIGENOUS KNOWLEDGE SYSTEMS

Prior to contact with Europeans between 300-600 years ago, Indigenous knowledge systems had developed and flourished over thousands of years in various parts of the world. These knowledges are rich and varied, ranging from soil and plant taxonomy, cultural and genetic information, animal husbandry, medicine and pharmacology, ecology, zoology, music, arts, architecture, social welfare, governance, conflict management, and many others.¹ This chapter will briefly outline a very small sampling of the manifestations of Indigenous knowledge systems that existed prior to European contact and colonization, most of which continue to exist and evolve.

Significant Contributions to Humanity: Devalued and Diminished

In the northern part of the continent of South America, Indigenous nations had charted the constellations, developed astrological charts and constructed elaborate pyramids that parallel the pyramids in Egypt. In the mountains near the mid-west coast of the Continent were complex city structures containing shaped stone buildings, stairs, walkways and irrigation systems that still stand today. The ruins show precision-crafted buildings with neat regular lines, bevelled edges, and mortarless seams that characterize the best of Inca architecture.² In the interior of North America, Indigenous nations constructed gigantic mounds, some in the shape of animal and human figures that can only be identified from an aerial view. Entombed bodies and metal tools have been found inside these mounds indicating, "a complex and advanced civilization at work."³ Along the Northwest coast of the Continent intricate wood longhouses were constructed comprising village structures that continue to intrigue architects. The three hundred or so tribal groups who lived in North America when Christopher Columbus arrived built their homes and arranged their settlements according to similar patterns and principles passed from generation to generation.⁴

Far beyond architecture Indigenous design in North America had produced products including a variety of canoe designs, the kayak, snow shoes, sunglasses and a multitude of various farming and hunting implements. Gardening using hydroponics and advanced farming techniques were developed and practiced in various continents by Indigenous peoples producing a range of crops including corn, squash, beans, tomatoes, wheat, potatoes and varieties of fruits. Throughout the Amazon basin Indigenous farmers had overcome problems with termites and other insects by utilizing extracts from trees that act as natural repellent – which some Western scientists now struggle to understand and reproduce. Throughout North America and South America, Indigenous farmers had a profound understanding of genetics enabling them to experiment with

¹ Hoppers, Catherine, (2002). In *Indigenous Knowledge and the Integration of Knowledge Systems: Towards a Philosophy of Articulation* (pp. 11). Claremont, South Africa: New Africa Books.

² Weatherford, Jack, (1988). In *Indian Givers: How Native Americans Transformed the World* (pp. 59). New York, New York: Crown Publishers.

³ Francis, Daniel (1992). In *The Imaginary Indian: The Image of the Indian in Canadian Culture* (pp.193). Vancouver, British Columbia: Arsenal Pulp Press.

⁴ Nabokov, Peter, & Easton, Robert, O.B. (1989). In *Native American Architecture* (pp. 12). Oxford, New York: Oxford University Press.

new strains of potatoes. In the Andean region Indigenous farmers knew that by taking pollen from one variety of corn and fertilizing the silk of another variety, they could create a corn with combined characteristics of the two parent crops.⁵

Major advances in the realm of health and herbal medicines had been developed throughout the continents of the Indigenous world. Shamans and traditional healers practiced spiritual, herbal, and psychological techniques, including the placebo effect. Indigenous herbal specialists around the world gathered plants and studied and developed natural medicines that continue to surpass by far advances in herbology by non-Indigenous peoples.

Indigenous knowledge systems have also made many significant contributions to the arts and humanities of the world. The technique of acid etching of designs of Hohokam peoples in what is now southwestern Arizona (dating back to 500 b.c.) predates the technique in Europe by three hundred years.⁶ Stories of ancient times before human beings, stories of the Creation of Indigenous peoples and other stories of spiritual, mythological and legendary figures are rooted in the Oral Tradition of Indigenous nations and have been passed down through generations and continue to fascinate many of the peoples of the world. Elaborate Indigenous artistic techniques and designs in sculpture, painting, music, drama, dance, continue to thrive in traditional and evolved forms, and have intrigued art historians and the art world for centuries.

In the area of governance, complex political systems exist among Indigenous nations and include chieftainships, monarchies, and evidence of universal rights and democracy prior to any such concepts in Europe. The Haudenosaunee People of the Longhouse practice a democratic form of government and formed the League of the Six Nations Confederacy that would later influence the development of American and European democracy. Oral history among the People of the Longhouse place the origin of the league at about 900 b.c.⁷ Other united nations structures along the northwest coast, eastern seaboard and southern and northeast plains of North America developed between 2500 and 1500 years ago and far predate any such structures in Europe.

Indigenous knowledge systems represent the accumulated experience, wisdom and know-how unique to nations, societies, and or communities of people, living in specific environments of America, Africa, Asia and Oceania. It represents the accumulated knowledge of seventy per cent of the earth's people—some ten thousand distinct peoples and cultures. In the past, Eurocentric knowledge has condescendingly associated Indigenous knowledge with the primitive, the wild, and the natural.⁸ This is the prevailing negative Eurocentric perception of TK that forms the basis for the status quo. Despite the advances made by knowledge systems throughout the Indigenous world, the Western world's general response throughout the colonial and most of the post-colonial periods was to dismiss the value of TK. Since only European people could progress, all Indigenous knowledge was viewed as static and historical.⁹

Indigenous knowledge is not only "technical" or empirical in nature, but also its recipients integrative insights, wisdom, ideas, perceptions and innovative capabilities that pertain to ecological, biological, geographical, and other physical phenomena. It has the capacity for total systems understanding and management.¹⁰ Yet these high capacity, time-tested Indigenous systems' have been devalued and diminished by having Eurocentric perceptions and institutions imposed upon them. In the process, many of the systems have been de-based through

⁵ Weatherford, Jack, (1988). In Indian Givers: How Native Americans Transformed the World (pp.85). New York, New York: Crown Publishers

⁶ Francis, Lee, (1996). In Native Time: A Historical Time Line of Native America (pp. 14). New York, New York: St. Martin's Griffin.

⁷ Ibid.

⁸ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.1). Unpublished.

⁹ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp.6). Unpublished

¹⁰ Henderson, Sakej, (2004). Traditional Indigenous Knowledge (pp. 2). Unpublished.

misrepresentation, misappropriation, unauthorized use and the separating of the content from its accompanying regulatory regime.

Customary Laws: Developed Legal Regimes Devalued and Diminished

Indigenous Peoples have numerous internal Customary Laws associated with the use of TK. These Customary Laws have also been called “cultural protocols” and are part of the laws that Indigenous Nations have been governed by for millennia and are primarily contained in the Oral Tradition. Although, in lieu of the increased outside interest in TK and problems with interaction between TK and IPR systems, there is a current movement among Indigenous Nations to document their protocols in written and/or digital format.

Customary Laws around the use of TK vary greatly between Indigenous Nations, but include such regulations as:

- Certain plant harvesting, songs, dances, stories and dramatic performances can only be performed/recited and are owned by certain individuals, families or clan members in certain settings and/or certain seasons and/or for certain Indigenous internal cultural reasons;
- Crests, motifs, designs and symbols, and herbal and medicinal techniques are owned by certain individuals, families or clan members;
- Artistic aspects of TK, such as songs, dances, stories dramatic performances, and herbal and medicinal techniques, can only be shared in certain settings or spiritual ceremonies with individuals who have earned, inherited and/or gone through a cultural and/or educational process;
- Art forms and techniques, and herbal and medicinal techniques, can not be practiced, and/or certain motifs can not be used, until the emerging trainee has apprenticed under a master of the technique;
- Certain ceremonial art and herbal and medicinal techniques can only be shared for specific internal Indigenous cultural and/or spiritual reasons and within specific Indigenous cultural contexts.

These are but a few general examples of Customary Laws that Indigenous Nations around the world have developed over thousands years to regulate the use of TK. Indigenous protocols are intimately intertwined and connected with TK and form what can be viewed as whole and complete integrated complex Indigenous Knowledge systems throughout the world. For example, speaking about clan ownership in Nlakapamux Customary Law, Shirley Sterling states: “This concept of ownership by clans, nations and family groups and individuals of stories and other knowledge must be respected. The protocols for the use of collective knowledge from each cultural area and each First Nation would have to be identified and followed.”¹¹

Indigenous Customary Law, like other sources of law, is dynamic by its very nature. Like its subject matter – culture, practices and traditions – it is not frozen in time, it has evolved with the social development of Indigenous peoples. Indigenous Customary Law also has an inextricable communal nature. The social structures that recreate, exercise and transmit this law through generations, and the protocols that govern these processes, are deeply rooted in the traditional territories of Indigenous peoples, and, understandably are inalienable from the land and environment itself.¹² Indigenous Customary Law is inseparable from Indigenous knowledge. In some Indigenous Nations, the abstract subtlety of Indigenous customary law is indivisible from

¹¹ Sterling, Shirley, (1997). In *The Grandmother Stories: Oral Tradition and the Transmission of Culture* (pp. 39). Unpublished Doctoral thesis. University of British Columbia Press.

¹² Alexander, Merle, (2003). In *Customary Laws: Applying Sharing within Communities to International Instruments* (pp.9). Unpublished.

cultural expressions such as stories, designs and songs. That is, a story may have an underlying principle of environmental law or natural resource planning.¹³ A song may explain the custodial relationship that a certain community has with a particular animal species. A design may be a symbol that expresses sovereignty over a territory as well as the social hierarchy of a nation's clan system. A watchman's pole may be considered an assertion of Aboriginal title, tell a story of a historical figure and have a sacred significance.¹⁴

Neither the common law nor international treaties place Indigenous customary law on equal footing with *other* sources of law. As a result, the TK is particularly vulnerable to continued destruction without substantive legal protection. Indigenous jurisprudence and law should protect Indigenous knowledge. In relation to Eurocentric law, Indigenous jurisprudence of each heritage should be seen as an issue of conflict of laws and comparative jurisprudence. With regard to its authority over Indigenous knowledge, Indigenous law and protocols should prevail over Eurocentric patent, trademark or copyrights law.¹⁵ However, due to a series of historical realities that will be considered in the following sections, the *status quo* is that Indigenous knowledge has become subjugated under European legal regimes.

Empirical-Like Knowledge as an Indigenous Methodology

The vast majority of Western-based research has been conducted through the scientific process, which has in turn produced most of Western-based knowledge. Vine Deloria Jr. has characterized the effect of the scientific process as follows, "Eventually, we are told, the results of this research with many other reports, are digested by intellects of the highest order and the paradigm of scientific explanation moves steadily forward, reducing the number of secrets Mother Nature has left."¹⁶ In contrast to Western-based scientific research methodology, there are emerging principles of Indigenous-based research that draw Indigenous traditional methods of learning through lived experience including ecological and social interaction. Aspects of such methodologies can also be viewed in parallel with Western-based theories of: 1) historical methodology, regarding primary sources and oral tradition, and 2) discourse analysis, as expounded by Vivien Burr (1995) and Kenneth Gergen (1985).

The historical method comprises the techniques and guidelines by which historians use primary sources and other evidence to research and then to write history. The question of the nature, and indeed the possibility, of sound historical method is raised in the philosophy of history, as a question of epistemology (Wikipedia-2006). Aspects of the historical method and Indigenous epistemology also converge in the use of Oral Tradition; whereby the oral transmission of information from person to person is considered a legitimate method of knowledge acquisition. Whereas oral testimony derived from a person who was present at (or otherwise involved with) a past event can legitimately inform present and future generations of history; oral transmission of cultural knowledge flowing from the past legitimately informs Indigenous heritage in preceding generations. In both cases, a form of exclusive expertise is extended to the person with empirical knowledge of the event, or the Elder with empirical and trans-generational cultural knowledge. In many cases, the historical method's Oral Tradition and the Indigenous Oral Tradition is often the most reliable method of knowledge acquisition, and, indeed, sometimes the best or only option.

With regard to discourse analysis, Burr and Gergen contended that, "Our ways of understanding the world are created and maintained by social processes" (Burr 1995: 4; Gergen 1985: 268).

¹³ See Borrows, *supra* 1, at 17–20 for an interpretation of an Anishinabek resource law regarding *Nanabush v. Deer, Wolf et al.*

¹⁴ Alexander, Merle, (2003). In *Customary Laws: Applying Sharing within Communities to International Instruments* (pp.11). Unpublished.

¹⁵ Henderson, Sakej, (2004). In *Indigenous Traditional Knowledge* (pp.9). Unpublished.

¹⁶ Deloria Jr., Vine, (1995). In *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact* (pp. 42). New York, NY: Scibner.

Discourse is a form of social action that plays a part in producing the social world – including knowledge. Knowledge is created through social interaction in which we construct common truths and compete about what is true or false.¹⁷ Although some understandings of Traditional Knowledge (TK) can fit discourse analysis, more useful aspects are based fundamentally on Indigenous traditional methodologies that are now emerging as being useful to Indigenous research in contemporary contexts. Indigenous pedagogy paradigms are heavily based on the natural world and apprenticed relationships with Elders and other authoritative experts within Indigenous cultural confines. Within traditional Indigenous cultures, authority and respect are attributed to “Elders” – people who have acquired wisdom through life experiences, education (a process of gaining skills, knowledge and understanding), and reflection.¹⁸

Perhaps the single most important precept of the Indigenous worldview is the notion that the world is alive, conscious and flowing with knowledge and energy. In his paper, *An Organic Arising: An Interpretation of Tikanga based upon Maori creation traditions* Charles Royal states the following:

The natural world is not so much the repository of wisdom but rather is wisdom itself, flowing with purpose and design. We can say that the natural world is a mind to which all minds find their origin, their teacher and proper model. Indigenous knowledge is the fruit of this cosmic stream, arising organically when the world itself breathes through and inspires human cultural manifestation. Leading from this view of the world being alive, conscious and wisdom filled is the obvious conclusion that all that we need to know, all that there is know and all that we should know already exists in the world, daily birthed in the great cycle of life. That is, human cultural production is a natural organic expression arising from the contours, shapes and colours of the environments in which we dwell.¹⁹

In order to carry this Indigenous principle into the contemporary context, it must be acknowledged that many Indigenous peoples no longer dwell solely in what was “the world” to their ancestors (i.e., the natural world). Many Indigenous peoples are now located in a world which consists of a complex physical and cultural layering of principles derived from nature and modernity. However, as emerging Indigenous research methodologies express, this does not mean that traditional models are not applicable and adaptable. Therefore, in contemporary research Indigenous models can be adapted in the following ways: 1) Interaction with the contemporary environment and the subsequent gained experience can be an important and relevant way of acquiring knowledge; and 2) Authoritative figures who have accumulated a wealth of experience over time on particular aspects of the contemporary world can be afforded an Elder-like status for the purposes of research.

This Indigenous model of learning through experiencing is articulated further in *Decolonizing Methodologies: Research and Indigenous Peoples* by Linda Smith (1995) as “intervening” and “connecting.” Smith contends that, “Intervening takes action research to mean literally the process of being proactive and becoming involved as an interested worker for change” (p.14). Intervening and getting involved in a process occurring in the world is therefore a legitimate method of acquiring knowledge through the benefit of an insider perspective to the process, while also engaging and affecting the process. With regard to connecting, Smith states,

¹⁷ Phillips, Louise & Jorgensen, Marianne W, O.B. (2002). In *Discourse Analysis as Theory and Method* (pp. 5). London, England: Sage Publications.

¹⁸ Archibald, Jo-ann, (1997). In *Coyote Learns to Make a Storybasket* (pp. 63). Unpublished Doctoral thesis. University of British Columbia.

¹⁹ Royal, Charles (2007), *An Organic Arising: An Interpretation of Tikanga based upon Maori creation traditions* (Unpublished)

“Connectedness positions individuals in sets of relationships with other people and with the environment.”²⁰

***Terra Nullius* and the Colonization of Traditional Knowledge**

Between 30,000 and 530 years ago, Traditional Knowledge systems developed and thrived, protected and regulated by their associated Customary Laws, upon approximately 90% of the earth’s landmass which was under the occupations of thousands of Indigenous Nations. In this pre-colonization era, Indigenous Peoples were the vast majority of the world population and lived in balance with Natural Laws and their respective territories. In the early colonial period Western perspectives interpreted Indigenous Nations through the lens of Social Darwinism as subhuman and primitive. Consequently, despite its immense universal value, TK was also seen to be of little or no value.

Columbus came to Indigenous America as an invader and a colonizer without regard for the original inhabitants he “discovered”²¹ The arrival of Columbus signified the beginning of a period of colonization in which Indigenous peoples were subjected to Western legal norms in replacement of their own. By 1493, the patterns were set for the next 520 years in the Americas and other places where European colonizers relocated and dispossessed Indigenous peoples from their lands and resources.²² Throughout the early period of colonization debates and discussions around Europe considered whether Indigenous peoples were human beings or not, largely concluding the later. Theories of Social Darwinism added further justification that Indigenous, Black and other brown skinned peoples were lesser evolved than Western European peoples.

Indigenous peoples territories were interpreted by Western legal regimes as *Terra Nullius*, literally meaning that it was nobody’s land. *Terra Nullius* justified the idea and legal concept that when the first Europeans arrived... the land was owned by no one and therefore open to settlement (Wikipedia 2010). In the 16th Century when Spanish, British and French colonial forces began large scale encroachment upon the 30 million Indigenous peoples in North America, *Terra Nullius*, Social Darwinism, and the Doctrine of Discovery were the dominant ideologies, which prevailed through colonial institutions through to many current modern Western institutions.

North American Colonization and Residential Schools

Early settlers in North America were able benefited from Indigenous peoples sharing their Traditional Environmental Knowledge, especially in the arctic and semi arctic northern regions of the continent that later became Canada. This early history of the relationship between the Britain Crown/Canada and Indigenous Nations was based on International Law, nation-to-nation negotiations and treaties. However, soon afterward Canada began to stray down a path leading away from International Law and to an adversarial/hostile, dominating relationship with Indigenous Peoples. This era, which continues through to today, including the Residential School System and several other breaches of International Law that was later developed through the United Nations. With the Act for the Gradual Civilization of Indian Tribes of 1851 Canada began passing laws designed to eliminate Indigenous peoples without their consent. In this era the Canadian Government viewed Indigenous peoples as an obstacle to complete control of the resources and territories of Canada and began to speak of “The Indian Problem.” With the

²⁰ Smith, Linda Tuhiwai, (1999). In *Decolonizing Methodologies: Research and Indigenous Peoples* (pp. 147). London & New York: Zed Books.

²¹ Venne, Sharron, (1998) In *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*, (pp. 2) Theytus Books, Penticton,

²² Venne, Sharron, (1998) In *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*, (pp. 4) Theytus Books, Penticton,

implementation an official Policy of Assimilation the Indian Act in 1876, the colonial project in Canada was in full force.

Throughout the period of 1879 to the late-1980s The Canadian Government in conjunction with Catholic, Protestant and Anglican Churches displaced whole generations of Indigenous children from their homes, families, elders, and communities in the Indian Residential School (IRS) System. The vision was anchored in the fundamental belief that to educate Aboriginal children, effectively had to be separated from their families-that the parenting process in Aboriginal communities had to be disrupted.²³ The children were taught to be ashamed of who they are and were physically, mentally, and sexually abused. Thousands lost their lives at these schools (Sinclair 2010) many due to disease. The IRS System was the hallmark institution of the assimilation policy. In 1920 Canadian Superintendent of Indian Affairs Duncan Campbell Scott made his (in)famous expression of the policy that “Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic” .

The overriding goal of IRS was to divest Indigenous peoples of their TK, and thereby their attachment to (and knowledge related to) their territories forevermore within a few generations. In the schools children were punished for displaying all aspects of their original cultures. Resetting the child’s cultural clock from the “savage” setting the seasonal round of hunting and gathering to the hourly and daily precision required by an industrial order was seen by the Department (of Indian Affairs) as an issue of primary consideration.²⁴ As Indigenous peoples were being divested of their TK throughout the IRS era some of the following disciplines and third parties were actively engaging in the following practices: 1) anthropologists, archeologists and some missionary groups were in the process of documenting TK in data banks, 2) Museums and collectors were confiscating Indigenous cultural artifacts containing and representing TK, and 3) Third party corporations were appropriating Indigenous artistic and functions designs such as symbols, totem poles and functional designs such as canoes and snowshoes. This era in general represented the first wide scale colonization of TK. The impacts of Residential Schools are not buried in the past; they continue through the ongoing loss of TK and other multi generational traumatic affects. Still many, if not most Canadians today, are unaware the impacts of Residential Schools, including the loss and colonization of TK.

In 2008, Class Action lawsuits from IRS Survivors lead to the court ordered IRS Settlement Package, the Government of Canada Apology to IRS survivors and The Truth and Reconciliation (TRC). The TRC 5 year mandate is to:

- (a) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission;
- (b) Witness, support, promote and facilitate truth and reconciliation events at both the national and community levels;
- (c) Promote awareness and public education of Canadians about the IRS system and its impacts;

²³ Milloy, John, (1999) In A National Crime: The Canadian Government and the Residential School System, (p,23), University of Manitoba Press, Winnipeg

²⁴ Milloy, John, (1999) In A National Crime: The Canadian Government and the Residential School System, (p. 36), University of Manitoba Press, Winnipeg

- (d) Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;
- (e) Produce and submit to the Parties of the Agreement 2 a report including recommendations 3 to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;
- (f) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement).

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Similar IRS institutions were deployed in the U.S. and Australia. In the 1879 Captain Richard Henry Pratt was given responsibility for overseeing education systems for Indian children in the U.S. By 1895 the Boarding School system had been devised the goal of which Pratt stated was "to kill the Indian and save the man in every pupil." Canada in most respects modeled its system on that of the U.S.²⁶ The Bringing Them Home Report 1997 also led to the Australian Government's Apology to Residential School Survivors in 2008.

The Residential School System was the ultimate institution of colonization. Colonization can be characterized as a deliberate organized program on the part of an invading foreign regime to culturally or physically eliminate the Indigenous peoples of the territory to make way for complete foreign domination and control. This is achieved by: 1) debasing and delegitimizing pre-existing Indigenous institutions, 2) replacing them with foreign institutions, and 3) subjugating Indigenous Peoples to the foreign institutions. This can only be achieved significantly if Indigenous worldviews are replaced with Western worldviews within the minds of Indigenous peoples (Younging 2010). Colonialism is not satisfied with snaring the people in its net or of draining the colonized brain of any form of substance. With a kind of perverted logic, it turns its attention to the past of the colonized people and distorts it, disfigures it, and destroys it. This effort to demean history prior to colonization today takes on a dialectical significance.²⁷

Under colonial regimes, Indigenous governmental, social, economic, religious, educational, land tenure, and other, institutions are deemed to be inferior/illegitimate and replaced with foreign institutions deemed to be superior. This includes knowledge and legal institutions. Therefore, TK and Customary Laws are also seen to be inferior and replaced with western knowledge and Intellectual Property Rights (IPR) laws. In this process of colonization, Indigenous peoples are divested of the control of TK through their Customary Laws, and TK that is of value to Western knowledge and societies is colonized by the IPR system; and, therefore, TK is colonized along with various other Indigenous institutions. It comes as no surprise then that through the process of colonization, Indigenous knowledge and perspectives have been ignored and denigrated by the vast majority of social, physical, biological and agricultural scientists.²⁸

²⁵ <http://www.trc.ca/websites/trcinstitution/index.php?p=7>

²⁶ Churchill, Ward, (1997) *Genocide by Any Other Name: North American Indian Residential Schools in Context*, In *A little matter of genocide: Holocaust and denial in the Americas, 1492 to the present*, City Light Books, Boulder

²⁷ Fannon, Frantz, (1963), In, *The Wretched of the Earth*, Grove Press Inc, New York

The Public Domain

In the process of transporting European institutions into various parts of the world occupied by Indigenous people, the IPR system has now been imposed upon the TK system. Many issues have arisen in the past ten years regarding problems resulting from the existing IPR system's apparent inability to protect TK. The main problems with TK protection in the IPR system are:

- 1) that expressions of TK often cannot qualify for protection because they are too old and are, therefore, supposedly in the Public Domain;
- 2) that the "author" of the material is often not identifiable and there is thus no "rights holder" in the usual sense of the term; and
- 3) that TK is owned "collectively" by Indigenous groups for cultural claims and not by individuals or corporations for economic claims.

Under the IPR system, knowledge and creative ideas that are not "protected" are in the Public Domain (i.e. accessible by the public). Generally, Indigenous peoples have not used IPRs to protect their knowledge; and so TK is often treated as if it is in the Public Domain – without regard for Customary Laws. Another key problem for TK is that the IPR system's concept of the Public Domain is based on the premise that *the author/creator deserves recognition and compensation for his/her work because it is the product of his/her genius; but that all of society must eventually be able to benefit from that genius*. Therefore, according to this aspect of IPR theory, all knowledge and creative ideas must eventually enter the Public Domain. Under IPR theory, this is the reasoning behind the time period limitations associated with copyright, patents and trademarks.

The precept that all Intellectual Property, including TK, is intended to eventually enter the Public Domain is a problem for Indigenous peoples because Customary Law dictates that certain aspects of TK are not intended for external access and use in any form. As a response to this, there have been circumstances where indigenous people have argued that some knowledge should be withdrawn from circulation and that for specific kinds of knowledge, protection should be granted in perpetuity.²⁹ Examples of this include, sacred ceremonial masks, songs and dances, various forms of shamanic art, sacred stories, prayers, songs, ceremonies, art objects with strong spiritual significance such as scrolls, petroglyphs, and decorated staffs, rattles, blankets, medicine bundles and clothing adornments, and various sacred symbols, designs, crests, medicines and motifs. However, the present reality is that TK is, or will be, in the Public Domain (i.e., the IPR system overrides Customary Law.)

Certain aspects of TK should not enter the public domain (as deemed under Customary Law) and should remain protected as such into perpetuity, which could be expressed as a form of "Indigenous private domain." (Younging 2007). Indigenous peoples' historical exclusion from the broad category of 'public' feeds part of the differences in objectives. Indigenous peoples also present different perceptions of knowledge, the cultural and political contexts from which knowledge emerges, and the availability, or perceived benefits of the availability, of all kinds of cultural knowledge.³⁰

Copyright Case Study: The Cameron Case

²⁸ AIQ: Volume 26 (2008) -University of California, Berkeley. Native American Studies, Southwestern AmericanIndianSociety

²⁹ Anderson, Jane, (2010) In indigenous traditional knowledge & intellectual property, Center for the Study of the Public Domain, Duke University School of Law, Durham

³⁰ Anderson, Jane, (2010) In indigenous traditional knowledge & intellectual property, Center for the Study of the Public Domain, Duke University School of Law, Durham

In 1985 the Euro-Canadian author Anne Cameron began publishing a series of children's books through Harbour Publications based on Westcoast Indigenous traditional stories. These books include: *The Raven, Raven and Snipe, Keeper of the River, How the Loon Lost Her Voice, Orca's Song, Raven Returns the Water, Spider Woman, Lazy Boy and Raven Goes Berry-picking*. Cameron had been told the traditional stories by Indigenous storytellers and/or had been present at occasions where the stories were recited. The original printing of the books granted Anne Cameron sole authorship, copyright and royalty beneficiary, and gave no credit to the Indigenous origins of the stories. As the discourse around Indigenous cultural appropriation emerged in the 1990s, Cameron's books came under severe Indigenous criticism; not only on the grounds of cultural appropriation, but the Indigenous TK holders asserted that some of the stories and aspects of the stories were incorrect.

This led to a major confrontation with Indigenous women authors at a women writer's conference in Montreal in 1990. At the end of the confrontation Cameron agreed not to publish any more Indigenous stories in the series: however, she did not keep her word and the books continued to be reprinted and new books in the series continued to be published (Armstrong and Maracle-1992). Some minor concessions have been made in subsequent reprints of books in the series and new additions. Reprints of the books that were produced after around 1993/94 contained the disclaimer: "When I was growing up on Vancouver Island I met a woman who was a storyteller. She shared many stories with me and later gave me permission to share them with others... the woman's name was Klopimum." However, Cameron continued to maintain sole author credit, copyright and royalties payments. In a further concession, the 1998 new addition to the series *T'aal: the One Who Takes Bad Children* is co-authored by Anne Cameron and the Indigenous Elder/storyteller Sue Pielle who also shares copyright and royalties.

Patent Case Study: The Igloolik Case

An example of the failure of the Patent Act In Canada to respond to Inuit designs is the Igloolik Floe Edge Boat Case.³¹ A floe edge boat is a traditional Inuit boat used to retrieve seals shot at the floe edge (the edge of the ice floe), to set fishing nets in summer, to protect possessions on sled when travelling by snowmobile or wet spring ice, and to store hunting or fishing equipment. In the late 1980's the Canadian government sponsored the Eastern Arctic Scientific Research Center to initiate a project to develop a floe edge boat that combined the traditional design with modern materials and technologies. In 1988 the Igloolik Business Association (IBA) sought to obtain a patent for the boats. The IBA thought that manufactured boats using the floe edge design would have great potential in the outdoor recreation market. To assist the IBA with its patent application the agency, the Canadian Patents and Developments Limited (CPDL) initiated a pre-project patent search that found patents were already held by a non-Inuit company for boats with similar structures. The CPDL letter to the IBA concluded that it was difficult for the CPDL to inventively distinguish the design from previous patents and, therefore, the IBA patent would not be granted. The option of challenging the pre-existing patent was considered by the IBA, however, it was decided that it would not likely be successful due to the high financial cost and risk involved in litigation.

Trademark Case: The Snumeymux Case

As most Indigenous communities are far behind in terms of establishing businesses most trademarking of TK involves a non-Indigenous corporation trademarking an Indigenous symbol, design or name. Again, many cases could have been examined in this section but only two have been chosen: one case involving the Snumeymux Band trade marking petroglyphs through the Canadian Patent Office, and one involving an international corporation's patent licence being the subject of an intense international Indigenous lobbying effort.

³¹ Ford, Violet. *The Protection of Inuit Cultural Property* (pp. 20). Paper presented at the meeting of the Creator's Rights Alliance National Conference on Traditional Knowledge, June 4, 2004, Montreal.

The Snuneymux people have several ancient petroglyphs located off their reserve lands near False Narrows on Gabriola Island, BC. In the early 1990s non-Indigenous residents of Gabriola Island began using some of the petroglyph images in coffee shops and various other business logos. In the mid-1990s the Island's music festival named itself after what had become the local name of the most well known petroglyph image, the dancing man. The Dancing Man Music Festival then adopted the image of the dancing man as the festival logo and used it on brochures, posters, advertisements and T-shirts.

The Snuneymux Band first made unsuccessful appeals to the festival, businesses and the Gabriola community to stop using the petroglyph symbols. In 1998 the Snuneymux Band hired Murry Brown as legal counsel to seek protection of the petroglyphs (Manson-2003). At a 1998 meeting with Brown, Snuneymux Elders and community members on the matter, The Dancing Man Festival and Gabriola business' and community representatives were still defiant that they had a right to use the images from the petroglyphs (Brown-2003).

On the advice of Murry Brown, The Snuneymux Band filed for a Section 91(n) Public Authority Trademark for eight petroglyphs and was awarded the trademark in October of 1998 (Brown-2003). The trademark protects the petroglyphs from "all uses" by non-Snuneymux people and, therefore the Dancing Man Festival and Gabriola Island business and community representatives were forced to stop using images derived from the petroglyphs. In the Snuneymux case the petroglyphs were trademarked for "defensive" purposes. The Snuneymux case represents an innovative use of the IPR system that negotiated within the systems limitations and found a way to make it work to protect TK.

Case Studies Summary

The case studies have shown that serious conflicts exist between the IPR and TK systems and lead to the conclusion that it constitutes a major problem which Indigenous peoples must work out with the modern states they are within and the international community. In contrast to Eurocentric thought, almost all Indigenous thought asserts that property is a sacred ecological order and manifestations of that order should not be treated as commodities.³² It is clear that there are pressing problems in the regulation of TK. It is also clear that IPR system and other Eurocentric concepts do not offer a solution to some of the problems. There have been cases of Indigenous people using the IPR system to protect their TK. However, the reality is that there are many more cases of non-Indigenous people using the IPR system to take ownership over TK using copyright, trademark, patents and the Public Domain. In many such cases this had created a ridiculous situation whereby Indigenous peoples cannot legally access their own knowledge.

A study undertaken on behalf of the Intellectual Property Policy Directorate (IPPD) of Industry Canada and the Canadian Working Group on Article 8(j) concluded: "There is little in the cases found to suggest that the IP system has adapted very much to the unique aspects of Indigenous knowledge or heritage. Rather, Indigenous peoples have been required to conform to the legislation that was designed for other contexts and purposes, namely western practices and circumstances. At the same time, there is little evidence that these changes have been promoted within the system, i.e., from failed efforts to use it that have been challenged" (IPPD-2002). Such conclusions, along with other conclusions being drawn in other countries and international forums, and the case study examples discussed, appear to support the argument that new systems of protection need to be developed. *Sui Generis* models based on and/or incorporating Customary Laws have been proposed and developed in many countries and are being discussed in the WIPO IGC.

³² Battiste, Marie, & Youngblood Henderson James, (2001). Protecting Indigenous Knowledge and Heritage: A Global Challenge (pp.145). Saskatoon, Saskatchewan: Purich Publishing.

Gnaritas Nullius (Nobody's Knowledge)

Just as Indigenous territories were declared as *Terra Nullius* in the colonization process, so too has TK been treated as *Gnaritas Nullius* (Nobody's Knowledge) by the IPR system and consequently flowed into the public domain along with Western knowledge. This has occurred despite widespread Indigenous claims of ownership and breach of Customary Law. The problem is that advocates for the public domain seem to see knowledge as the same concept across cultures, and impose the liberal ideals of freedom and equality to Indigenous peoples knowledge systems. Not all knowledge has the same role and significance within diverse epistemologies, nor do diverse worldviews all necessarily incorporate a principle that knowledge can be universally accessed. Neither can all knowledge fit into a Western paradigms and legal regimes. A central dimension of Indigenous knowledge systems is that knowledge is shared according to developed rules and expectations for behavior within frameworks that have been developed and practiced over centuries and millennium. Arguments for a public domain of Indigenous knowledge again reduces the capacity for Indigenous control and decision making (Anderson 2010) and can not be reasonably made outside the problematic frameworks of the colonization of TK and *Gnaritas Nullius*.

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