Discussion Paper on Protocols

By Dr. Jane Anderson and Dr. Gregory Younging

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

INTRODUCTION

National and international experiences have acknowledged that Indigenous Cultural Expressions are commonly misrepresented and misused, and that development of Protocols is often an effective means of dealing with such misappropriation. Protocols provide guidelines for behavior. They can function as a means for changing people's understanding of an issue, and thus, how they act in relation to it. In the context of the sharing, usage and storage of Indigenous knowledge, protocols are being utilized as a strategic way of increasing reflective behavior around Indigenous rights in cultural knowledge. One clear advantage of protocols is that they can be flexible and adaptable to specific contexts and local interests. This makes them ideal tools for guidance on appropriate and/or ethical behavior and practice. In the absence of formal legal intellectual property mechanisms for recognizing and protecting rights in Indigenous cultural knowledge, and in ever increasing contexts where relationships with Indigenous peoples are sought, or where Indigenous knowledge is used, protocols are providing a productive tool for negotiating new kinds of equitable relationships.

PROTOCOLS

The possibility of using protocols emerged out of the problems that Indigenous, traditional and local communities have with intellectual property law. In short, intellectual property and copyright in particular demands that Indigenous knowledge and Indigenous people are identified and categorized in ways that do not necessarily reflect Indigenous laws, epistemology, ontology, systems of governance or personhood. For example, copyright law requires both an individual author and a work to provide copyright protection. A work is a tangible expression of an idea in the form of a book, or a photograph etc. Indigenous knowledge systems do not necessarily mark the transition from intangible knowledge to tangible property in the same way. The cultural specificity of intellectual property law, especially its

western emergence and development creates frameworks that do not map easily onto Indigenous knowledge systems. This has produced a range of problems – including the mis-use and appropriation of diverse indigenous knowledge's for non-indigenous use.

While intellectual property law has been slow to develop new frameworks that can incorporate Indigenous needs and expectations around knowledge use, access and control, questions about what practical alternatives exist for protecting Indigenous knowledge use, that are not dependent upon a specific legislative remedy, have emerged. It is in this context, and in responding to a lack within current national and international legislation and intellectual property norms that the possibility of protocols have been raised, developed and utilized. Protocols seem to have become a legislative alternative for various interested parties – especially and initially in the arts. However their development spans various domains and institutions that have intersections in Indigenous knowledge access and use, two examples include the arts (generally speaking) and within libraries/archives.

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

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

Quite clearly protocols are guidelines for conduct. They provide information about ways for dealing with a particular problem or issue. They offer informed instructions about direction and action. But how do they do this (particularly given their non-binding nature)? Why would we follow protocols – do we have to believe

in them in part to follow them, or do they need to become inscribed in a social and cultural context, where not following them becomes an improper act. There is an inherent power to protocols – as the adoption of protocols is in order to achieve certain ends, for example respecting rights or alerting attention to alternative ways of social and cultural engagement.

Protocols could be understood as context driven policy. They are produced through a complex matrix of relations exercised through ongoing and changing cultural engagement that is always already invested with politics. Protocols are not neutral forms. They are prescriptive – in that they prescribe particular types of behavior. Like guidelines, codes of conduct and policy they have the capacity to convey a mode of behavior that individuals are presumed to follow. Protocols work precisely through the self-governing capacity of individuals. Protocols prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement. The presumption is that we read a protocol, we take on the advice, and we act accordingly. Whilst this effect is not given, overtime protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs. However a key point of interest for protocols is that they offer choice as their differential – an individual, or even an institution either chooses to follow them or not. Overtime, the adoption and usage of protocols can establish cultural standards the lead to more binding forms of enforcement, such as policy, legislation and law.

Protocols are not value neutral but enhance or consolidate systems of value that may already be socially circulated within a particular context. In this sense they provide the possibility for accounting for changing cultural values and norms, and that these may vary from context to context, community to community.

The proliferation of protocols in the area of intellectual property and Indigenous knowledge is very important but not necessarily surprising. Other areas of intellectual property law, challenged by various social, bureaucratic or governmental values and demands, have also found themselves co-exiting, with a

body of protocols that draw from law and further imbue social relationships with legal mechanisms. An easy example is to point to the variety of protocols relating to digital and communicative technologies. For example, the entire world wide web is governed by a protocols and a series of developing and emerging protocols.

Perhaps the increase of protocols dealing with Indigenous knowledge protection suggests a particular movement and direction relating to Indigenous rights and the protection of Indigenous knowledge. It is representative of activity that is occurring throughout IP law, where protocols are part and parcel of repositioning certain agendas. The practical utility of protocols is that they are playing a crucial role in changing attitudes and perspectives about how certain industries deal with Indigenous knowledge. The hidden power of protocols is that they effect change by encouraging actors to make a choice about how they behave in relation to a particular issue, this is as a compliment to more stringent court based methods.

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

AUSTRALIAN EXAMPLES OF PROTOCOLS

There are certain elements of protocols that have been or are currently in circulation, and several others that are currently being developed. Many of these protocols have been developed in Australia and draw significantly from the work of the Indigenous lawyer Terri Janke.

1. Aboriginal and Torres Strait Islander Library and Archive Protocols

The Aboriginal and Torres Strait Islander Library and Archive Protocols were developed in 1994 and 1995.[1] They sought to provide a guide to libraries, archives and information services about interaction with Aboriginal and Torres Strait Islander people and communities as well as how to handle material with Aboriginal and Torres Strait Islander content. Specifically the protocols encouraged:

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

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

In a context where, as far as the law of copyright goes, Indigenous people own very little of the material found in such institutions, the protocol began a process of recognition and standard setting. It began to address certain historical power imbalances that law was really ill-equipped to deal with. The protocol prescribed a change of behavior – that Aboriginal and Torres Strait Islander people did have rights in relation to the material, and while these would not be recognized legally, the Institutions themselves could be proactive in recognizing these. Institutions could choose to be respectful and acknowledge differing and not necessarily legal rights. Whilst the exact nature of Indigenous intellectual property remained ambiguous, the step of encouraging reflection about rights and interests previously excluded because they were not legally recognizable and hence enforceable, was the explicit purpose of the protocol. The protocol has been

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

effective in that it has raised the level of expectation about the actions of libraries, archives and information services in relation to Indigenous material.

2. NAVA protocols

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

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

> Protocols provide a means of complying with the customs and cultural value systems of a particular situation, group or culture, in order to acknowledge and respect the situation or people involved, and to ensure that negotiations and transactions are able to be undertaken in a spirit of co-operation and goodwill. The importance of respecting the protocol requirements of every cultural group involved in collaboration and transactions should be acknowledged.[2]

Here we get a good idea about the nature of protocols: what they seek to achieve and realize is an increase in understanding certain cultural nuances that have not historically been easily accessible. The protocol seeks to bring certain principles and guidelines for correct conduct into a more public, visible space. In compiling these general principles the protocol prescribes how the art sector should engage with Indigenous artists, as a different category of artists.

[2] NAVA page 43

It is worth noting that the audiences for these protocols are not usually Indigenous people, but rather those working in fields where Indigenous interests are involved. That is to say that the protocols have not been about translating traditional IP rights into Indigenous contexts, but more translating a range of Indigenous rights, utilizing the language of intellectual property, into frameworks perceived to be lacking in understanding and/or at risk of bad behavior.

3. Australia Council

Following on the heels of the NAVA protocols, the Australia Council launched a series of protocols that were designed to specifically deal with translating intellectual property rights. This is clear in the way in which the protocols are separated into intellectual property classificatory rubrics, art, song, dance, performance, digital technology. Constituting divisions in copyright, the protocols explain copyright and when certain uses of works might arise that involve copyright issues.

These protocols are general guides. They are full of information about principles governing good conduct in relation to respecting Indigenous heritage. The five separate documents dovetail each other in information and direction. As a whole, they are seen as a kind of kit – instructive in the different divisions of copyright law as this relates to Indigenous arts.

It is fair to say that protocols have become the popular option in pushing for recognizing Indigenous rights. There are a wide range of other protocols being developed in Australia. For example: through the Ara Iritja Archive, FATSIL and the State Library of Queensland protocol. These are being produced to response to quite site specific and contextual needs. They are also, importantly, being seen as tools for communities – that are conversant with community needs in this area, and are driven from the specific needs of the locale, rather than as a general interpretive

grid. These new protocols are both explanatory IP protocols and community protocols.

FURTHER THINGS TO THINK ABOUT

One difficulty with protocols is their accessibility. In a sense they have traditionally had a very specific audience, one that is predominately educated and literate. The utility of protocols has been to alter perspectives of Indigenous rights, but it has not necessarily been to alter perspectives in communities about law and rights – and find some practical middle road between, what is popularly described as 'two bodies of law'. In many ways this maintains a perspective about the incommensurability of intellectual property law for Indigenous knowledge. This perspective rests on specific narratives of what intellectual property is, does and means. There is a gulf here, but it is not being bridged necessarily through protocols. For instance, communities still retain very limited understandings of intellectual property.

CANADIAN CONTEXT FOR PROTOCOLS

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

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

Indigenous Artist Research Project

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

contribution to current work on TK underway within federal government and Indigenous communities and that collaboration will continue to take place in the future (IARP Final Report-2004).

The National Gatherings on Indigenous Knowledge

Traditions: National Gatherings on Indigenous Knowledge (NGIK) was the third in a series of national gatherings organized by the Department of Canadian Heritage (DCH) with the goal of continuing" engagement with Aboriginal communities across Canada on areas of mutual interest." DCH proposes that 'the findings of *Traditions* will help to build and enhance policies, programs and services that are supportive of Indigenous peoples in Canada and are relevant to their needs." (NGIK Draft Final Report-2006)

The preamble to the Draft Report states that "Dialogues with First Nations, Inuit and Métis identified the need for all Canadians to recognize these contributions and acknowledge the unique challenges faced by communities in the three areas of Indigenous knowledge targeted for discussion: languages and cultures; intellectual and cultural property; and artistic expression." The Gatherings provided a forum in which DCH came together with Indigenous communities and representatives from other government sectors to discuss a framework for the recognition, respect, protection and celebration of Indigenous knowledge in all the ways it is used and expressed. The NGIK allowed delegates to share information about best practices and support available from federal departments and agencies, and they encouraged open and relevant discussions of key issues and brainstorming on opportunities and strategies for change.

During the months of May and June 2005, national Gatherings on Indigenous knowledge were held in eight communities across Canada: Rankin Inlet, Edmonton, Penticton, Wanuskewin, Yellowknife, Wendake, Eskasoni and Six Nations. They brought together over 400 representatives of Indigenous communities with DCH and other government representatives. Each Gathering took place over three days

and involved approximately fifty invited delegates. Gatherings consisted of small break-out circles and plenary discussions focused on the following themes: 1) Indigenous Knowledge and Languages and Cultures, 2) Indigenous Knowledge and Intellectual and Cultural Property, and 3) Indigenous Knowledge and Artistic Expression.

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

Although each Gathering, and indeed each circle discussion, had its own unique conception of Elders' Councils, the underlying message was that guidance and advice from Elders is essential because traditional laws and protocols govern virtually all aspects of community life, including finding solutions and strategies to address critical issues. The NGIK process was an example of a National government inviting Indigenous communities to take part in a process and express their views. It remains to be seen if the NGIK will have any significant impact of DCH and Canadian Government policy on TK. (http://pch.gc.ca/pc-ch/org/sectr/cp-ch/aa/rng-eng.cfm)

To be sure Canada has the benefit of learning from the Australian examples and the opportunity of building on recent initiatives and the 2010 Olympic, including the controversial appropriated Inukshuk in the Olympic logo. Canada appears to be at a similar stage that Australia was at a decade ago in that, after about two decades of Indigenous peoples raising TK issues, the state has slowly begun to acknowledge the problem. Perhaps the IARP, the NGIK, and other grassroots

initiatives among Indigenous artists and communities, could lead to of the beginning of a movement to act on TK issues more substantively in Canada. However, as with the Australian example, this work requires the support of Government and arts agency funding.

INTERNATIONAL CONTEXT

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between Intellectual property and TK, genetic resources and traditional cultural expressions (folklore). The WIPO Intergovernmental Committee has developed draft provisions for the protection of Traditional Cultural Expressions (TCEs). Objectives of the draft provisions are to "*Prevent the misappropriation of traditional cultural expressions/expressions of folklore*" and "*provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions…"*

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

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

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

CONCLUSION

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

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

The challenge for the next wave of protocols is to make them practically accessible. For the utility of protocols is that they can entertain cultural specificity and context in ways that law can't. Whilst they are still dependent upon people choosing to follow their direction, they do maintain the capacity to exert influence in a variety of domains. Significantly they are instructive – providing guidelines for possible modes of engagement. In this sense they hold the capacity to respond to contextual needs in a given locale. Whilst protocols offer a practical possibility for protecting Indigenous knowledge, they can also be unintelligible, general and useless. This means that in making decisions to use and develop protocols, there is an urgent need to reflect upon who they are being designed for, what perspectives they are presenting and to what purpose.

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Internet Resources for Protocols

Aboriginal and Torres Strait Islander Library and Information Resources Network http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index0c51.html?option=com_frontpage&Itemid=1

Australian Arts Council – Indigenous Arts Protocols
http://www.australiacouncil.gov.au/research/aboriginal_and_torres_strait_islander_arts

Australian Broadcasting Commission – Cultural Protocol
http://www.abc.net.au/indigenous/education/cultural_protocol.htm

Biocultural Community Protocols
http://www.unep.org/communityprotocols/PDF/communityprotocols.pdf

Development of a Protocol Framework for Meaningful Consultation with Canada's Aboriginal People on Forest Management
http://www.cec.org/grants/projects/details/index.cfm?varl an=ENGLISH&ID=108

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

Indigenous Knowledge: Place, People and Protocol
http://www.pch.gc.ca/pc-ch/org/sectr/cp-ch/aa/trd/ppr-eng.cfm

Protocols for Native American Archival Materials
http://www2.nau.edu/libnap-p/protocols.html