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**Protecting Canadian First Nations and Maori Heritage
through Conventional Legal Means¹**

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“Heritage” generally refers to both the tangible manifestations of past human endeavours, such as archaeological or historic artifacts, structures and sites, and the intangible expressions of past or living peoples, such as stories, music, beliefs, and knowledge. Appreciation for heritage is apparently boundless, as witnessed by museums, tourism, and the antiquities market, but also by the widespread appropriation and commodification of cultural items and ideas from around the world. However, the unauthorized or undesired use of items, images or ideas of cultural significance can have very real impact on people's lives, particularly so for Indigenous peoples, for whom heritage is an integral part of their identity and worldview.

To date, there has been very limited application of conventional law in the protection of the cultural and intellectual property of Indigenous peoples because expressions of traditional knowledge and culture generally fall outside the protection of copyrights and patents. For many Indigenous peoples, there is no difference between cultural property (i.e., things) and intellectual property (i.e., ideas or knowledge), and thus no separation between the intangible and tangible aspects of cultural heritage, past and present. The misappropriation and commodification of heritage can have significant costs for Indigenous people, including: loss of access to ancestral knowledge; loss of control over proper care of heritage; diminished respect for the sacred; commercialisation of cultural distinctiveness; dangerous uses of special or sacred symbols to the uninitiated; replacement of original tribally-produced work with reproductions; threats to authenticity; and loss of livelihood, among other things.

Furthermore, few legal options protect Indigenous cultural heritage. In Western law, protection of intellectual property is based on property values and “rights,” and concerned largely with things; ownership is based on individual rights; and infringement results in economic loss. Protection is through copyrights, patents, and trademarks, which are very specific in application. “Indigenous Intellectual Property,” however, is situated in customary law and culture. It is based on social relations and responsibilities; ownership may be communal; and infringement results in cultural, spiritual and economic loss.

¹ This is the short, presentation version. The full-length version of this paper, complete with citations, will be available in the near future.

While very little legal protection exists for Indigenous heritage, there have been some novel applications of trademark law in Canada and New Zealand, which have achieved varying degrees of success. Our paper examines the nature of this form of cultural and intellectual property protection by discussing the effectiveness of western legal and customary laws within the larger socio-cultural and political contexts of the two countries.

TRADEMARKING INDIGENOUS CANADIAN CULTURE

Of existing intellectual property legislation in Canada, only trademark registration has been effectively used to protect Indigenous interests, primarily in contexts relating to artistic expression. The window of protection is very narrow, and most aspects of heritage do not meet the legal criteria. However, there are some notable examples of trademark protection.

In 1958, the Canadian government created and registered as an official trademark, the “igloo” logo, to indicate the items being sold, initially soapstone carvings, were certified by the Government to be handmade by an Inuit. This protected the interests of both artists and consumers by providing a means to distinguish between Inuit-made crafts and non-Inuit pieces. In this case, the federal government took a fiduciary role in protecting Inuit heritage.



www.inuitartofcanada.com/certificat/english.gif

Since then, there has been a growing number of applications to the Canadian Intellectual Property Office by individual First Nations to register traditional names and images to provide a degree of control over their commercial and non-commercial use. For example, in the 1990s, the Cowichan Band Council of British Columbia registered such terms as “Cowichan” and “Genuine

Cowichan” to certify the authenticity of hand-made sweaters, hats, blankets, and other items created by knitters using traditional materials, methods and patterns. The Cowichan and other Northwest Coast peoples have a long tradition of weaving dog hair and mountain sheep hair into blankets and other items.



Blog.ounodesign.com/tag/textiles

A different use of trademark occurred in 1998 when the Snuneymuxw First Nation of British Columbia registered a series of ancient petroglyphs (or rock art designs) as “official marks.” This enabled them to curtail commercial use of the images on clothing and cards, and to restrict reproduction by anyone for any reason unless permission was first obtained. This was not just to prevent commodification of their culture, but out of concern that inappropriate use of these images was not only culturally offensive but also potentially dangerous.

CANADIAN TRADE-MARK DATAAPPLICATION NUMBER:

0910393

Subparagraph 9(1)(n)(iii)STATUS:

ADVERTISED

FILED:

1998-10-13

FORMALIZED:

1998-10-27

ADVERTISED:

1998-12-16

APPLICANT:

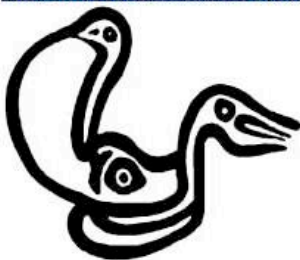
SNUNEYMUXW FIRST NATION

1145 TOTEM ROAD

NANAIMO

V9R 1H1

BRITISH COLUMBIA

PROHIBITED MARK: OFFICIAL MARK:MARK DESCRIPTIVE REFERENCE:

PETROGLYPH DESIGN

VIENNA INFORMATION:**Code Description**

- 2.9.4 Eyes Note: Including eyes with or without eyebrows and eyes with
- 3.7.6 Ducks, geese, swans
- 3.7.14 Ostriches, emus
- 3.7.19 Parts of birds, feathers, footprints, skeletons of birds
- 3.7.24 Birds stylized
- 4.5.15 Other forms representing an unidentifiable animal, other fantastic beings having the appearance of animals Note: Not including fabulous animals classified in division 4.3.

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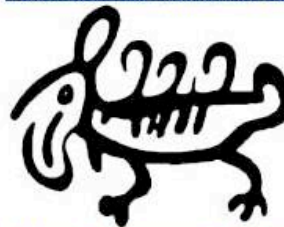
SNUNEYMUXW FIRST NATION

1145 TOTEM ROAD

NANAIMO

V9R 1H1

BRITISH COLUMBIA

PROHIBITED MARK: OFFICIAL MARK:MARK DESCRIPTIVE REFERENCE:

PETROGLYPH & DESIGN

VIENNA INFORMATION:**Code Description**

- 3.4.7 Deer, stags, elk, reindeer, fawns, antelopes
- 3.4.24 Animals of Series IV stylized
- 3.11.10 Chameleons, lizards, salamanders
- 3.11.24 Animals of division 3.11 stylized

From Canadian Intellectual Property Office website

Even words and phrases can be registered. Many Indigenous groups and organizations are now registering names, phrases and images mostly as organization or company logos. However, to the dismay of Indigenous Canadians, there are also instances where expressions of Indigenous culture have been trademarked by non-Indigenous parties: Genfoot Inc. has registered the name “kamik,” an Inuit term for a type of boot.

In these examples, trademark registration was successful because the items or images in question are familiar to Western trademark law. The situation changes when protection is sought for traditional knowledge itself. This is exemplified by the efforts of the Pauktuutit Inuit Women's Collective to protect a traditional clothing item, the *amauti*. This windproof, waterproof parka common to the eastern Arctic is very distinctive in design and manufacture. In 1999, the Pauktuutit became concerned when New York designer Donna Karan attempted to use *amauti* as the basis for a new clothing line. The Pauktuutit Inuit Women's Collective subsequently began to explore ways to protect their collective knowledge. Their goal is to develop a registry of *amauti* makers and traditional *amauti* designs, and then implement a trademark or other mark of



Blog.ounodesign.com/tag/textiles

A second issue emerged when several First Nations-run businesses claimed that VANOC was outsourcing the manufacture of “authentic aboriginal products” being sold on the Winter Olympics web site. Although some products are manufactured by Indigenous persons, others items reproduced designs produced by Aboriginal artists.

Home : Authentic Aboriginal Products










Authentic Aboriginal Products

View By:

Sort By: [Top Sellers](#) | [Price Low To High](#) | [Price High to Low](#) | [Featured Products](#)

46 Products Viewing 1 - 40 of 46 items | [View All](#)

Previous Page: 1 2 Next

 <p>Vancouver 2010 Authentic Aboriginal Paddles Pin \$8.00 IN STOCK ★★★★★</p>	 <p>Vancouver 2010 Authentic Aboriginal Lil'wat Nation Pin \$8.00 IN STOCK ★★★★★</p>	 <p>Vancouver 2010 100% Wool Scarf Embroidered with Salmon \$52.00 IN STOCK ★★★★★</p>	 <p>Vancouver 2010 Please Mum Authentic Aboriginal Printed Fleece Hoodie for Babies Starting from: \$54.00 IN STOCK</p>
<h3>Most Popular Products</h3>			
 <p>Vancouver 2010 Authentic Aboriginal Hoodie—Four Host First Nations \$64.99</p>			
 <p>Vancouver 2010 Please Mum Authentic Aboriginal Snowflake Full-Zip Hoodie for Girls \$64.00</p>			
 <p>Vancouver 2010 Inukshuk Sculpture 4" \$150.00</p>			
 <p>Vancouver 2010 Aboriginal Side Swipe Hat \$32.99</p>			
 <p>Vancouver 2010 Authentic Aboriginal Surviving the Flood T-Shirt \$29.99</p>			

<http://www.vancouver2010.com/store/authentic-aboriginal-products>

In response, Indigenous critics and their supporters protested this practice, plus developed their own logo to identify Aboriginally designed, produced, and distributed items. What is clear from these issues emanating from the Winter Olympics, and from the “successful” trademarking of Indigenous Canadian culture, is that Western legal schemes can be relatively effective but overall offer very little to address the bulk of Indigenous concerns.



from <http://trulyauthentic.wordpress.com/2010/01/26/aboriginal-authentic/>

NEW ZEALAND EXPERIENCE

In recent years the New Zealand Government has developed a number of policy, and policy-related, initiatives to protect Maori cultural and intellectual property rights. As in Canada, the most influential legal protective measures to date have been in the area of trademarks.



Goods: "butter" (1893)



Goods: "ale and stout" (1914)



Goods: "Worcester sauce, pickles and chutney" (1927)



Goods: "cigarettes" (1931)

Examples of early trademarks unlikely to be registered today

The Maori Trade Marks Advisory Committee was established by an amendment to the Trade Marks Act in 2002 as a *sui generis* measure to prevent objectionable misappropriations and misuses of traditional cultural expressions in trademarks that are, or appear to be derivative of, Maori signs, including text or images. Last year 'Maori trademarks' comprised about 3% of the total number of trademark applications, and of these 3% were identified as offensive.

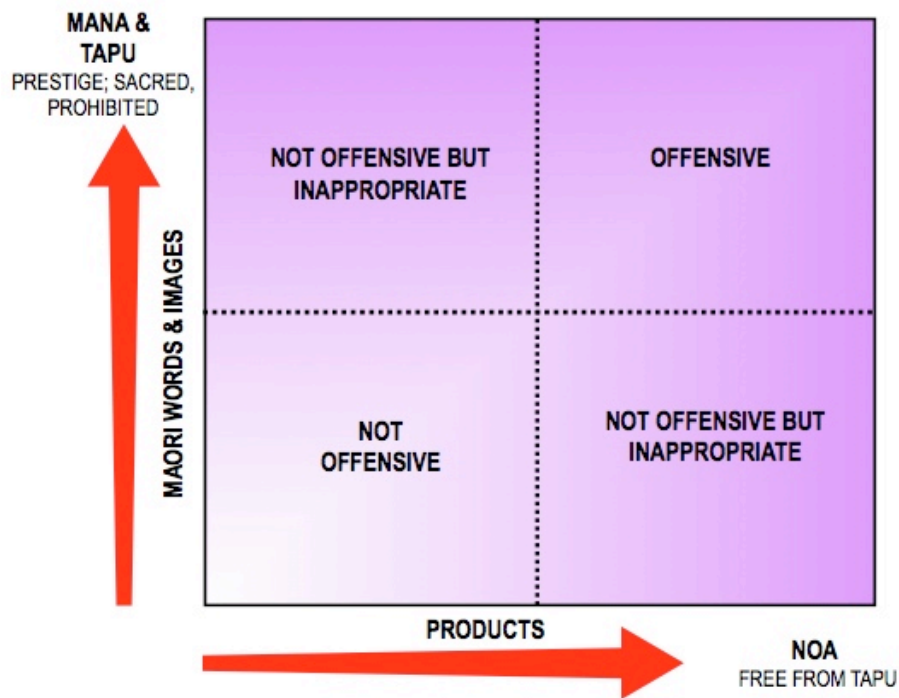
The committee has also produced guidelines for prospective applicants and trademark examiners concerning the use of Maori geographic place names, the *pitau* (or *koru*) motif, and the word 'kiwi,' which are the most popularly used Maori-derived signs in trademark applications. Although much of the discussion about the appropriation of Maori words and symbolism into commercial culture has revolved around the concept of appropriateness, the Trade Marks Act only

prohibits the registration of marks that are offensive, with the threshold of offensiveness being much higher than that of inappropriateness.



Examples of registered Maori geographical place names, pitau (koru) and kiwi trademarks

An important emerging outcome from the committee's work is an assessment matrix based in *kaupapa Maori* (or Maori traditional knowledge) that defines where this threshold lies. As the *mana* (or prestige) and associated *tapu* (or sacred and/or prohibited nature) of a Maori word or image increases so does the likelihood of offensiveness that might be caused by a product, bearing these words or images, that is *noa* (in other words, elements free from *tapu* such as food or products related to, or from, the body as well as alcohol or tobacco at the extreme end of this range)



The Toi Iho Maori Made trademark was registered as a trademark in 2002 by Creative New Zealand, the arts funding arm of the New Zealand government. Although initially considered a milestone in the protection of cultural property, in October 2009 Creative New Zealand announced its decision to “divest” itself of this trademark, and associated trademarks. The concept of the mark had originally been developed in response to concerns from the customary Maori art community about the large number of poorly made, and increasingly non-Maori and even foreign-manufactured, Maori-style souvenir objects that were conceived within a design framework that owed little to, and sometimes denigrated, Maori culture. As a protective device, an initial objective of the Toi Iho was to identify the quality and authenticity of a diverse range of Maori arts, made by Maori, for the commercial market. It therefore differed from the usual application of trademarks as a brand identity for a group of closely related commodities. By 2009, there were approximately 250 artists and retailers using the Toi Iho under licence.



Putting aside frustrations related to the uptake, promotion and efficacy of the mark as a protective and marketing device, the response to the Toi Iho's divestment by its supporters has revealed another underlying aspect to trademarks, and specifically trademark licensing procedures. In order to become a licensed Toi Iho user, applicants had to undergo a process of cultural identity verification and a rigorous panel review of their continuing practice in terms of its cultural and artistic integrity. The trademark, for these practitioners, was a sign of peer esteem that culturally and artistically validated their practice. A number of Maori organisations have expressed an interest in assuming the registration of the Toi Iho. One might argue that its 'divestment' presents a timely opportunity to move the Toi Iho out of government hands and into Maori custodianship. However, not all Maori agree with the application of intellectual property laws to art and art practice, even if such a process is managed by Maori, because of the commercial imperatives and commodification of culture that underpin such legal measures.

*Rangi Kipa**Manos Nathan**Nadine Rathjens*

DISCUSSION

In Canada and New Zealand, trademarks have been the most accessible, although not always the most effective or satisfying means to protect some forms of Indigenous visual artistic expression and language. Canadian First Nations and Maori peoples have regarded trademark protection of their words and phrases in slightly different ways. As revealed by the Genfoot Inc. application for ‘kamik’ in Canada, there has been dismay over the registration of Indigenous words by commercial companies for their products and First Nations groups have trademarked sensitive words in an attempt to protect them. In New Zealand, a more inclusive approach has been adopted where the commercialisation of Maori words and phrases through trademarks, appropriate to their meanings and significance, is regarded as part of the normalisation of Maori language.

- Trademarks have been used to protect Indigenous words, phrases and images
- Debate surrounds the meaning of ‘authenticity,’ ‘quality’ and ‘authorship’ in relation to cultural art products made for commercial purposes
- The costs of establishing and maintaining protection through trademarks has been prohibitive
- Not all Indigenous concerns can be met through intellectual property law

Nevertheless, there remain unresolved fundamental and pragmatic issues in the application of trademarks to Indigenous heritage. The recent controversy over VANOC's "authentic aboriginal products" website is in part a manifestation of an ongoing debate about the meaning of concepts such as 'authenticity,' 'quality' and 'authorship' in relation to cultural art products made for commercial purposes. The costs of establishing and maintaining protection through trademarks, such as the Toi Iho, have also proved to be prohibitive for Indigenous and government organisations.

It is important to note that the driving reason to seek protection has not been to "ring-fence" culture, as is sometimes claimed, but to mitigate the possibility of transgressions that might cause offence or create dangerous or destructive situations. Accepting that intellectual property law may never adequately achieve this purpose does not necessarily mean that its application is without purpose. The new frontier of protection involves the identification of boundaries—between the inappropriate and offensive, authentic and inauthentic, safe and dangerous, and legal and social—in order to develop education or awareness campaigns that promote heritage protection beyond conventional legal means.

One means to achieve this is the Intellectual Property Issues in Cultural Heritage (IPinCH) research project, which we represent. The IPinCH project provides a foundation of research, knowledge, and resources to assist scholars, academic institutions, descendant communities, policy makers, and others in negotiating more equitable and successful terms of research and policies through an agenda of community-based research and topical exploration of intellectual property issues. Funded by the Canadian Social Sciences and Humanities Research Council, this international collaboration of over 50 archaeologists, lawyers, anthropologists, museum professionals, ethicists, and other specialists is working to explore and facilitate fair and ethical exchanges of knowledge relating to cultural heritage.

The examples we have discussed today reflect just one facet of a wide array of issues relating to cultural heritage that ultimately affect all of us. There have been a number of reasons why intellectual property law has not met the needs of Indigenous people in their desire to have their cultural heritage protected. What has emerged from this comparative discussion is that extending protection to a wider range of heritage issues beyond Western law requires developing trusting and mutually beneficial relationships between Indigenous communities and administering agencies.

Dr Deidre Brown is a Senior Lecturer in Architecture at the University of Auckland, and a member of the Ngapuhi and Ngati Kahu tribes of Northland, New Zealand. Her specialist teaching and research interests include Maori and Pacific art and architectural history and contemporary practice, Indigenous intellectual and cultural property issues, and minority education in mainstream tertiary institutions. She is author of five books on Maori art and architecture, and is currently completing a jointly authored book on Pacific art and another on the animal in New Zealand culture. Since it was convened in 2003, she has been a member of the Maori Trademarks Advisory Committee of the Intellectual Property Office of New Zealand, and last year became an Associate Scholar of the Intellectual Property in Cultural Heritage project (which will be discussed in this presentation). Deidre is an IPinCH Associate Scholar.

Dr George Nicholas is Professor of Archaeology at Simon Fraser University, British Columbia, and is Director of the Intellectual Property in Cultural Heritage project. From 1991 to 2005, he developed and directed SFU's internationally known Indigenous Archaeology Program in Kamloops, BC. He has worked closely with the Secwepemc and other First Nations in Canada, the United States, and Australia. His research focuses on intellectual property rights and archaeology, Indigenous archaeology, the archaeology and human ecology of wetlands, hunter-gatherers past and present, and archaeological theory, all of which he has published widely on. From 2000 to 2007 he was editor of the *Canadian Journal of Archaeology* and is currently co-editor of the World Archaeological Congress' *Research Handbooks in Archaeology* series. Nicholas is also an adjunct faculty member at both Flinders University in South Australia and the University of Massachusetts-Amherst.