

Forthcoming in Catherine Bell and Val Napoleon, eds. *First Nations and the Law: Respect, Reconciliation and Reform*. UBC Press:

**Non-legal Instruments for Protection of Intangible Cultural Heritage:
Key Roles for Ethical Codes and Community Protocols**

Kelly Bannister

CONTENTS

I. INTRODUCTION: IDENTIFYING PROBLEMS

A. Issues underlying calls for protection

1. Understanding intangible cultural heritage
2. Understanding Aboriginal concerns over intangible cultural heritage

B. Potential and limitations of intellectual property law

II. NON-LEGAL PROTECTION MECHANISMS

A. Academic standards for ethical research

1. University research ethics policies
2. Codes of ethics of academic societies and professional associations

B. Indigenous statements and declarations

C. Community Research Protocols

1. Research Standards
2. Template Agreements
3. Sample Negotiated Agreements

D. Key Considerations in Community Research Protocols

1. General features
2. Innovative protections for intangible cultural heritage

III. CONCLUSIONS: COMMUNITY-BASED SOLUTIONS

I INTRODUCTION: IDENTIFYING PROBLEMS

...in the advent of an awareness of the valuable genetic and knowledge resources within native communities and lesser developed nations, the advocates for the public domain—and, in turn, propertization—have flipped. Now, corporations declare the trees and the shaman’s lore to be the public domain, while indigenous peoples demand property rights in these resourcesⁱ

The use of Indigenous peoples’ intangible cultural heritage in research, technology, economic development and other activities of mainstream society raises a number of complex and interrelated ethical, legal and political issues, particularly about ownership and control.ⁱⁱ Perhaps the most widely cited example is the use of Indigenous peoples’ traditional plant knowledge to find new pharmaceutical drugs or other commercializable products. Beyond instances of appropriation of cultural knowledge of the natural world, however, many other examples of concern exist, related to the misuse, exploitation or commodification of traditional songs, stories, prayers, ceremonies, religious practices, rituals, techniques, designs, associated images, philosophies, and beliefs.

An array of protection mechanisms for intangible cultural heritage is required to accommodate both the diversity in cultural expressions and the many forms that appropriation and exploitation can take. The focus of this paper is to examine *non-legal* mechanisms of protection for intangible cultural heritage, particularly in cases where cultural knowledge is used in academic research. The paper explores various mechanisms that are in place or emerging to guard against misappropriation and unfair exploitation. A special emphasis is given to community-level strategies for protecting intangible cultural heritage, such as ethical guidelines and research protocols, and the increasingly important role these locally-developed instruments are playing in both national and international policy development.

ⁱ Anupam Chander and Madhavi Sunder “The Romance of the Public Domain” (2004) 92 *California Law Review* 1331-1374 at 1335.

ⁱⁱ This paper uses the terms “Indigenous” when referring to Indigenous peoples outside of Canada and “Aboriginal” when referring to First Nations, Métis and Inuit peoples within Canada.