

[SLIDE 1] Keynote address by James Anaya
Dean, University of Colorado Law School
Former Special Rapporteur on the Rights of Indigenous Peoples

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I am grateful to once again have the opportunity to address the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

[SLIDE 2] My fellow panelists and I have been invited to address Outstanding Issues concerning the Intergovernmental Draft Articles on the Protection of Traditional Cultural Expressions, particularly as those issues relate to the perspectives of Indigenous Peoples and Local Communities. Indigenous peoples' representatives involved in this process have advanced their interests in their traditional knowledge and cultural expressions fundamentally from a human rights perspective. Therefore, my presentation will emphasize the relevant human rights framework, drawing from the technical review on the draft instruments that I completed for WIPO at the request of the Permanent Forum on Indigenous Issues, which is available in the background documentation for this session of the Inter-Governmental Committee. I note that my technical review also addressed the other two instruments being developed by the committee, which are on traditional knowledge and genetic resources. In significant part my comments today are also relevant to those two other instruments.

[SLIDE 3] During this process, it has become apparent that two essential goals are shaping indigenous peoples efforts protect their interests in their traditional cultural expressions and their traditional knowledge, including in relation to cultural expressions and genetic resources. The first is to maintain the cultural integrity and sacred character of the cultural attributes of indigenous peoples, apart from any economic considerations. And the second is to protect the interests of indigenous peoples in benefitting economically on an equitable basis from the use of their cultural expressions and traditional knowledge when that use is consistent with the integrity of indigenous culture.

[Slide 4] In contrast, the underlying policy objectives of the prevailing international and domestic intellectual property regimes is to economically reward original creative work that can be attributed to specific individuals, while advancing consumer access to that work in a market economy. Framed by these objectives, standard intellectual property law has not adequately protected the interests of indigenous peoples. So, the question becomes, how do we reconcile these seemingly ideologically opposed approaches? For indigenous peoples the question more precisely is how to adjust intellectual property regimes to accommodate indigenous peoples' goals, interests and aspirations.

[SLIDE 5] As I affirmed in my technical review for the IGC instruments, an indispensable benchmark for answering these questions is the system of human rights norms that now exist on a global level, and which States have accepted in various international documents. It bears emphasizing the international human rights regime is now a fundamental component of the international system of organizations and norms that cover a broad array of concerns and that govern cooperation in economic, social and political spheres.

The international human rights regime is imbedded in the United Nations Charter as indispensable to achieving lasting peace and minimum conditions of human wellbeing on a global scale, and hence it is part of the architecture of fundamental norms to which international rules developed by the World Intellectual Property Organization must align.

The international human rights regime as it relates specifically to indigenous peoples is elaborated upon in a number of international sources of authority. Among these most prominently is the **United Nations Declaration on the Rights of Indigenous Peoples**. As I stated in my report to the United Nations General Assembly in 2012 (A/67/301) in my capacity as the United Nations Special Rapporteur on the Rights of Indigenous Peoples, the Declaration defines the minimum standards for any activity within the United Nations system which touches upon the concerns of indigenous peoples, in addition to being a stimulus for affirmative measures to promote their rights. No international standard-setting process, including those of the World Intellectual Property Organization and this committee, should lead to an instrument that goes below or undermines the standards articulated in the Declaration and other established sources of authority, but rather should reinforce those standards and the fundamental rights they protect.

[SLIDE 6] The Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly by an overwhelming majority vote, reinforces human rights trends at the domestic level and reflects an important level of contemporary international consensus. Articles 3 and 4 provide that "*indigenous peoples have the right to self-determination*", and that "*indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs*". Moreover, Article 31 of the Declaration explicitly provides that indigenous peoples' autonomy and self-government arrangements encompass a right to manage and control traditional cultural expressions, genetic resources and traditional knowledge. This provision proclaims that "*indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, [including] traditional knowledge and traditional cultural expression, as well as the manifestations of their sciences, technologies and cultures, ... 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.*"

[SLIDE 7] This article is grounded in a range of widely accepted universal human rights that are now part of international law. These include rights to culture, religion, property, and, as already noted, self-determination, all as understood in light of the fundamental norm of non-discrimination and with attention to the specific characteristics of indigenous peoples.

With regard to the **rights to culture and religion**: It is widely recognized that the right to the enjoyment of culture, that is affirmed in multiple human rights instruments, including widely ratified multilateral treaties, extends to the distinctive cultural characteristics of indigenous peoples, which include their distinctive art forms and other cultural expressions. In many instances these aspects of indigenous heritage are part of or related to indigenous religious belief systems and hence also fall within the ambit of the right to religion.

Beyond being grounded in the right to culture and, and in certain contexts, the right to religion, article 31 of the Declaration quoted before is an affirmation of indigenous peoples' proprietary interests in the referenced aspects of their cultural heritage. That indigenous peoples hold **property rights** over

traditional cultural expressions generated and created by them follows from the general idea that intellectual creativity vests its creator with moral and material interests. This understanding of the right to property in relation to traditional cultural expressions is also reaffirmed in other sources such as the International Covenant on Economic, Social and Cultural Rights, article 15, paragraph 1(c), as interpreted by the UN Committee on Economic, Social and Cultural Rights.

In addition, the “right to maintain, control, protect and develop” aspects of cultural heritage articulated in article 31 of the Declaration is a component of the **right to self-determination**, which is affirmed for “all peoples” in the international human rights covenants and for indigenous peoples in particular in article 3 of the Declaration. Interpreting the right to self-determination as enshrined in the International Covenant on Civil and Political Rights, the UN Human Rights Committee has emphasized, with explicit reference to indigenous peoples, that the right “requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources”.

As part of their right to self-determination, indigenous peoples “have the right to autonomy or self-government in matters relating to their internal and local affairs”. This right necessarily implies a right of indigenous peoples to manage and regulate the use of their traditional cultural expressions, in accordance with their own customs, laws and traditions. An important component of indigenous peoples’ control over their resources and aspects of their cultural heritage is the right to determine to what extent and under what conditions such subject matter can be accessed and used by others.

[SLIDE 8] A corollary of all internationally recognized human rights is the duty of States to respect, protect and fulfil them. This duty is affirmed in the major United Nations and regional human rights instruments in various formulations, including in the Declaration on the Rights of Indigenous Peoples, which prescribes in relation to the rights in cultural heritage and genetic resources affirmed in article 31 that, “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” While the broader interests of society and human rights of others must duly be taken into account, as stipulated in article 46, the specific rights of indigenous peoples must be recognized, protected, and brought into harmony with the human rights of all.

Among the affirmative duties of States to protect the rights of indigenous peoples is the duty to ensure consultations with them in order to obtain their **free, prior and informed consent** to any measure that may materially affect the enjoyment of their rights. The UN Committee on Economic, Social and Cultural Rights has underscored that States “should respect the principle of free, prior and informed consent of indigenous authors” whenever their rights may be affected, and this principle is gaining increasing acceptance in practice. As a general rule, therefore, indigenous peoples’ traditional cultural expressions should not be accessed or used by others without consent upon terms that are consistent with the affected rights. The principle of consent functions as protective of and instrumental to the enjoyment of rights recognized in authoritative international sources, including those referred earlier.

These principles and rights of indigenous peoples establish certain minimum requirements with regard to the proposed provisions of the Draft Articles on the Protection of Traditional Cultural Expressions, to which I will now turn my attention.

[SLIDE 9] A threshold issue in the Draft Articles is the definition of the “**beneficiaries**” in Article 4. It would seem clear that the beneficiaries of the instrument should be those who have created the cultural

expressions and whose human rights are bound to them. It is surprising to still see, however, the use of the term “peoples” still bracketed, since the use of that term is now widely accepted in relation to indigenous groups, as manifested by the UN Declaration on the Rights of Indigenous Peoples.

Of more fundamental concern is the **scope of protection**, addressed in Article 5. While indigenous peoples or communities are beneficiaries of protection, the nature and degree of protection that States would be required to implement remain substantially undefined by the many alternatives and heavily bracketed text. Certain general parameters and issues, however, are evident.

The Draft Articles’ “scope of protection” indicates a tiered approach, that is differing levels of protection depending on the extent to which it can be established that a beneficiary has a close cultural nexus or exclusivity with, or regards as secretive or sacred, the traditional knowledge or cultural expression in question. At the end of the spectrum with the highest level of protection are traditional cultural expressions that are sacred or known only to beneficiaries. For these forms of expression, States are to ensure beneficiaries control over the subject matter, prevention from unauthorized use or distortion, as well as attribution for and equitable benefits from any authorized use.

At the other end of the spectrum are traditional cultural expressions that are now widely known or publicly available and no longer intensively used by the people or community of origin. In these cases, protection is in the realm of ensuring attribution and respectful use; more robust protections for direct control and sharing in the benefits or the use would not be required. Benefit-sharing and certain other protections would apply at the mid-range of the spectrum.

Animating the sliding scale framing of the scope of protection is the concept of public domain, which has problematic aspects in its application to indigenous peoples. This concept is inherent to conventional intellectual property rights regimes, which aspire to provide sufficient protection to spur creativity, but not more as it is held beneficial to society at large if others can eventually build on existing creativity. Public domain theory provides, generally speaking, that intellectual property rights should eventually expire and that, further, what is already known to a wider circle cannot be subject to such rights unless certain conditions related to individual creativity are met.

However, from a human rights perspective, this rationale does not make complete sense for determining the scope of protection of indigenous peoples’ traditional cultural expressions. Rather, the human rights regime requires recognition that traditional cultural expressions, irrespective of broad public awareness of them, form integral parts of indigenous peoples’ cultures and societies. As the United Nations Committee on Economic, Social and Cultural Rights has held: “While ... intellectual property rights ... may be ... limited in time and scope ... human rights are timeless expressions of fundamental entitlements of the human person”; human rights protections, moreover, safeguard the link between “peoples ... and their collective cultural heritage”. Hence, the human rights regime as applied in this context requires a wider scope of protection than follows from conventional intellectual property theory.

[SLIDE 10] Related to these concerns about scope of protection are two specific issues that have been raised by indigenous peoples: claims of theft and illegal possession of traditional cultural expressions, and claims of false marketing.

Regarding claims of **theft and illegal possession**, indigenous advocates point out that it is essential for States to recognize nonconsensual takings of traditional cultural expressions as illegal. The WIPO instrument should therefore animate, if not specifically obligate, States to create, in consultation with indigenous peoples and local communities, effective criminal and civil enforcement procedures to recognize, prevent and redress the nonconsensual taking and illegitimate possession, sale, transfer, and export of traditional cultural expressions. Some examples of the harms incurred when such criminal and civil protections are not available include:

- The proposed sale of the Acoma Shield by a French auction house, which received international attention.
- The sale of Hopi sacred masks and statues in a Parisian auction house.

False marketing of items held out as indigenous should also be better addressed under the scope of protection. States should be made to provide legal mechanisms to prevent and redress marketing of traditional cultural expressions that falsely suggest manufacture or production by indigenous peoples, or that is likely to cause confusion or to deceive as to affiliation, connection, endorsement, or origin by indigenous peoples. Some examples of these harms include:

- The misleading sale by the clothing manufacturer and retailer Urban Outfitters of Navajo-labelled products, and
- The influx of false production of Hopi kachina dolls in the North American Southwest.

[SLIDE 11] Another issue of note in the Draft Articles is the **term of protection** offered in Article 8. The alternative formulations leave to the discretion of States determination of the term of protection or are confined by the scope of protection to be defined by the instrument. Conventional intellectual property theory allows for time-bound protection as a means of promoting dissemination and creativity, with an emphasis on the economic value of generated knowledge and creative work. However, the human rights regime recognizes that traditional cultural expressions constitute integral elements of indigenous peoples' cultures and societies, and that it is this characteristic, above their economic value, that motivates their protection. Thus, indigenous traditional cultural expressions should be protected as long as such subject matter remains relevant to indigenous peoples' cultures.

Closely connected to the scope and term of protection are the draft provisions on **exceptions and limitations** (Article 7). The suggestion that it be left to national law to determine the exceptions and limitations to the scope of protection gives States latitude to decide that certain traditional cultural expressions should not be subject to protection at all. Any potential exception or limitation should be defined and concretely formulated in the instruments, in compliance with human rights law.

Similar to the draft articles on exceptions and limitations, the absence of a definition of **misappropriation** suggests that misappropriations of traditional cultural expressions be left to national law. Again, such an approach is problematic, since it fails to incorporate an international standard, leaving traditional cultural expressions potentially unprotected. That is, if national law does not protect traditional cultural expressions, no misappropriation, by definition, occurs when these aspects of cultural heritage are used by other than those who generate or create them. In keeping with human rights standards, misappropriation should be defined as occurring when someone accesses indigenous traditional knowledge and cultural expressions without consent.

[SLIDE 12] While more issues remain regarding the Draft Articles' compliance with the international human rights regime, I will end here by reiterating the need to ensure that all WIPO instruments and UN system-wide actions harmonize with existing UN norms and principles regarding human rights, including the rights of indigenous peoples as affirmed by the Declaration on the Rights of Indigenous Peoples. Coherence in the international system requires such harmonization, and justice demands it.

Distinguished delegates, the work of the Inter-Governmental Committee is of a highly technical character, requiring expertise on matters of intellectual property that are well beyond my own. But the work is not just that of technocrats. It bears heavily on matters of social and economic development and international cooperation potentially for the good of all. At the same time it bears heavily on matters of fundamental human rights of peoples who throughout history have been among the most vulnerable segments of humanity. The history of the interplay between the forces that, on the one hand, would perpetuate that vulnerability and, on the other hand, those that are liberating of it are at play in this process. May you proceed to be on the right side of history.

I thank you for your kind attention.