A Framework for Managing Disputes Over Intellectual Property Rights in Traditional Knowledge

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A FRAMEWORK FOR MANAGING DISPUTES OVER INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL KNOWLEDGE

Stephen R. Munzer*

ABSTRACT

Major controversies in moral and political theory concern the rights, if any, Indigenous peoples should have over their traditional knowledge. Many scholars, including me, have tackled these controversies. This Article addresses a highly important practical issue: Can we come up with a solid framework for resolving disputes over actual or proposed intellectual property rights in traditional knowledge?

Yes, we can. The framework suggested here starts with a preliminary distinction between control rights and income rights. It then moves to four categories that help to understand disputes: nature of the traditional knowledge under dispute; dynamics between named parties to disputes; unnamed Indigenous claimants; and the various normative systems (for example, custom, U.N. documents, treaties, statutes, administrative regulations) within which disputes are decided. Throughout, examples that inform the framework come principally from Indigenous peoples in the Pacific rim. Lastly the Article tests the framework against some disputes over traditional knowledge in Samoa and New Zealand.

This framework is comprehensive and sensitive to context. It is flexible regarding which normative systems are best suited to settling disputes. A test run shows that the framework helps to resolve practical legal issues.

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I. INTRODUCTION

Important issues concerning traditional knowledge ("TK") are whether it should receive legal protection under domestic and international law and, if so, how robust that protection should be.1 Yet on occasion we should lay such large issues aside, if only briefly, and devise a partly conceptual and partly normative framework for thinking about and managing disputes of actual or proposed intellectual property ("IP") rights in TK.2 This Article deals almost entirely with questions about a suggested

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1. This Article is concerned with TK in a broad sense that includes Indigenous knowledge (also referred to here as TK in a narrow sense and later as "IK") and traditional cultural expressions ("TCEs"). See infra notes 25-26.

2. As understood here, a framework is broadly a skeletal arrangement of multiple parts that hang together as a group for one or more purposes. The particular framework advanced here aims to promote clear thinking about disputes over IP rights in TK and to articulate
framework. Among these questions are: Which fundamental distinctions should drive the framework? How might these distinctions inform subordinate distinctions or categories? Examples throughout come mainly from Indigenous groups in the Pacific Rim—especially Australia, New Zealand, Samoa, Peru, and the United States. This Article is chiefly a practical endeavor rather than a work of moral or political theory. Still, no sharp line separates practical understanding of TK disputes from a rarefied moral or political theory.

To forestall misunderstanding, the framework suggested here does not generate answers on its own. To obtain answers one must know the factual background and the applicable law, and if the law is murky or incomplete, one has to investigate which possible legal rules can or should be used. In either case, the broad outlines of the framework are clear enough to sharpen thinking about IP rights in TK. However, the suggested framework is inductive in origin: existing legislation and legal cases, along with the secondary literature on TK, prompt efforts to create a framework that is both broad and deep. Here breadth means covering as much terrain as possible, and depth means making the distinctions and arguments that an illuminating article should bring to the table. So while the framework is clear in outline, the emphasis on depth is granular and requires attention to detail.

What counts as a successful framework varies by field. In chemistry, Mendeleev’s periodic table of the elements is a terrific success. It provides a way to group elements in rows and columns that indicate the chemical properties of various elements and which elements can combine with others. A well-known legal framework is W. N. Hohfeld’s “fundamental legal conceptions,” which is useful in analyzing private law cases in common law jurisdictions, even if it has lately attracted criticism. Again in law, some normative considerations for managing such disputes. The Conclusion lists the components of my framework.

3. E.g., Michael Gordin, A Well-Ordered Thing: Dmitrii Mendeleev and the Shadow of the Periodic Table 22–48 (2004). In fact, there are more than a thousand variations on the periodic table. Eric Scerri, The Periodic Table: Its Story and Its Significance (2d ed. 2019); Siobhan Roberts, Reconsidering the Periodic Table, N.Y. Times, Aug. 27, 2019, at D3.

4. Mendeleev’s table left blank spaces for then-unidentified elements and accurately predicted which new naturally occurring elements scientists would eventually discover.

Calabresi and Melamed’s conceptual framework of entitlements in terms of the legal rules used to protect them—property rules, liability rules, and rules of inalienability—plays a conspicuous role in law-and-economic analysis.6

The conceptual and normative framework for IP rights in TK proposed here enables us to understand the nature of these disputes more clearly, to analyze them more carefully, and sometimes to resolve them.7 Moreover, the framework has explanatory benefits, which are identified in the major divisions of the article.8 As the inverted tree diagram in Table 1 below suggests, I use a preliminary distinction that sheds light on some of the categories. It is outside the scope of this Article to offer an account of knowledge as that concept is used by anthropologists, philosophers, historians of science, or other thinkers.9 Also outside its scope is a rigorous account of the concept of indigeneity, if such an account is even possible.10 Tables 1 and 2 contain various categories and subcategories. The tables are tentative to some extent. Identifying the number of disputes in each category requires further legal research.


7. In statistics, information science, and machine learning, some thinkers distinguish between classification (labeling things) and clustering (sorting into sets things that do or seem to go together). The term “framework” as used in this Article includes both labeling and sorting. Both promote the recognition of patterns, which in turn promotes efficiency and effectiveness in legal analysis.

8. See infra at the ends of Parts III, IV, V, and VII.


10. See Manvir Singh, You First: Does Anyone Really Know What It Means To Be “Indigenous”?, NEW YORKER, Feb. 27, 2023, at 23–24 (finding it impossible to provide necessary and sufficient conditions for indigeneity in terms of firstness, nativeness, primiveness, pastoralism, tribalism, simplicity, pastness, wildness, and/or spiritual attunement to nature). However, that failure does not entail that every qualified, partial, or blurred concept of indigeneity, or of Indigenous groups or persons, is useless. Id. at 26.
TABLE 1. A FRAMEWORK CONCERNING DISPUTES OVER INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL KNOWLEDGE

- **Preliminary Distinction**

  Control Rights (Autonomy Interest) vs. Income Rights (Distribution of Surplus)

- **Category 1: Nature of the TK at Issue**

  | Indigenous Knowledge | Traditional Cultural Expressions |

- **Category 2: Dynamics Between Named Participants**


- **Category 3: Indigenous Claimants**

  | “On-Stage” (named in Cat. 1) | “Off-Stage” (not named in Cat. 1) |

- **Category 4: Normative Systems within which Disputes are Settled**

  (expanded in Table 2)
II. A PRELIMINARY DISTINCTION

In the realm of property rights, John Christman (who builds on Hohfeld and A. M. Honoré) distinguishes between control rights and income rights. Control rights are “the rights to use, possess, manage, alienate, modify, and consume or destroy the owned asset.” Income rights are “the rights to transfer and receive income from the property.”

According to Christman, control rights promote autonomy interests mainly because they contribute to a psychological sense of control and serve expressive and symbolic functions. Those who have control rights are more able to manage the conditions that shape a person’s self-understanding. Control rights also give owners the opportunity to advance their personal or group interests. To illustrate, IP rights in TK help Indigenous peoples to act autonomously by excluding outsiders from their TK and by allowing Indigenous people to sell their TK to others on terms acceptable to the sellers. For Christman, control rights are associated with individual sovereignty. Still, the case of Indigenous peoples indicates that control rights can promote collective sovereignty as well. Especially when Indigenous peoples act in groups, they can exercise not only their autonomy but also their sovereignty. And if Indigenous peoples as transgenerational entities have some control rights over TK, these rights can advance their sovereignty directly. For example, the right of the Native American Church to possess and use peyote for religious purposes validates Indigenous spiritual expression and allows tribes to control the production and cultivation of a plant they consider sacred.

Income rights promote mainly the distribution of economic surplus and have distributive effects. Examples include rights to distribute interest income, dividends, royalties, and proceeds from sales. “The nature of the recognized income rights,” says Christman, “will serve as the distribution

12. Christman, supra note 11, at 231.
13. Id. at 232.
14. Id. at 235–38.
15. Id. at 239.
16. Id. at 249.
18. Christman, supra note 11, at 245–46. In my view, the considerations shaping the distribution can include economic efficiency, distributive justice, corrective justice, and perhaps other factors.
mechanisms of the surpluses created by the greater efficiency of a property rights system that includes control rights.” 19 To illustrate, an Indigenous peoples’ right to receive income from sales of their TK handicrafts and royalties from copyright licenses gives them additional resources to remain an intact, transgenerational group.

However, I wish to qualify Christman’s discussion. He does not mention a right to exclude under either category of property rights. The omission is unusual because many property theorists and scholars consider this right important and a few regard it as a, or even the, defining characteristic of property. This qualification is important for our purposes because one cannot exclude others’ access to an IP right in TK in the same way one can exclude others from property in land. With TK, one would have to exclude others from, say, making or selling the TK. Further, Christman at times allows more or less the same right to fall under both categories. He lists the right to “alienate” under control rights and the right to “transfer” under income rights. But in property lawyers’ parlance, alienation and transfer are largely overlapping though not identical terms.

I state advisedly that control rights promote mainly autonomy interests and that income rights promote mainly the distribution of surplus. Evidently, control rights indirectly advance the opportunity to receive income and thus increase the possibility of living as an intact group. In the same way, income rights indirectly advance autonomy to some extent. Thus, the legal and practical effects of control rights and income rights have some measure of overlap. What’s more, the boundaries that separate control rights from income rights, and the private domain from the public domain, might be more permeable than Christman suggests. 20 Control rights, when exercised in the private domain, can have external effects that merit policy intervention in some instances. For instance, the display of a sculpture in a private homeowner’s backyard might be unsuitable for viewing by children, which could justify a court order to cover the artwork from the view of passersby under a nuisance theory or perhaps a zoning restriction. 21

Nevertheless, Christman’s analysis is useful, and it can with some adjustment illuminate the situation of Indigenous holders of TK. TK helps to shape the identity of Indigenous individuals and groups. For instance, if a particular Indigenous person is a hunter who uses dogs to identify prey, and if other members of the Indigenous group adopt her techniques, then she may identify personally as a skilled hunter and her group may identify collectively as skilled hunters.

19. Id.
20. Id. at 249.
21. Id. at 245.
Under Christman’s theory, income rights would not ordinarily be justified by the autonomy interests of the group but rather by social distributive policy. Yet analysis shows that income rights also indirectly serve the autonomy interests of Indigenous individuals and groups. There may be a situation in which TK holders are concerned with income-generating licensees using licensed TK respectfully. For example, if respectful use was stipulated in a licensing agreement, then this transaction would constitute an overlap between income rights and control rights. Thus, to the extent that the resolution of disputes over TK sometimes provides rights to exclude others and generates compensation for interference with TK, Indigenous individuals and groups can find support for their sustenance, autonomy, and sovereignty.

Earlier, I said that the framework for IP rights in TK articulated here would, at various points, have explanatory value. Over eighty years ago, Adamson Hoebel showed how Hohfeld’s conceptual framework sharpened understanding of a sort of TK: among the Comanche, “the owner of a vision complex can sing its songs and possess its distinctive paraphernalia, and others cannot.” Christman’s control rights and income rights are fundamentally Hohfeldian claim-rights. In the present context, control rights explain how to support autonomy interests resting on TK. By contrast, income rights explain how one can distribute an economic surplus from the licensing and sale of TK. In sum, Hohfeld’s framework and Christman’s distinction aid in grasping the significance of TK.

The framework constructed here, including Christman’s contribution to it, does not suppose that Indigenous peoples are primarily and constantly seeking money damages for violations of IP rights in their TK. Sometimes they seek injunctions against offensive uses of their TK. At other times they seek declaratory judgments that their understanding of nature merits acknowledgment and respect.

III. CATEGORY 1: NATURE OF THE TK AT ISSUE

So far I have used the terms “traditional knowledge” and “TK” as general terms for Indigenous knowledge and practices. In Category 1 of Table 1, I divide TK into “Indigenous knowledge” or “IK” (also called

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22. His theory emphasizes the complex structure of ownership. Id. 227-35. He “make[s] an analytical separation between different sets of rights associated with ownership,” namely between control rights and income rights. Id. at 231. For Christman’s account of income rights, see id. at 240-47.
23. See supra text accompanying note 8.
here traditional knowledge in a narrow sense) on the one branch and “traditional cultural expressions” or “TCEs” on the other. Indigenous knowledge is Native peoples’ traditional understanding of medicinal remedies, the use of plants and animals, and practical technologies. Traditional cultural expressions include songs, dances, myths, stories, poems, rituals, art objects, rites of passage, and folklore generally. Both control rights and income rights are pertinent to IK and TCEs. The two sorts of rights therefore do not map squarely onto the distinction between IK and TCEs. It is an empirical question which matters more to Indigenous peoples in any given dispute: autonomy or the distribution of surplus, or something else altogether such as being attuned to the natural world.

The line between IK and TCEs is not always sharp. One Indigenous person might have a knack for selecting exactly the right wood to sculpt a turtle. Another Indigenous person might compose a song celebrating the feats of an Indigenous sculptor who has carved turtles and other creatures in fine-grained hardwoods. Here we have two individuals, two specimens of IK (provided by the sculptor and the composer), and one specimen of a TCE (the song). But if one individual provides all of these specimens, the line between the sculpting and the composition might seem blurry. If the line is blurry, it is unclear whether IP rights should cover only the song or also the underlying IK that gave the song a point.

Particular Indigenous knowledge and TCEs can be diffused throughout a country or region, or they can be found only in a specific Indigenous community. If the holder of IK or TCEs can be readily ascertained, it is likely that a greater number of control rights are allocated to that holder. Conversely, it is more difficult to allocate control rights over IK and TCEs when there are multiple holders of IK and TCEs. So far as income rights are concerned, there might be less of a gap between

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25. See supra Table 1. Many scholars accept this vocabulary, but some regard it as possibly erasing some overlapping categories. See, e.g., JANE ANDERSON, INDIGENOUS TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 3–5 (Ctr. for the Study of the Public Domain, Duke Univ. Sch. of Law, 2010), https://web.law.duke.edu/cspd/itkpaper/ [https://perma.cc/4T3V-F5F9] (warning of the political and definitional problems associated with terms like “TK” and “TCE”).


single-holder and multiple-holder entitlements to the distribution of surplus. This closeness is generally a function of the communal ownership structures prevalent among Indigenous communities. In single-holder cases, however, the holder is likely to get the main share of the income. For example, Indigenous artisans could have exclusive rights to more particularized TK.

Does the discussion in Part III have any explanatory value? Take a look at Table 1 and Category 1 and ask why lawyers might usefully distinguish between IK and TCEs. A partial explanation is that lawyers can use this distinction to articulate a difference that can promote their clients’ interests. TCEs have some features in common with Western IP rights such as copyrights on songs, poems, and choreography. In contrast, items of IK are harder to bring within the fold of Western IP rights, which makes it less likely that they will be enforceable in Western legal systems. However, tribal legal systems may, or may not, enforce them. Some readers may take the contrasts as a datum about the extent to which Western legal systems tease apart various Indigenous rights. Other readers may take it as a jumping-off place for law reform, or for making room for tribal legal systems.

IV. CATEGORY 2: DYNAMICS BETWEEN NAMED PARTICIPANTS

The dynamics between the Indigenous claimant or claimants and other parties can affect the allocation of control over TK. In Table 1, the rudiments of Category 2 come from a brief exposition by Christoph Graber. The first three subcategories are straightforward. The final subcategory, Pleadings and Joinder, imports some civil procedure maneuvers that should be familiar to students of U.S. law. Examples include demurrers, affirmative defenses, counterclaims, cross-claims, interpleader, and impleader. Graber’s model is limited insofar as it supposes that disputes take place only between two adverse parties. Disputes over TK can involve any number of participants. There may be more than one Indigenous claimant. There may be multiple defendants. Generally, the larger the number of parties to the dispute, the more likely it is that multiple interests are in play and the more difficult it will be to


29. Id. at 12–13; (1) Indigenous Community vs. Non-Indigenous Third Party; (2) Indigenous Community vs. One of its Members; (3) Indigenous Community vs. Indigenous Community, supra Table 1.

resolve the dispute. Assuming only two parties would sharply limit the practical applicability of the framework.

An evaluation of the dynamics between the parties in the dispute requires assessment of the motives and values of each party. One should consider how much is at stake for each party and how the interests and values of all parties are aligned or misaligned. Disputes between an Indigenous community and one of its members, for example, might involve a similar understanding of applicable law or custom. In contrast, disputes between an Indigenous community and a non-Indigenous party might be rooted in quite different value systems.

A legal system that resolves these disputes, in an Indigenous court or a national court, is likely to set the epistemological tone for sorting out subsequent disputes. An Indigenous court that sees a particular item of TK as knowledge pertinent to settling a dispute is bound to have a different perspective from that of a national court that does not see this TK as knowledge on a level with, say, a patented invention. Any court system is apt to endorse some assumptions over others concerning what counts as legally cognizable knowledge.

The dynamics between Indigenous claimants vary because of the great variety of their interests. A claimant might be an Indigenous individual or an Indigenous community. Or a claimant might be an Indigenous group leader who represents the interest of the community or of a subgroup within that community. Some leaders might set their own interests ahead of the group. In some societies, Indigenous male leaders might not represent adequately the interests of Indigenous women. For instance, legislation recognizing customary ownership in Samoa resulted in 87 percent of Indigenous land being owned by men.31

Furthermore, an Indigenous individual holder of TK rights might seek to advance his or her personal interests at the group’s expense.32 Miranda Forsyth argues persuasively that portrayals of group cohesion are sometimes “based on idealized notions of custodianship and intragroup responsibility.”33 At the same time, individual interests can legitimately give more benefits to some persons than others. Some Indigenous painters, potters, or rug weavers may have special authority over certain forms of TK.34 Different Indigenous individuals may clash over who has the right

31. Forsyth, Regulation of TK, supra note 27, at 12.
33. Miranda Forsyth, Lifting the Lid on “The Community”: Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture?, 19 INT’L J. CULTURAL PROP. 1, 3 (2012) [hereinafter Forsyth, Lifting the Lid].
to produce culturally important TK. A good example lies in a dispute over who is entitled to create tattoos (tatau) in Samoa.Originally, two families of tattooing specialists called tufuga did almost all such work using traditional tattooing combs and ink, and the families received objects of high value in return. After the 1960s, Samoans who did not belong to one of these families started tattooing non-traditional designs with modern needles and ink, much to the chagrin of the two tufuga families. Division arose between and even within the two families, with members on each side claiming an exclusive right over the practice. Eventually, some non-Samoan tattoo artists sought legal protection for their work.

Forsyth writes:

Thus tatau is a practice over which there are multiple, often conflicting, claims and aspirations: There is the desire to preserve and limit the practice to its pre-modern form to reinforce a Samoan sense of identity and cultural pride; there is the desire to exploit it for commercial gain (through marketing opportunities such as the ink, tatau festivals, and performing tatau); and there is the desire to use it to market the state and to distinguish it as a tourist destination.

This passage distills the complexity of tattooing in Samoa by illustrating the context and internal dynamics, uncovering conflicts and challenges, and elucidating the market forces at play. The adjudication of TK disputes using Category 2 of the framework should play out similarly.

Some might object: the so-called explanation at the end of Part III is too abstract and does not account for the dynamics between named participants in civil litigation. A good reply would explain how Table 1 and Category 2 make these dynamics more transparent. Manifold differences between Indigenous and non-Indigenous parties illuminate the dynamics between them. Moreover, TK litigation often involves different combinations of Indigenous parties, such as an Indigenous community and one of its members, or a group of tribes. The permutations of civil litigation across Anglo-American common law, if meticulously analyzed and applied, can aid understanding of these dynamics. These points, taken together, help to explain why Table 1 and Category 2 are useful.

35. Forsyth, Lifting the Lid, supra note 33, at 8–13.
36. Id. at 8–9.
37. Id. at 8–10.
38. Id. at 11.
39. Id.
40. Id. at 13. The Independent State of Samoa (quite distinct from American Samoa) places tatau designs on its banknotes as a symbol of its unified national heritage and on advertising materials to attract tourists. Id. at 12.
V. CATEGORY 3: INDIGENOUS CLAIMANTS ON-STAGE AND OFF-STAGE

Category 2, in Table 1, includes only “on-stage” claimants, i.e. named Indigenous claimants. As such, it works nicely for many cases, such as *Milpurrurru v. Indofurn Pty Ltd.* George Milpurrurru, the claimant/plaintiff, was an internationally-recognized bark painter and the first aboriginal artist to be honored with a solo exhibition at Australia’s National Gallery. The defendant, Indofurn, was an Australian proprietary company that, without permission from Milpurrurru, engaged a Vietnamese carpet manufacturer to imprint the artist’s designs on carpets and then sought to import the carpets into Australia. The court ruled in favor of Milpurrurru and awarded him damages, which were to be parcelled out in accordance with the customs of his aboriginal group.

Even if all persons and groups relevant to the dispute are on-stage, the composition of the Indigenous claimant or claimants may vary. This variation differs from that among non-Indigenous claimants due to the prevalence of communal property ownership among Indigenous groups. Moreover, group claimants are likely to be culturally interwoven and kinship-based in ways that western governments and corporations are not. The Indigenous claimant could be an Indigenous person, the Indigenous community as a whole, or a group leader who represents the community or a subgroup within it. If the TK is held by a collective entity, individual members of the community can have various relations to that item of TK. Often, key individuals such as artists and elders have special responsibilities and authority over some TK.

There are also cases in which important Indigenous claimants are “off-stage,” i.e., unnamed and unheard. For instance, in *Tenodi v. Blue Mountain Council*, the council ordered Vesna and Damir Tenodi, the homeowners, to take down a Wandjina sculpture that the Tenodis had placed on their property a mere 2.5 meters from a public highway in the

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42. Id.
43. Id. at 209-10, 212.
44. Id. at 210-12.
46. Stoll & von Hahn, supra note 32, at 8, 20.
47. Id.
48. I thank Malena Muehl for the on-stage/off-stage distinction.
town of Katoomba, New South Wales. The Wandjina is a sacred entity for Mowanjum aborigines.\textsuperscript{50} Mowanjum created the initial sacred sculptures of this type but were neither named nor represented.\textsuperscript{51} Thus, \textit{Tenodi} is a Category 3 case with an off-stage claimant, namely the Mowanjum aborigines. The Australian court upheld the council’s decision requiring the Tenodis to remove the sculpture, which was not created by an aborigine, because its display was offensive to the cultural values of Mowanjum people.\textsuperscript{52}

The point of Category 3 is to make room for the control rights and income rights of Indigenous people, whether on-stage or off-stage. Frequently, off-stage Indigenous individuals and groups do not make their voices heard. Even if they were on-stage, they still might lack powers of enforcement that other parties, such as city councils, possess. It would be more difficult for an off-stage claimant to secure the removal of an offensive sculpture visible from a public road next to the lot of a private homeowner, because it lacks the legal standing typically required to do so. At the same time, \textit{Tenodi} shows that being off-stage is not always fatal to the interests of Indigenous individuals and groups. But that result turned on the sensitivity and engagement of both the council and the court to protect Mowanjum interests.

One can make the homespun distinction between on-stage and off-stage claimants a bit more sophisticated by looking at contemporary systems of civil procedure. In the United States, the legal rules concerning

\textsuperscript{50} Id. (finding that the Mowanjum regarded the depiction of the Wandjina as sacred, and found images of mouths to be quite offensive).


\textsuperscript{52} \textit{Tenodi v. Blue Mountains City Council} (2011) NSWLEC 1183 (Austl.) (discussing fundamental issues about a conflict between a right to display art and Indigenous rights under aboriginal law in Australia).
parties and joinder are central. The law of parties aims in part to separate real from nominal parties and to analyze the assignment and subrogation of claims. For a long while, there was a difference between “necessary” and “indispensable” parties in federal litigation. “Necessary parties are those who must be included in an action either as plaintiffs or defendants unless there is a valid excuse for their nonjoinder.” In contrast, “indispensable parties are those whose joinder was so important to a just resolution of the case that, if they could not be joined, the action should not be allowed to proceed.” Though that distinction persists in some state courts, nowadays the Federal Rules of Civil Procedure speak only of “required” parties, “but the underlying analysis remains the same.” If we transfer this vocabulary to the Tenodi case, Mowanjum people can be seen as required parties but their naming and inclusion were not essential for the action to go forward.

That observation brings us to joinder. The concept of joinder applies to both parties and claims, and may be either required or permissive. The Federal Rules of Civil Procedure and cases under those rules determine which parties and which claims must be included in a lawsuit, and which need not be. If we project joinder rules onto the Tenodi case, it would appear that Mowanjum people were not required to be included as parties and that their possible claims were not required to be included either, even though the court ended up protecting Mowanjum interests to some extent. Both the Mowanjum and their claims would be permissive under this reading. Behind this vagueness concerning Mowanjum people lies some uncertainty about what, if anything, they can do to protect their interests under current Australian law. Whether one describes this uncertainty in terms of standing or justiciability or something else, aboriginal peoples deserve greater clarity and more favorable process rights than they now have. This uncertainty demonstrates the need for a framework that guides lawyering and judicial decision-making in TK disputes.

53. HAZARD, LEUBSDORF & BASSETT, supra note 30, at 228-333 (discussing parties, joinder, and class actions).
55. JAMES HAZARD & LEUBSDORF, supra note 54, at 582-625.
56. Id. at 608 (footnote omitted).
57. Id. at 608.
58. FED. R. CIV. P. 19.
59. HAZARD, LEUBSDORF & BASSETT, supra note 30, at 228-44 (discussing permissive joinder of claims and of parties).
60. Id. at 244-49 (discussing also the treatment of “multiple claims with multiple parties”) (block capital letters omitted).
There might be a way to achieve greater clarity and more favorable aboriginal process rights by building on recent work on nonparties. As the Introduction makes clear, the present Article offers a framework that expands substantive Indigenous rights, though it is not results-driven. Geoffrey D. Callaghan suggests that nonparty participation by members of the general public, which would include aboriginal peoples, can be process-driven rather than results-driven. The upshot of Callaghan’s suggestion is to increase nonparty participation at the trial level as well as the appellate level. Amicus curiae briefs and other forms of intervention by nonparties are worth a careful look. Still, allowing additional interventions is costly, and proceduralists are likely to be skeptical about opening the door to Indigenous nonparties.

Explanatorily, Table 1 and Category 3 show how the distinction between on-stage and off-stage Indigenous claimants reveals one respect in which Indigenous claimants are sometimes invisible to Western courts. The short of the matter is that off-stage Indigenous claimants, precisely because they are off-stage, are often overlooked by Western courts deciding TK disputes. Occasionally a court may take judicial notice of, or become aware of, an off-stage claimant, as in *Tenodi*. A good lawyer can further the interests of a potential off-stage claimant by filing a claim or at least by bringing the claimant to the court’s attention. The examples in this Part illustrate the limitations of off-stage claimants in Category 3 because so much relies on the sympathy of the court or the skill of legal counsel.

VI. CATEGORY 4: NORMATIVE SYSTEMS WITHIN WHICH DISPUTES ARE SETTLED AND CONTROL IS ALLOCATED

Category 4, in Table 1, isolates normative systems under which disputes over TK are settled. Some systems are embedded within larger normative systems. To call them “normative systems” captures both that they include many of Hohfeld’s modalities (liberty–rights, powers, immunities, and duties as well as claim–rights) and that they involve different hierarchical levels, for example, from a constitution to judicial decisions. The normative systems in Category 4 include some arrangements that might not rise to the level of legal rights but nevertheless play a role in settling disputes. Custom, for example, is sometimes not quite law even if it is law-like.

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63. For a sharp-eyed use of Hohfeld’s normative modalities in a partly legal and partly sub-legal system, see Hoebel, *supra* note 24.
Normative systems in domestic, comparative, and international law affect the allocation of control rights and income rights. Rights of both sorts can be allocated by custom, United Nations documents, treaties, free trade agreements, constitutions, statutes, administrative regulations, and judicial decisions. This list is not exhaustive. Most nation states use more than one of these normative systems, but the exact configurations and interrelationships of the system vary greatly.

TABLE 2. EXPANSION OF CATEGORY 4: NORMATIVE SYSTEMS WITHIN WHICH DISPUTES ARE SETTLED

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A. Custom

In this context, custom is a repeated practice or usage that assigns control rights and income rights to IK and TCEs and specifies mechanisms for settling disputes over these rights. Custom, or customary law, often applies to internal disputes over Indigenous societies. Custom, or customary law, often applies to internal disputes over Indigenous societies.64 Domestic legal systems have often ignored Indigenous customary practices or found them wanting, particularly in regard to rights in land.65 In Australia, a few courts have retreated from this position.66 Sometimes courts have recognized

65. E.g., Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that customary Indian possessory rights did not give title or ownership under U.S. law); Milpurruru v. Nabahko Pty Ltd (1971) 17 FLR 141 (Austl.) (holding that although the Indigenous peoples of Australia had customary occupancy rights under their own law, they lacked any land rights recognized by the Crown or by Australian law).
66. E.g., Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1 (Austl.) (holding that aboriginal title to land does not come from a Crown grant but is a radical title). For an excellent study of these issues under English and Commonwealth law, see ULLA SECHER, ABORIGINAL CUSTOMARY LAW: A SOURCE OF COMMON LAW TITLE TO LAND (2014). For
customary Indigenous rights to TK, in particular to TCEs; the Milpurruru, Bulun Bulun, and Tenodi cases mentioned earlier are good examples. Nevertheless, such cases are exceptional in Australia.

In the United States, an appeal to custom played a role in the early scholarly analysis of the Crazy Horse case. In 1992 the Hornell Brewing Co. began to market “The Original Crazy Horse Malt Liquor.” When a firestorm broke out over the brew, Hornell argued, successfully, that the federal “government had impinged on its First Amendment commercial speech rights without a showing of governmental interest.” Jessica R. Herrera later contended that the Crazy Horse estate could appeal to customary tribal law in tribal court. Her main point was that the tribal court could find that Crazy’s Horse’s name was “defamed under customary tribal law.” However, she acknowledged that posthumous defamation, even if coupled with a private right of publicity, was unlikely to succeed.

More broadly, Henry E. Smith perceptively examines custom and its role in legal systems. He argues that recognizing custom imposes information costs on certain outsiders such as courts and duty holders. Formalizing would lower information costs, because it would reduce the dependence on context and create rules that apply to broader situations and audiences.

But formalizing custom would be a challenging project. First, Indigenous customary law differs significantly even in related Indigenous communities, and it could be difficult to crystallize a general principle that would apply accurately and optimally across these communities. Second, customary law is often unwritten, and some Indigenous communities...
might not be willing to share their knowledge of it with outsiders. Smith’s laudable desire to reduce information costs might work better in legal systems where some customs are explainable in a common language than it would in legal systems where multiple Indigenous communities and languages exist. Third, formalization could undermine the dynamic nature of some customs and deprive Indigenous communities of the autonomy to develop or replace their own customary rules. In short, it might ossify existing custom and impede adaptive changes.

B. United Nations Documents

The relevant principal document in this category is the U.N. Declaration on the Rights of Indigenous Peoples (2007) (“UNDRIP”). It differs from custom in many ways but is similar in its liminality between law and not-law. The United States, Australia, Canada, and New Zealand originally refused to sign on to this declaration. China has signed on to it but has maintained that it has no Indigenous peoples, only 55 “ethnic minorities.” This declaration has legal force only if a signatory nation has incorporated it into its domestic law or used it as part of a treaty with other nations. Today, the declaration is mostly aspirational.

Nevertheless, the text of the declaration is normative and stresses the rights of Indigenous peoples. Under it, Indigenous communities have rights to autonomy, self-determination, self-government, and a nationality. Indigenous peoples have detailed rights to IK, TCEs, their cultural heritage, and much more:

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

78. Id.
79. Id. at 517.
80. G.A. Res. 61/295 (Sep. 13, 2007) [hereinafter UNDRIP].
83. UNDRIP, supra note 80, arts. 3, 4, 6.
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.84

Beyond that, Indigenous peoples have rights to restitution and compensation for infringements of the rights just listed.85 Decisions on disputed matters should be prompt and accessible through fair procedures.86 If many of these provisions are incorporated by law or treaty into the domestic law of a nation state, IP protections are more likely for TCEs than for IK or “cultural heritage.” TCEs such as songs or dances are closer to Western copyrightable works than are IK and cultural heritage.

Perhaps least likely to be recognized are IP protections for genetic resources and knowledge of the properties of flora, because Indigenous peoples generally have not isolated and described these resources in patentable ways.87 However, this situation could change with increased adoption of the Nagoya Protocol (2010), a supplement to the Convention on Biological Diversity (1992).88 As an optional protocol, member countries must voluntarily decide to sign and ratify the treaty in order to bind themselves to it.89 One of the objectives of the Protocol is to promote the equitable sharing of the benefits of “genetic resources that

84. Id., art. 31(1).
85. Id., art. 40.
86. Id. For discussion of these provisions, see Stephen R. Munzer, Indigenous Peoples’ Rights and Remedies in Complex Situations, 7 WIPO J. 58, 63–65 (2015).
87. For illustration, the San people of southern Africa never managed to get a patent on the appetite-suppressant properties of the Hoodia plant because they never isolated the active ingredient (a chemical known as P57). The government of South Africa licensed the IP rights to Phytofarm plc, which sublicensed them to Pfizer, Inc. For technical reasons, the chemical never made it to market as a drug to treat obesity. After much protest, a negotiated agreement awarded the San a minimal amount of money. Stephen R. Munzer & Phyllis Chen Simon, Territory, Plants, and Land-Use Rights Among the San of Southern Africa: A Case Study in Regional Biodiversity, Traditional Knowledge, and Intellectual Property, 17 WM. & MARY BILL RTS. J. 831, 848–56 (2009) (describing the San predicament).
are held by Indigenous and local communities.”

It also establishes compliance obligations for contracting parties, including a requirement that genetic resources are “accessed in accordance with prior informed consent, and that mutually agreed terms have been established, as required by another contracting party.”

Although UNDRIP is advantageous to Indigenous peoples, it may not adequately recognize their inherent sovereign rights. More precisely, it does not do so in countries where Indigenous peoples have limited sovereignty. In such countries, Indigenous peoples and tribal nations can create their own property arrangements only within limits.

Nature rights are a prime example of novel indigenous property rights. Diné custom, part of Navajo law, states: “All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws and have rights and freedoms to exist.” Alexandra Huneeus suggests, in regard to written law, that “the Diné 2002 amendment to the Navajo Code contains the world’s first positive rights of nature provision.” If the reader finds all creation dizzyingly broad for a right of nature, one can tackle something narrower: wild rice. In 2021, a tribal court received a complaint relating to Manoomin, which is wild rice for a particular tribal nation. Under the tribal law of the White Earth Band of Ojibwe, and under an 1855 treaty, the plaintiffs alleged that wild rice was a legal person. Among the defendants were Enbridge Inc., which sought to build a Line 3 oil pipeline in Minnesota, and the Minnesota Department of Natural Resources (“DNR”), which issued a water permit to Enbridge. The tribal court denied DNR’s motion to dismiss. DNR sued in a federal district court, lost, and then simultaneously appealed to both the federal Eighth Circuit

90. Nagoya Protocol, supra note 88, art. 5.
92. I thank Matthew L.M. Fletcher for this suggestion.
97. Complaint, supra note 96, at 24-27.
98. Huneeus, supra note 95, at 155-56.
The Court of Appeals and the White Earth Tribal Court of Appeals. The Tribal Court of Appeals dismissed Manoomin’s suit on the ground that it lacked subject matter jurisdiction because neither DNR nor Enbridge engaged in any activities on tribal land. So what happened here? The White Earth Band got tripped up by a failure of subject matter jurisdiction but Manoomin (wild rice) survived as a legal entity of sorts.

Another example comes by way of the Yurok Tribe in California. In 2019, the Yurok Tribal Council passed a resolution establishing the legal personhood of the Klamath River ('We-Roy'). The tribal council specifically established the right of the Klamath River to “exist, flourish, and naturally evolve; to have a clean and healthy environment free from pollutants; to have a stable climate . . . and to be free from contamination by genetically engineered organisms.” Moreover, the ensuing ordinance granted the Klamath River legal standing in actions “against entities inflicting harm in violation of the Klamath River, its ecosystem, and species rights.” The tribal council cited UNDRIP Articles 26(1) and 29 specifically in support of its sovereign right to confer legal personhood in this manner. Like Manoomin, the Klamath River’s legal personhood is unrecognized outside of the tribal government. However, some observers hope that governments and the environmentalist movement will take notice of these legal innovations and follow suit.

C. Treaties

The Treaty of Waitangi deals with some rights of Māori people, the native inhabitants of New Zealand (Aotearoa). White officials representing the British Crown and more than 500 Māori chiefs signed the treaty. The English and Māori texts are not equivalent, which makes it difficult to determine the authoritative content of the treaty. As a practical matter, the treaty gave the British sovereignty, or at least
governance, over New Zealand. It also granted the Māori ownership of their lands and the rights of British subjects. Disputes festered over the interpretation of the treaty. The Treaty of Waitangi Act 1975\endnote{108} set up the Waitangi Tribunal to assess complaints that the British had breached the treaty, for many Māori grievances remained unresolved. The treaty dealt almost entirely with land rights and native species; it did not address IP rights in TK.

Two papers by Jessica C. Lai clarify the status of actual and potential IP rights in IK and TCEs in New Zealand.\endnote{109} One paper addresses mostly what I call Indigenous knowledge, or IK.\endnote{110} Article 2 of the Māori version of the treaty guarantees tino rangatiratanga (governance and authority) over their lands, mātauranga Māori (knowledge of treasured works and species), and taonga (“treasures”).\endnote{111} For our purposes, taonga are Māori cultural treasures. These Māori words cover more than IK, as they also apply to plant and animal species, material heirlooms, and sacred places. They also cover some items that fall under TCEs. Because Māori ways of seeing and speaking about the world differ from Western ways, it is hazardous to try to say exactly what these Māori words cover. The expression closest to “Māori Indigenous knowledge” is probably mātauranga Māori. Thus, Māori IK would include know–how and practices relating to plants and animals that the Māori regard as treasures.\endnote{112}

With these provisional definitions of Māori IK and TCEs, we now have a better understanding of the control and income rights that the Māori seek for their Indigenous knowledge. As Lai puts it:

The interests that the Māori seek are generally related to: (1) acknowledgement as the traditional knowledge holders; (2) respect for the Māori values relating to the knowledge (protecting kaitiakitanga [Māori stewardship]); (3) consultation and PIC [prior informed consent] to use, develop or commercialize the TK or a development thereof; (4) participation in the research process to

\begin{footnotesize}
\begin{enumerate}
\item See Lai, Māori TK, supra note 109.
\item Id. at 4–5, 6–8.
\item Id. at 13–14.
\end{enumerate}
\end{footnotesize}
ensure continued respect for Māori values and kaitiakitanga; and (5) the sharing of any benefits that accrue from their TK.¹¹³

Lai’s second paper concerns TCEs.¹¹⁴ Māori songs, dances (especially the haka), poems, myths, legends, belief systems and other typical TCEs are protected by Māori customary law (tikanga Māori).¹¹⁵ Māori customary law also protects some items that are difficult to see as typical examples of TCEs. Among these items are taonga species, taonga-derived works, and the manner of displaying taonga works.¹¹⁶ A salient difficulty is figuring out how a distinction between “authentic” artworks (taonga works) and “non-authentic” artworks (taonga-derived hybrids of Māori and non-Māori works) is to be grasped.¹¹⁷ Lai underscores how hard it is to make the distinction work:

[I am] trying to point out the difficulties in articulating and constructing the framework with which to [make sense of the Treaty of Waitangi] . . . without simultaneously creating an “authentic”/”non-authentic” divide. There will be some situations where a work is clearly a taonga work or a taonga-derived work. The complexity lies in capturing in words why this is and, in doing so, creating some generally applicable guidelines.¹¹十八

The complexities multiply when one tries to work out whether and, if so, why offensive uses of Māori TCEs should be prohibited.¹¹⁹ This problem is similar to the underlying issue in the Wandjina case discussed earlier.¹²⁰

D. Free Trade Agreements

Free trade agreements (“FTAs”) related to intellectual property take many forms—from worldwide agreements such as TRIPs¹²¹ to regional agreements to bilateral agreements. TRIPs tends to favor the IP rights of

¹¹³. Id. at 14. For further discussion, see Susy Frankel, A New Zealand Perspective on the Protection of Mātauranga Māori (Traditional Knowledge), in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 439 (Christoph B. Graber et al. eds., 2012).
¹¹⁴. See Lai, Māori TCEs, supra note 109.
¹¹⁵. Id. at 6.
¹¹⁶. Id. at 6–13.
¹¹⁷. Id. at 12–13.
¹¹⁸. Id. at 12–13.
¹¹⁹. Id. at 14–17.
¹²⁰. See supra text accompanying notes 49-52 for discussion of Tenodi v. Blue Mountains Council.
countries in the global North. Some regional agreements do so as well. Often, FTAs deal with development as well as IP rights. The development funding that wealthy nations offer to nations with Indigenous peoples typically comes with strings attached. Nations in the Global South often have to accept pro-Indigenous IP rights as part of the deal. Only some of these FTAs will prove useful to Indigenous peoples in settling disputes about IK or TCEs.

However, some regional and bilateral FTAs can help Indigenous peoples in one country agree to mutually beneficial rules with other countries to settle TK disputes. For trade to occur freely, it must involve goods and services that Indigenous peoples are willing to sell and buy. FTAs should not require Indigenous peoples to sell IK or TCEs against their will.

Consider two hypothetical Indigenous groups, A and B, whose members live in separate but geographically proximate island nations in the South Pacific. Each is aware of the other’s existence and seeks to exchange IK and TCEs, but there is a dispute over terms. To make the example concrete, suppose that Indigenous group A has IK of the medicinal uses of plants to treat skin diseases. Group B wants to learn about this medicinal IK because although group B has similar plants, it has not figured out how to use them to treat skin diseases. Conversely, Indigenous group B has TCEs in the form of handicrafts that it is willing to exchange for the medicinal IK, and Indigenous group A finds these TCEs quite attractive. The leaders of each group can see that a mutually beneficial trade is possible, even if there is some initial difference of opinion on the exchange value of one unit of dermatologic instruction and one artfully woven basket. A bilateral FTA would be a likely mechanism for facilitating exchanges of this kind between two nations.

E. Constitutions

Few constitutions have specific legal protection for TK. Usually the most one sees is a vague reference to cultural diversity or cultural objects, which may, or may not, be specified more clearly by statute. For instance, the Peruvian Constitution says that the state “preserves the diverse cultural

and linguistic manifestations throughout the country.”125 Moreover, “art
objects, and tokens of historical value, expressly declared cultural assets and
those provisionally presumed to be so, are the cultural heritage of the
Nation, irrespective of whether they are private or public property,”
receive state protection.126 “The law guarantees ownership of such
cultural heritage.”127 A much-discussed Peruvian statute of 2002 protects
un conocimiento colectivo (“collective knowledge”).128

F. Statutes

Over the last few decades, some nations have enacted statutes to
protect TK. A good example is the Haka Ka Mate Attribution Act 2014,
which makes a brief appearance in Part VII.C.129 This statute protects
Māori from potentially offensive commercial uses of their TCE. Another
element is the Whanganui River Claims Settlement Act 2014, which
grants legal personhood to the titular river as an indivisible and living
whole.130

A few South Pacific nations have instituted more general TK
protections by statute. In the Cook Islands, the Traditional Knowledge Act
2013 defines TK and establishes a register for TK owners that grants them
exclusive rights.131 In 2000, Vanuatu enacted the Copyright and Related
Rights Act, which defines Indigenous knowledge and recognizes a right of
collective ownership.132 These nations took inspiration from the Model
Law for the Protection of Traditional Knowledge and Expressions of
Culture, which was developed under WIPO supervision and adopted by
the Pacific Islands Forum in 2003.133

125. Constitución de la República del Perú, available in English as Peru’s Constitution of
1993 with Amendments through 2009, art. 17, www.constituteproject.org/constitution
126. Id. at art. 21.
127. Id.
128. For commentary on this statute, see Munzer & Raustiala, supra note 123, at 91-94.
129. See infra text accompanying note 204.
130. Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, § 12 (N.Z.); cf.
Te Urewera Act, 2014, § 11 (N.Z.) (granting legal personhood to the historical home of
Tūhoe, a Māori iwi).
131. Traditional Knowledge Act 2013, §§ 4(1), 7(1)(a) (Cook Islands); cf. Taoga Niue
Act, 2012, § 3 (Niue).
132. Copyright and Related Rights Act, 2000, § 1 (Vanuatu).
133. See Purcell Filipo Siaki Sali, Protecting Traditional Knowledge, 51 VICTORIA U.
G. Administrative Regulations

Scholars sometimes overlook the use of administrative regulations pertaining to IK and TCEs. In general, administrative agencies work within a constitution and one or more statutes. They seek to make more concrete the rights, duties, and authorizations of power created by such sources. An administrative agency must work carefully within one or more statutes to make sure that the regulations conform to the statutes. It must also take care not to exceed the authority granted by the statutory framework. Beyond that, an administrative agency often has to make sure that the regulations it issues promote sensible policies. One way to do this is to use a notice-and-comment period during which interested parties can offer their views on the proposed regulation.

Until recently, few have addressed the use of regulations in connection with IK and TCEs. Miranda Forsyth assembles a “regulatory toolbox”\textsuperscript{134} of mechanisms that serve three main objectives: preventing misappropriation, aiding commercialization, and securing the conservation of TK and TCEs.\textsuperscript{135} To illustrate, I call attention to some of the tools she suggests and the ends to which she would put them.

One tool is a research-permit scheme for foreign researchers that restricts the types of IK and TCEs that researchers may collect and use.\textsuperscript{136} The restrictions will advance the control rights and income rights of the Indigenous group that created the IK and TCEs in question. Still, this tool has limitations. Much depends on who drafts the research-permit scheme, who administers it, and who is in charge of compliance.

A second tool is regulation prohibiting the offensive use of IK and TCEs.\textsuperscript{137} Such a regulation might work best if Indigenous custom specifies which uses are offensive: think of placing a mouth on a Wandjina image, as in Tenodi.\textsuperscript{138} However, Indigenous custom might not specify such uses, which would leave regulators without direction. Also, many countries permit parodies of artworks and beliefs of others as part of freedom of speech and the press. In these countries, it could be difficult to justify prohibiting parodies of Indigenous artworks and beliefs without having a similar prohibition on all other artworks and beliefs.

A third tool is regulation of access and benefit agreements that govern the distribution of profits.\textsuperscript{139} These agreements affect both control rights

\textsuperscript{134} Forsyth, Regulation of TK, supra note 27, at 2.

\textsuperscript{135} See Forsyth & Farran, supra note 124, at 237–66.

\textsuperscript{136} Forsyth, Regulation of TK, supra note 27, at 16–17.

\textsuperscript{137} Id. at 23.

\textsuperscript{138} NSWLEC 1183 (2011) (Land & Env’t Ct.) (Austl.); see supra text accompanying notes 49-52. A mouth would make a Wandjina too powerful.

\textsuperscript{139} Forsyth, Regulation of TK, supra note 27, at 17–18.
and income rights. Unlike proprietary schemes that vest ownership in specific actors, access and benefit agreements allow the distribution of profits and other forms of income from IK and TCEs to a flexible set of beneficiary groups, such as different Indigenous groups, leaders of subgroups, and Indigenous individuals.  

A fourth tool is regulation of imports on handicrafts produced elsewhere that are marketed as local Indigenous products to tourists. To create awareness of the regulation and to ensure compliance, import controls require involvement by the government, especially by customs agencies. The final tool for our purposes is regulation that conserves IK and TCEs. An agency can aid conservation by promoting the use of IK and TCEs in local communities, by publicly attributing IK and TCEs to their origins, and by supporting Indigenous cultural festivals. These measures will increase the market for Indigenous groups. It will also help secure a cultural identity associated with IK and TCEs. A stronger cultural identity may in turn increase the control rights of such groups.

The suggestion here is not that regulations should have pride of place over other normative systems and other methods of settling disputes. All of the rights systems in Category 4—including custom, treaties, statutes, courts, and regulations—have different roles to play. Regulations in particular are nimble and easier to change than treaties and statutes. Moreover, administrative agencies often have fact-finding powers and expertise that courts lack. Proposed regulations can be open to a notice-and-comment period, which gives interested persons and groups an opportunity to point out shortcomings and suggest improvements.

On the other hand, courts are better than administrative agencies at settling highly particularized disputes, if only because judges are used to dealing with the specific facts of a case. All the same, given the way administrative law has often been overlooked in the classification of IK and TCEs and the settlement of disputes over them, it is salutary to mark out a place for administrative regulations.

H. Judicial Decisions

The role of judicial decisions is evident from the earlier discussions of *Milpurrum v. Indofurn Pty Ltd* and *Tenodi v. Blue Mountains City Council*. In *Milpurrum*, the Indigenous claimant/plaintiff was an on-stage

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140. Id.
141. Id.
142. Id. at 15–16, 22.
144. Tenodi, NSWLEC 1183, discussed at supra text accompanying notes 49–52.
party known for his bark paintings. In Tenodi, Indigenous Mowanjum people were off-stage but the court’s decision protected their interests.

I now return to Crazy Horse, the warrior and spiritual leader known as Tasunke Witco in the Oglala Band of the Lakota Sioux. The initial federal suit against Hornell Brewing Co. failed on commercial free speech grounds. Subsequent litigation by the Estate of Tasunke Witco in the Rosebud Sioux Tribal Trial and Supreme Courts failed. Litigation in the federal courts met a similar fate. But opposition to the brew produced bans against it in some states. On the corporate side, Hornell was acquired by Heileman Brewing Co., which in turn was acquired by SBC Holdings Inc. (previously Stroh Brewing Co.). Lo and behold, SBC Holdings took a conciliatory approach and settled the case with the Crazy Horse Estate.

No money changed hands in the settlement. John Stroh III, head of SBC Holdings, apologized publicly. He presented “32 Pendleton blankets, 32 braids of sweetgrass, 32 twists of tobacco, and seven thoroughbred horses” to the administrator of the Estate. The settlement is a good reminder that sometimes Indigenous peoples seek respect rather than money.

VII. TESTING THE FRAMEWORK

If the framework proposed here is to be of practical use, it must help to understand and resolve disputes. By way of example, this Part first tackles an IK issue from Samoa. After that, this Part examines different uses of the haka, a Māori TCE.

Samoan traditional healers have historically treated viral infections, including hepatitis, with the bark of the native mamala tree (Homalanthus nutans). In 1984, an American ethnobotanist collected samples of the

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145. See discussion supra Section VI.A.
148. Id. at 54-58.
150. Pommersheim, supra note 147, at 59.
151. Id.
152. Id.
153. Id.
mamala tree and sent them to the United States. The National Institutes of Health ("NIH") later patented the process of extracting the key compound (prostratin) from the mamala tree. The NIH did not include the traditional healers who shared their TK on the list of inventors. After determining that prostratin could be effective in treating HIV/AIDS, the NIH granted the AIDS Research Alliance ("ARA") an exclusive license to develop prostratin as an HIV drug.

ARA entered into an agreement with the Samoan government to share a percentage of future royalties with the government, the village of Falealupo (where the ethnobotanist collected the crucial samples), and the families of the two healers who shared their IK. Unfortunately, none of these parties received any financial benefit owing to high production and testing costs for the drug.

Despite the lack of financial benefit, this example illustrates certain applications of the framework. First, the knowledge of the mamala tree’s healing properties is an example of IK under Category 1. A potential dispute would fall under the “Indigenous Community v. Non-Indigenous Third Party” subcategory of Category 2. Next, the agreement between ARA and the Samoan government illustrates the state’s concern for Category 3 off-stage participants, namely the village of Falealupo and the families of the healers. As for Category 4, Samoa is a signatory to the Nagoya Protocol. By negotiating with ARA on behalf of Falealupo and the healers’ families, Samoa is arguably meeting its obligations under that treaty. However, the Samoan parties likely cannot sue ARA or any successor entity because the United States is not a signatory to the Nagoya Protocol.

Next, I discuss two applications of the framework to disputes over the haka in New Zealand. The first is a version of the Ka Mate haka used

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155. Samoa Law Reform, supra note 154, at 11.
156. Id.
157. Id.
158. Id. at 12; see also Paul Alan Cox, Holly E. Johnson & Gaugau Tavana, Giving Samoan Healers Credit for Prostratin, 320 SCIENCE 1589 (2008) (letter).
159. Samoa Law Reform, supra note 154, at 12.
160. Id.
161. See supra Part III.
162. See supra Part III-V.
164. See supra Part VI.C.
165. Parties to the Nagoya Protocol, supra note 163.
in an advertisement by the Bakery Industry Association of New Zealand ("BIANZ"). The second is a version of the haka used in the 2017 film The Fate of the Furious (also titled Fast & Furious 8 or for short F8).

As to the resolution of disputes, I am concerned with the existing laws of New Zealand and to a lesser extent current international law on IK and TCEs. Often these bodies of law are aspirational and do not give Māori or other Indigenous peoples the enforcement rights, substantive rights, or remedies they desire. Many such rights and remedies lie outside the scope of this Article. Elsewhere Kal Raustiala and I have argued that none of the theories of property we examined gave Indigenous peoples the robust intellectual property rights they frequently sought, though the theories may support modest protections. 166 I stand by that analysis. 167 Perhaps other theories of property, or arguments that do not rest on property theory at all, will prove more favorable to Māori and other Indigenous groups. These unspecified theories and arguments may generate rights and remedies that they see as fair and respectful.

A. Background and Facts

Traditionally, the haka is a ceremonial dance performed by Māori men of New Zealand. The haka still plays an important role in Māori culture. For example, Māori tribes perform the haka to welcome important guests, and Māori individuals often compete in haka competitions. 168 The New Zealand All Blacks rugby football team performs the haka on the field just before starting play. 169 There are numerous variations of the haka each with its own lyrics and choreography. The Māori chief Te Rauparaha from the Ngāti Toa tribe composed the most famous variation of the haka, the Ka Mate, in 1820. 170 In 2000, the Ngāti Toa tribe modernized the choreography of the Ka Mate.

166. Munzer & Raustiala, supra note 123, at 56–95.
167. Stephen R. Munzer, Corrective Justice and Intellectual Property Rights in Traditional Knowledge, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 58 (Annabelle Lever ed., 2012) articulates an argument from corrective justice not present in Munzer & Raustiala, supra note 123, though it is not at odds with the earlier article.
The producers of the BIANZ advertisement did not consult with Māori at any point in the development process.\textsuperscript{171} They simply purloined the Ka Mate rather than creating a new haka. Even though the movements of their haka were largely accurate, they were presented in a humorous and occasionally absurd manner: the performers were gingerbread men dancing in an oven.\textsuperscript{172} According to BIANZ executive officer Belinda Jeursen, the producers “took appropriate steps to ensure the promotion wouldn’t cause offence.”\textsuperscript{173} These steps included using the same words as in the Ka Mate haka “to maintain the integrity of it.”\textsuperscript{174} Despite these steps some Māori took offense.\textsuperscript{175}

In \textit{F8} the actor Dwayne Johnson (the Rock) performed a new, original haka with his daughter’s soccer team, the Red Dragons, before a game.\textsuperscript{176} The performance was humorous and light-hearted. Soccer uniforms replaced traditional Māori garb. The juxtaposition of the hulking Johnson with the girls in soccer gear only added to the hilarity. At the end of the performance, the opposing team walked away in near-total silence as one player said, “I don’t wanna play anymore.”\textsuperscript{177}

\section*{B. Using the Framework}

An aggrieved Māori tribe could try to sue Belinda Jeursen in her capacity as an executive officer at BIANZ. Under Category 1 of the framework, the Ka Mate haka is a TCE because it is a dance and/or ritual.\textsuperscript{178} In addition, the lawsuit would fall under the “Indigenous Community v. Non-Indigenous Third Party” subcategory of Category 2.\textsuperscript{179} A lawsuit regarding the \textit{F8} performance would likely fall under the same category. A tribe could sue the choreographer, but the production company is a likelier target of litigation. Under Category 3, on-stage participants in a possible BIANZ case would be BIANZ itself on one side, and a Māori individual or the Ngāti Toa tribe (to the extent it has legal personhood) on the other. Off-stage participants in this lawsuit would be Māori individuals.

\begin{itemize}
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} The Fate of the Furious: The Greatest Haka HD Clip, YOUTUBE (Oct. 20, 2020), https://youtu.be/-hUIxziBEns [https://perma.cc/2VD6-E9UM].
\item \textsuperscript{177} Id. at 00:51.
\item \textsuperscript{178} See supra Part III.
\item \textsuperscript{179} See Introduction and Table 1, supra text accompanying note 5.
\end{itemize}
A Framework for Managing Disputes

and tribes that could benefit from generalizable haka protections, even if they lack claims to the Ka Mate haka. As for Category 4, a brief look at Table 2 suggests that custom, U.N. declarations, treaties, constitutions, statutes, and administrative regulations might all be at issue, in one way or another, for these situations.

A convincing analysis of these cases requires some digging into context and pertinent law. It might trouble some readers that the conceptual framework does not by itself settle whether BIANZ and F8 both get off scot-free, or neither does, or one does but not the other (and if so which). An analogous example should torpedo this concern. Consider Hohfeld’s discussion of O’Connell v. Leathem. Quinn, a union organizer, sought to persuade Leathem, a butcher, to replace his nonunion employees with union members. Leathem refused. Quinn then said he would arrange a strike at the shop of one of Leathem’s clients unless the client ceased to do business with Leathem. The client stopped buying meat from Leathem, and Leathem sued Quinn for damages for unfair competition. The case turned on whether Leathem had only a “privilege” (i.e., a liberty-right) instead of a “claim-right” to conduct his butcher business. The House of Lords ruled in favor of Leathem.

Hohfeld’s scheme of fundamental legal conceptions does not generate an answer by itself. Leathem’s assertion of a claim-right, which would involve a correlative duty on Quinn not to interfere, would founder unless Leathem could show that the English law of unfair competition at the time of the incident imposed a duty on Quinn. The point here is that my conceptual framework, like Hohfeld’s, is not a substitute for knowing the applicable law, but it indicates where to look.

C. Applicable Law

A valuable article by Isabella Tekaumārua Wilson, a New Zealand lawyer of Māori descent, sheds light on the legal issues under New Zealand law and international law. The haka falls under mātauranga Māori, and the Intellectual Property Office of New Zealand (“IPONZ”) supports Māori individuals and businesses in recognizing, managing, and protecting their intellectual property.

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180. See supra Part VI.
181. See supra Table 2.
182. [1901] A.C. 495 (H.L.), discussed by Hohfeld, supra note 5, at 42–43; see Munzer, A Theory of Property, supra note 5, at 20–21 (exploring the case in Hohfeldian terms). But see Frydrych, supra note 5, at 304–06 (finding fault with some of Hohfeld’s analysis of the case).
184. Id. at 542.
In the BIANZ case, no evidence exists that Māori individuals or businesses participated in the production of the advertisement. This fact prevents the producers from requesting IPONZ support for mātāuranga Māori. New Zealand law gives some protection to the Ka Mate haka, namely under the Haka Ka Mate Attribution Act 2014. However, the BIANZ advertisement was “released well before the Haka Ka Mate Attribution Act was in force.” Hence there are no domestic laws to sue under. Regardless, Wilson offers stringent criticisms of the bakery association’s behavior. She contends that the association misappropriated the haka even though the writers and producers of the advertisement were New Zealanders. But their status as New Zealanders points in the direction of misappropriation under Wilson’s analysis because BIANZ “should have known better than to use Ka Mate in their advertisement . . .”

Although BIANZ’s behavior was insensitive and disrespectful, Wilson may not have clinched her case for misappropriation. No objective test for misappropriation exists under New Zealand law. As for international law, there is currently no relevant instrument to turn to. The WIPO-IGC is currently considering possible protections for TCEs, but progress is slow. The difficulty of reaching consensus on this issue underscores its complexity. In any case, an international instrument protecting TCEs would bind New Zealand only if its government were to ratify and domesticate it.

I turn now to F8. Despite the humorous context and the lack of Māori representation among cast and crew, Wilson concludes that the haka performance in the film is not a misappropriation. Three factors seem to carry weight for her. First, Dwayne Johnson and haka choreographer Layne Hannemann are of Samoan descent, which gives them a Polynesian connection to the haka. Second, Hannemann developed the haka in

185. Id. at 544–48.
186. Id. at 548.
187. Id. at 536.
188. Id.
189. Id. at 557–58.
consultation with the Māori, and after the fact Māori leaders blessed the performance. 192 Third, the haka performed in the scene is sensitive to the difference between male and female pūkana (the contorted face made by a haka performer): Johnson thrusts his tongue out but the soccer girls keep “their mouths closed . . .”. 193 Female performers do not show their tongues because the tongue is traditionally “extended as a symbol of the performer’s penis, of his manliness and virility.” 194

I agree with Wilson’s conclusion with some qualifications. It is unclear whether strong Māori or Polynesian ties are, or should be, a necessary or sufficient condition for doing the haka. It is also unclear whether an Indigenous, non-Polynesian performer without strong ties to Māori culture could elude charges of misappropriation.

A powerful consideration in favor of Wilson’s analysis is free, prior, and informed consent (“FPIC”), which is a factor of increasing importance in relations between Indigenous peoples and nation-states. FPIC resides in the self-determination of Indigenous peoples to have control over their land and cultural patrimony.

The UNDRIP has many provisions concerning FPIC. 195 In the Western Hemisphere, the Organization of American States passed the American Declaration on the Rights of Indigenous Peoples (“ADRIP”) which also has FPIC provisions. 196 Choreographer Hannemann made good faith efforts to secure all elements of FPIC. Māori consultants signed off on the haka without coercion (“free”). Hannemann said in advance what he planned to do (“prior”). He explained what the haka scene would be used for (“informed”). Finally, there is no evidence that the Māori persons consulted withdrew their consent at any point. By contrast, there was no
FPIC in the BIANZ case. The producers of the advertisement did not consult with Māori at any stage, so there was no opportunity to receive consent.

UNDRIP has other provisions that could prove useful if misappropriation exists. Article 31\(^\text{197}\) states that, “Indigenous peoples have the right to maintain, control, protect and develop their . . . traditional knowledge and traditional cultural expressions . . . and develop their intellectual property over such . . . traditional knowledge and traditional cultural expressions.”\(^\text{198}\) UNDRIP also states that, “[i]n conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”\(^\text{199}\) In the BIANZ situation, a lawyer could use these provisions to argue that IPONZ, an agency of the state, has an obligation to intervene on behalf of Māori.

At the same time, UNDRIP will be effective only to the extent it is persuasive. When the United Nations published UNDRIP in 2007, New Zealand was one of four countries that did not initially endorse the document.\(^\text{200}\) In 2010, New Zealand changed course and officially endorsed the Declaration.\(^\text{201}\) However, New Zealand does not consider the Declaration legally binding.\(^\text{202}\) Along with the official endorsement, Prime Minister John Key announced that “[w]hile the declaration is non-binding, it both affirms accepted rights and establishes future aspirations . . . . This move will not compromise the fundamentals of this Government’s approach to resolving Treaty claims . . . .”\(^\text{203}\) Thus, any redress under UNDRIP seems unlikely. Moreover, any remedy the Treaty of Waitangi might give the tribe will be redundant because the Haka Ka Mate Attribution Act of 2014 was meant to give effect to the portions of the Treaty of Waitangi that relate to the Ka Mate haka.\(^\text{204}\) The

\(^\text{197}\) UNDRIP, supra note 80, art. 31.
\(^\text{198}\) Id. at art. 31, ¶ 1.
\(^\text{199}\) Id. at art. 31, ¶ 2.
\(^\text{201}\) Id.
\(^\text{202}\) This point is in keeping with New Zealand’s general approach to international legal instruments. See W. John Hopkins, New Zealand, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 429, 437 (Dinah Shelton ed., 2011) (“As a formally dualist system, New Zealand law does not recognize international treaties as part of the domestic legal system. Only when they are incorporated into New Zealand statute will they become part of the domestic legal system and thus actionable in the courts.”).
\(^\text{203}\) Id.
different legal approaches mentioned above demonstrate the operation of various Category 4 normative systems.

D. Explanation Again

Some might object that the treatment of Categories 1 through 4 and Tables 1 and 2 is nothing more than discussion of what lawyers do in TK disputes. Plainly, the fact that lawyers look at law and the factual background does not justify the framework by itself. Still, the framework does help us understand why and how lawyers look to law and facts in TK disputes. Here the goal is explanation rather than justification. Lawyers look at the law because it helps them to understand the normative context within which they can further their clients’ interests. In the early stages of Anglo-American law, pertinent normative content emerged from constitutions, legislation, judicial decisions, and occasionally custom. Eventually administrative regulations, treaties, U.N. documents, and free trade agreements supplied additional normative content. The test cases in Part VII illustrate how lawyers can weave law and facts together to advise their clients in civil litigation over TK.

VIII. CONCLUSION

The framework proposed here consists of the following main parts: a preliminary distinction between control rights and income rights; a division of TK into indigenous knowledge and traditional cultural expressions; the dynamics between named parties; a distinction between on-stage and off-stage claimants; and an assortment of eight different normative systems within which disputes are settled and control is allocated. The framework is, then, both conceptual and normative. Its chief purposes are to advance clear thinking about IP rights in TK and to develop sound procedures for managing disputes around actual or proposed such rights.

The difference between control rights and income rights is one driver of the framework. That difference infiltrates the more granular categories of the framework, which maintain enough clarity for general use. Plainly, it is necessary to have knowledge of the facts and the applicable law to use the framework effectively. With some adjustments, the framework might be helpful for certain non-TK cases as well. As the Introduction makes clear, the framework is tentative. It should generate additions and refinements that bring these issues into sharper focus. In this way, it is the beginning of a much broader discussion.
The virtues of this conceptual framework include the following. It is comprehensive. It is sensitive to context. It leaves open whether control rights or income rights are more important to an Indigenous group in particular situations. Moreover, it is flexible regarding which normative systems are best suited to settling disputes. The framework brings together many small parts of disputes over intellectual property rights into a large picture. A test run indicates that the framework helps to resolve practical legal disputes. And finally, the various parts of the framework have considerable explanatory value.