

Black Power, Brand Power

Brand-led Interpretations of Indigenous Intangible Cultural Heritage and Propositions for Sustainable Development

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Résumé de l'article

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C. J. TAYEH

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Abstract

This paper analyzes Indigenous intangible cultural heritage (ICH) through a commercial filter. It makes the point that brand and Indigenous ICH are conceptually aligned, and this alignment then generates a commercial understanding of Indigenous ICH and its strategic importance. Using an Australian case study of Cape York Dreaming Track, this paper argues that brand-led interpretations of Indigenous ICH hold immense promise for sustainable development initiatives. It shows how a sustainable development project can integrate brand into its long-term targets, improving ethical engagement, cultural investment and the quality of access and benefit sharing agreements, defined at international law.

Résumé

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Cet article analyse le patrimoine culturel immatériel autochtone (PCIA) à travers un prisme commercial. Il établit que le concept de marque et le concept de PCI autochtone sont mutuellement compatibles et que cet alignement génère ensuite une conception commerciale du PCI autochtone et de son importance stratégique. À partir d'une étude de cas réalisée en Australie au sujet de la « Piste des rêves » [Dreaming track] de Cape York, cet article soutient que les interprétations du PCI autochtone, lorsqu'elles sont placées sous l'égide d'une marque, sont extrêmement prometteuses pour les initiatives de développement durable. Cette étude de cas montre comment un projet de développement durable peut intégrer une marque dans ses objectifs à long terme, améliorer l'engagement éthique, l'investissement culturel et la qualité de l'accès, en plus de permettre des accords pour le partage des bénéfices tel que le définit la loi internationale.

Black was the colour that had to be used because we were talking in terms of ... black consciousness, black awareness, black power, be proud of your blackness.... I wanted to make it unsettling. (Thomas 1997)

In 1997, the Federal Court of Australia decided that Harold Thomas, a man from the Luritja clan group, owned the copyright to the Australian Aboriginal flag (*Thomas v. Brown* [1997]).

The Federal Court's decision highlights the enduring tension between private rights and the public domain that arises in the context of Indigenous intangible cultural heritage (ICH) in Australia. Compared with international legal norms, the Federal Court's decision puts greater emphasis on Thomas's private rights,

even though national and international communities recognize the flag's significance to all of Australia's Indigenous people. In effect, *Thomas v. Brown* [1997] set up an Indigenous ICH asset founded on intellectual property principles, well before policy makers and Indigenous peoples observed potential in intellectual property assets (Hebblethwaite 2013).¹ The outcome's key weakness is that authorial rights were granted and afforded more weight than the flag's common significance, which grew from first use in the Indigenous land rights marches of 1971. It is problematic when legal rights do not reflect community beliefs about how control should be allocated: Australian Indigenous people seek broad and deep collective ownership and cultural controls, which does not sit well with

the doctrine of free information long-worn by Google and Wikipedia (Janke 1998; Moses 2010). This paper responds to this weakness quite counter-intuitively, developing the concept of Indigenous ICH asset holdings and recommending that Indigenous peoples use Western legal and commercial principles to their full effect, rather than dismissing them as inherently incompatible with Indigenous ICH (Puri 2000).²

I argue that Indigenous ICH assets should be founded on principles of intellectual property—specifically principles of commercial brand management—because they are attuned to the economic realization and protection of intangibles. The first part of this paper identifies the characterizations of Indigenous ICH, evidenced by segmentation and overlap in international law and policy. The second part puts forward socioeconomic interpretations of commercial brands to show that brand is conceptually compatible with Indigenous ICH. The third part proposes a commercial, brand-led model as a response to the unique sustainable development concerns of Indigenous communities. This part draws on Australia’s geographical and political context to explore how this model is relevant to Cape York, focusing on a case study of the Cape York Dreaming Track tourism and development project.

Characterizations of Indigenous ICH

The characterizations of Indigenous Intangible Cultural Heritage (ICH) housed within five international global policy frameworks (detailed below) relating to heritage, traditional knowledge (TK), and traditional cultural expressions (TCEs) generate a multifocal profile of Indigenous ICH; such a profile should counteract false notions of “authenticity,” born of external interpretations of indigeneity as a static state. (Trilling 1972).³ The global policy relating to ICH consists of five international forums, each claiming its own standard-setting instruments, which in effect overlap to characterize Indigenous ICH in a certain way (see Table 1). As one would expect, each of these instruments is implicitly shaped by the *raison d’être* of its respective forum.

Overview of the Frameworks Characterizing ICH in International Law

United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO is the oldest forum in this framework, with the most expansive objective. It has a sweeping mandate to foster “a culture of peace ... built upon the intellectual and moral solidarity of all mankind” (UNESCO 1945). UNESCO has responded to global transformations by integrating sustainable development as corollary to peace. The effect of this integration has been a shift away from “barricading” world heritage in order to protect it and toward identifying how cultural heritage can help meet global challenges. This shift is conspicuous within the short time span of two years, as the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions emphasizes the links between culture and development, in contrast to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage.

The 2005 Convention focuses on cultural dialogue, its objectives are to:

- (1)(a) protect and promote the diversity of cultural expressions;
- (b) create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;
- (c) encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;
- (d) foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples (UNESCO 2005).

These objectives emphasize the reciprocity in ICH and, by extension, in Indigenous ICH; a requisite part of cultural expression is its ability to bridge division. Such reciprocity facilitates cultural expressions as vehicles of cultural development and interaction. The 2005 Convention also warrants the following in Article 4(4):

International Forum	Standard-setting instrument	Characterizations of ICH
United Nations Educational, Scientific and Cultural Organization (UNESCO)	Convention for the Safeguarding of Intangible Cultural Heritage 2003	Form of cultural interaction central to the human condition
	Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005	
United Nations Environment Program (UNEP)	Convention on Biological Diversity 1992	Utilized or potential to be utilized (by the modern sciences)
	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010 (Nagoya Protocol)	Associated with physical inputs
United Nations Permanent Forum on Indigenous Issues (UNPFII) and the United Nations Economic and Social Council (UNECOSOC)	Declaration on the Rights of Indigenous Peoples 2007	Managed according to principles of self-determination as a management principle Collective rights and control
World Intellectual Property Organization (WIPO) Inter-Governmental Committee (IGC)	The Protection of Traditional Knowledge: Draft Articles (Rev 2, April 2013)	Cultural connection Continuous from generation to generation
	The Protection of Traditional Cultural Expressions: Draft Articles (April 2014)	Collective rights and control
	Consolidated Document Relating to Intellectual Property and Genetic Resources (June 2016)	Creative and intellectual dimension
World Trade Organization (WTO)	Trade Related aspects of International Property Rights agreement 1995	Tied to geographic provenance

Table 1

Cultural activities, goods and services” refers to those activities, goods and services, which ... convey cultural expressions, *irrespective of the commercial value they may have*. Cultural activities *may be an end in themselves*, or they may contribute to the production of cultural goods and services. (UNESCO 2005, emphasis added)

This clause characterizes Indigenous ICH as having intrinsically valuable properties, which are detached from commerce and the production

process. ICH is intrinsically valuable because it is central to the individual’s “intellectual, emotional, moral and spiritual existence,” which is critical to good governance, political equality and Sustainable Development (UNESCO 2011). UNESCO’s moral positioning is prefaced on the intrinsic value of culture; the development of cultural wealth being a humanitarian end in itself.

United Nations Environment Program (UNEP)

The UNEP was created to pursue environmental conservation in the international arena. In 1981, the program pivoted to pursue a sustainable development mandate and a project endorsement framework, which focused on the “interrelationships between people, resources, environment and development” (UNEP 1981: 147). The Convention on Biological Diversity (CBD) came out of this shift (UNEP 1992). The CBD recognizes the value of biological diversity and treats it as a resource, which should be allocated between present and future generations. The Nagoya Protocol (adopted by the CBD in 2010) deals with one set of resource allocation problems, which falls within the parameters of the CBD: first, the fair, equitable and sustainable use of genetic resources; second, and most importantly for this study, the fair and equitable use of traditional knowledge (TK) associated with genetic resources; and third, the fair and equitable distribution of benefits that flow when either or both of the first two resource allocation problems have been solved.

These resource allocation problems are expressed in Article 8(j) of the CBD:

Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices. (UNEP 1992)

UNEP interprets TK through a utilitarian, resource-oriented filter, which reveals the forum’s general position on Indigenous ICH: UNEP values Indigenous ICH with reference to its “utilization,” a term undefined in relation to traditional knowledge associated with genetic resources (UNEP 1992). However, the *Nagoya Protocol* refers to the utilization of genetic re-

sources as the application of the scientific method to generate value or “benefits” (UNEP 2010). Impliedly, reference to TK associated with genetic resources, refers to the TK that is associated with a physical input (genetic resource) and that becomes socially valuable through the application of modern technology (scientific techniques and analysis) in accordance with this utilitarian view of traditional knowledge that knowledge that cannot be utilized is irrelevant.

I’d like to make one further remark about modernization. There seems to be a divide between technology and TK, which emanates from traditional lifestyles. The implicit assumption here is that this TK needs to be partnered with the modern sciences (e.g., biotechnology) for it to have scientific, economic, or cultural significance. This understanding characterizes Indigenous ICH according to early conceptualizations; that it is pristine and stuck in time. The reliance on static rather than fluid conceptualizations of Indigenous ICH could be the result of a negotiation process that put Indigenous participants at the periphery: Indigenous representatives argued that procedures in the CBD process were “one-sided” as they participated as observers to the negotiations, whereas nation states were the subjects and signatories (UNEP 2010: 13).

United Nations Permanent Forum on Indigenous Issues (UNPFII)

In contrast, the United Nations’ Declaration on the Rights of Indigenous People embeds the traditional in the present day. The institutional makeup of the UNPFII reflects this paradigm shift: it is a fully participatory, Indigenous-controlled advisory body to the United Nations Economic and Social Council. The Declaration presents a notion of Indigenous ICH that is grounded in the rights of every human and citizen, per Articles 1 and 2. Article 31(1) presents two principal characterizations of Indigenous ICH. The first is that Indigenous ICH hinges on self-determination and control over their diverse assets:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sci-

ences, 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 (UNGA 2007).

These assets are diverse because of their form (whether physical or intangible) and their maturity (long-held, revitalized, or newly generated). The second characterization of Indigenous ICH emanates from a social context: “They also have the right to maintain, control, protect, and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions” (UNGA 2007).

In other words, the maintenance, control, protection, and development of cultural heritage is a collective right and a community prerogative. The recitals strengthen this interpretation of Article 31(1) as they articulate the Declaration’s social and legal premise relating to the “collective rights [of Indigenous peoples] which are indispensable for their existence, well-being and integral to their development as peoples” (UNGA 2007).

World Intellectual Property Organization (WIPO)

The WIPO works to promote innovation and creativity through the harmonization and dispersion of global intellectual property norms. Dutfield (2009) argues that pressure to become more inclusive of the developing and newly independent states that emerged from post-Second World War decolonization triggered the establishment of the WIPO. The organization was extended to the Bureau International Réunis pour la Protection de la Propriété Intellectuelle, the international body responsible for administering the Paris and Berne conventions that entered into force in 1883 and 1886 respectively. The WIPO’s orientation today, particularly after institutionally integrating development goals in 2009, reflects this breadth of engagement. However, it is arguable that the WIPO has not overcome the Bureau’s exclusivity problems (Straus 2007).⁴ The WIPO Intergovernmental Committee (ICG) has been concerned with negotiating three instruments on ICH: the draft articles on The Protection of Traditional Knowledge and The Protection

of Traditional Cultural Expressions, and the Consolidated Document Relating to Intellectual Property and Genetic Resources. The WIPO debates (2013a: 12-13) hinge on the eligibility criteria for protection. In determining these eligibility criteria, they necessarily characterize Indigenous ICH in a certain way. My analysis draws together the eligibility clauses within these three instruments and then discusses the implications of this synthesis for Indigenous ICH.

The WIPO draft for The Protection of Traditional Knowledge sets out to protect knowledge that is distinctively “associated/linked” to socio-cultural identity “[and/] or cultural heritage” (2013a: 10). According to the draft criteria for eligibility, Articles 1.3 and 1.4: the knowledge must also be transmitted through a process, which is collective and inter-generational. The community must be able to either demonstrate exclusivity in their knowledge, or show that it has been in the public domain for less than a “reasonable period of time,” so it is not “normally and generally well-known” (10). The draft for The Protection of Traditional Cultural Expressions proposes that collective authorship and “creative intellectual activity,” in addition to provenance from distinct or unique socio-cultural identity or heritage, should serve as eligibility criteria (WIPO 2014: 6). Alongside these, the Consolidated Document recommends safeguards for TK associated with genetic resources within the international patent system (WIPO 2016: 8). Across the board, eligibility for protection under the WIPO implies the following characterizations of Indigenous ICH: cultural connection; intergenerational continuity; communal exclusivity; creative, intellectual inputs; and utilization by science or industry.

This discussion will focus on the creative and intellectual characterization of Indigenous ICH, which is unique to the WIPO forum. My earlier discussions have looked at its anthropological characterizations—characterizations related to culture, identity, time, and intergenerational elements, as well as the social institutions of knowledge transmission. The WIPO relies on the terminology, traditional cultural expression, to refer to the creative and intellectual characterization of Indigenous ICH. This characterization, which is the basis for the WIPO’s proposed framework is in line with WIPO’s founding

conventions and the common law's copyright criteria of authorship and originality. Creativity as a human right and as a peoples' right is a central pillar of the intellectual property protection system, whether that is expressed as creativity or invention (WIPO 2013a: 3-4). However, the idea of intellectual effort is controversial for two reasons: first, it broaches new difficulties of proof; and, second, it is unclear whether the repetitive, practical evolution of cultural rites and rituals constitutes intellectually steered concept development (WIPO 2013b: 19, 20). When we draw on rigid intellectual property norms to protect ICH we reinterpret the cultural maintenance systems developed by Indigenous and local communities presuming that these systems are based on a rational creative process. In this interpretation, Indigenous ICH becomes a more narrow concept: in addition to being of place, culture, and community, authentic and valuable traditional cultural expressions must also be *of mind*.

World Trade Organization (WTO)

The WTO is the international forum for multi-lateral trade negotiations and dispute resolution. It complements the WIPO forum by implementing trade measures to standardize intellectual property norms and secure participants' interests, albeit with a North-South imbalance (Hussain 2004).⁵ The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement establishes a minimum standard of protection for trademarks, copyright and patents and establishes value in geographic provenance. Arguably, this minimum standard incorporates a development agenda, as Articles 7 and 8 promote general technological, social and economic welfare (Yu 2009).⁶

The WTO's reluctance to engage with the changes across the global policy framework relating to heritage, traditional knowledge and traditional cultural expressions, indicates its reluctance to engage with Indigenous ICH, despite pressure on TRIPS to offer substantive protections. Debates since the 2001 Doha round of trade negotiations have centred on states' proposals to extend geographic provenance requirements, which can be attained if member states agree to amend Articles 22 and 23, and 27(b). Article 22 requires that member states

ban the misleading or anti-competitive use of geographic indications, which 22(1) defines as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin" (WTO 1994). This requirement is not limited to trade in a specific type of product, which means that Article 22 could be adjusted so that it provides protection for traded products based on Indigenous ICH, while also providing incidental protection to Indigenous ICH. Article 23 creates supplementary protection for wines and spirits, as it requires that member states provide legal redress against those who make inaccurate and illegitimate use of geographic indications. The wider reach, and lower threshold of such protection are grounds for broadening Article 23 to include cultural product, typically from developing countries.

Articles 22 and 23 create enforceable interests in provenance, which developing and newly industrialized countries (e.g., Brazil, India, Thailand) would like to see integrated into Article 27(b) through mandatory geographic disclosure. This would create obligations on member states to disclose the geographic origins of the TK associated with genetic resources and prove that fair and equitable access and benefit sharing terms⁷ have been reached with Indigenous and local communities. The WTO's fixation on geographic provenance is systemic to integrative trade and sophisticated global value chains (Cattaneo et al. 2013).⁸ An agenda that consists of broadening or introducing geographic provenance requirements to protect TK and cultural expressions is a symptom of this fixation. This agenda characterizes Indigenous ICH according to its geographic origins, giving rise to difficulties for the WTO.

The difficulties for the WTO are two-fold. First, Indigenous geographic knowledge and clan configurations often transgress state borders. This means that national statements of geographic provenance either misrepresent or fail to accurately characterize Indigenous ICH. The second difficulty is that the most common obligations, for producers to indicate where a product originated, do not apply within nations where the traditional knowledge or cultural expression is considered generic (Maulik 2012).⁹

The paradox here is that Indigenous ICH does not have a recognized value at the point of provenance. Though the WTO recognizes that there is a link between Indigenous ICH and place, the current TRIPS instrument is too blunt a tool for characterizing ICH and representing the value of place. To this effect, TRIPS would gain relevance if member states were to encourage Indigenous and local communities to innovate and thereby distinguish their cultural products, which are based on TK and traditional cultural expressions.

To summarize, the various international policy frameworks for heritage, TK, and traditional cultural expressions support plural characterizations of Indigenous ICH. Protection for intangible cultural assets has been integrated with heritage, environmental, international Indigenous intellectual property, and trade protections. The result is compartmentalized and diverse (see Table 1).

Relevance of Brand to Indigenous ICH

The concept of a commercial brand is compatible with Indigenous ICH, as characterized by the international policy frameworks. This compatibility is based on the synergistic socioeconomic dimensions of branding and of Indigenous ICH. I will first contextualize industry jargon such as “brand equity” and “brand value,” and then present multiple interpretations of branding—brand as a signal, as a form of capital and as an institution—to demonstrate its compatibility with, and move toward a commercial understanding of, Indigenous ICH.

Brand and Industry

Imprecise terminology and inconsistent positioning between the marketing and financial accounting industries affect the brand construct (Wood 2000).¹⁰ “Brand equity” and “brand value” are the most dominant terms used by these industries to understand the dimensions of brand: its function and asset base. Brand equity looks to the consumer to understand brand. It is a term bandied about in the marketing industry to refer to the strength of a brand in the market, incorporating the brand’s consumer loyalty and its socio-cultural associations. Leuthesser defines brand equity as “the set of associations and behaviour on the part of a brand’s consumers,

channel members and parent corporation that permits the brand to earn greater volume or greater margins than it could without the brand name” (1988: 6). This definition implies that market share, premiums, or volumes commanded of a brand, and corporate profits attributable to brand are measures of brand equity. To continue such focus on the customer, “brand value” is used in marketing to refer to the value that the consumer receives through the convenience and the experience of branding, irrespective of whether the product has actually been purchased (Kinnear and Bernhardt 1986: 299).

However, the accounting and financial industries understand brand differently as their interpretations are from the perspective of the firm (Raggio and Leone 2009: 253). One interpretation focuses on how much extra value branding adds to a product, so brand is the final touch on the realization of goods and services produced. Another interpretation considers a brand’s replacement value, which is the measure of how much it would cost to create and consolidate new branding (249). Replacement value very much depends on the internal capacity and personality of the brand developer. In context, these terminologies rely on the socioeconomic dimensions of brand as a basis for its commercial value. The following shows that these dimensions are compatible with Indigenous ICH, as we move toward an understanding of its commercial value.

Branding as a Signal

Early marketing constructs linked brand to a real or fictional producer. The most likely reason for this is that the origins of brand derive from the first trademark regimes, which emerged during the late 18th century and continued throughout the 19th century, to protect artisans and manufacturers in cross-border and domestic trade (Duguid 2009). Today, the notion that brand is a signal underpins its capacity to fulfill social and economic functions for consumers and producers. Interpreting branding as a signal focuses on its capacity to identify qualities, such as origins or production methods that enable consumers to distinguish between products. This is a one-directional communication channel that flows from the producer to the consumer. Brand allows the producer to capture the com-

mercial value of the “truth, beauty, and utility,” which they bring together with their products (Arvidsson 2005: 236). Brand’s ability to act as a signal means that it is a potential vehicle for communicating characterizations of Indigenous ICH to the consumer. In this way, brand fulfills the functions of a certification mark because it is used to separate product from its competitors by emphasizing its production-side values. The characterizations of Indigenous ICH (Table 1) that could be expounded with a certification mark or signal branding are: cultural connection, the centrality of geography and the fusion of self-determination with production principles. These are explored in the following case study.

Case Study 1: Aboriginal “Rip-Offs”

Australia has found it difficult to prevent Indigenous “rip-offs” (Commonwealth Attorney General’s Department 1994: 2). In the 1970s Aboriginal people brought a series of cases to litigate infringement of their copyright. In response, the Australian Government’s Report of the Working Party on the Protection of Aboriginal Folklore recognized the lack of legal protections for Indigenous ICH in 1981, though it is yet to make legislative headway (Davis 2005: 19). To make up for poor policy, several organizations have created various trademarks to communicate Indigenous cultural authenticity to the consumer.

Trademark 1: Respect Our Culture (ROC)

The Respect Our Culture (ROC) trademark is governed by Eco-Tourism Australia. Its primary tenet is that “Indigenous cultural experiences offer a competitive advantage to the Australian tourism industry” (Ecotourism Australia 2013: 1). Ecotourism Australia awards the ROC mark to businesses that have demonstrated, via self-assessment, that they “[Value] cultural and natural integrity and authenticity.... Protect and preserve the natural/cultural heritage and Indigenous relationship to land ... [and] will eliminate any practice that is unacceptably damaging the environment or Indigenous culture/beliefs” (Ecotourism Australia 2013: 3).

The ROC mark creates an awareness of cultural connection, self-determination, and geographic provenance by encouraging individual

businesses to internalize broader socio-cultural and environmental concerns. For instance, complying with the award scheme means that tourism operators must engage local Indigenous people to present the cultural components of the tours offered by the operator. However, the mark’s availability to tourism operators means that it is an educational exercise for producers as much as it is for consumers. This means that its ability to change the modus operandi of the tourism industry relies, perhaps too heavily, on the ability of self-certified businesses to interpret the trademark’s values and communicate these in a clear message to the consumer.

Trademark 2: National Indigenous Arts Advocacy Association’s Label of Authenticity

Though the National Indigenous Arts Advocacy Association’s label of authenticity has been abandoned, it is worth considering as a different approach to communicating certain characterizations of Indigenous ICH. The purpose of the Label was to certify artistic product “created, authored or produced wholly by an Indigenous person,” relying on the definition of an Indigenous person in Australian law (Janke 2003: 8-9). Certified producers were then subject to the rules of use relating to the Label. These rules required that the Indigenous artists paint in their traditional style, which varies extensively between clans. It also required that their artwork connect to traditional knowledge or cultural expressions (e.g., dreamtime stories, rituals) and be accompanied by information about the land and people to which the artwork relates. While the Label solely represented Indigenous artists and was based on an understanding of authentic Indigenous ICH garnered from consultations with Indigenous stakeholders, it failed to develop common currency in Australia’s Aboriginal Art market. One reason is that the Label was too generic, failing to communicate geographic provenance in detail, a particularly important failing, as regional art and craft collectives produce most Aboriginal art. Another reason is that certification seemed unnecessary, as producers believed authenticity was self-evident in their works (14).

The theory and case study show that brand can be used to communicate production qualities

to the consumer. This is the same function that certification trademarks fulfil, though success depends on their rules of access, minimum standards and the ability to encapsulate producer sentiment and motivate producers to mark their work. However, the case study also reveals the critical difference between a branding signal and certification, which is that the commercial value of a brand is not the same as the value of certification. The brand value is the extra value that brand adds to the product, whereas the value of certification is the value that the mark adds to the product, subtracting the producers' (artists') compliance costs. Two sets of consumers are engaged by the certification mark: those who purchase certified Indigenous products, and the Indigenous artists themselves who must take up the trademark as a necessary precondition. Although with respect to Indigenous artists, the cost of compliance also has the effect of cutting into the certification mark's commercial value. Assigning costs to individual producers rather than collectives may drag down the value of certification even further, as this disaggregates the cost-benefit decision-making to an individual level, forgoing the benefits of coordination and possible returns to scale. Arguably, the certification mark is inappropriate for an Indigenous audience and ICH subject matter.

Brand as Capital

Brand constructed as a type of intangible capital gained credence as brands came to play a more central role in today's purchasing decisions. In 1988, McKinsey and Company observed this trend in the context of *Fortune's* top 250 companies, where they found that intangible assets held approximately half of each company's market value (Court 1989). Intangible assets are commonly described as "hidden" assets, though this sits uneasily with the primary logic behind branding, which is to be identifiable. Intangible brand assets are perhaps more accurately described as "subliminal," a descriptor that captures the relational and emotional nuances of brand, existing internally and externally to the firm (Arvidsson 2005: 239; Aaker 2004: 11). Complementing this, brand constructed as a type of capital recognizes that brand generates commercial value, though by

means that are not as standard as the factor-input production model.

There are common features between the value-generating capabilities of Indigenous ICH and brand capital. These common features arise because Indigenous ICH and brand assets are strikingly similar in nature. These similarities appear the strongest in the characterizations of Indigenous ICH, in the environmental, Indigenous, intellectual property, and trade paradigms (Table 1). Like brands, these characterizations present relational and emotional nuances, which are based in cultural connection, intergenerational engagement and collective control. These nuances are more apparent through the investigation of how Indigenous ICH and brand assets are "endowed" and "deepened," insofar as they are compatible value generators.

Classical economists believed that capital was endowed, as their economic models assumed that physical capital assets, such as land, labour and machinery, were limited and pre-determined at first instance. This assumption set up the modern-day economic matrix: the allocation of resources to maximize gains, given capital scarcity. These economic models were devised against the backdrop of the agrarian and industrial revolutions, where physical factor inputs, rather than intangible assets, governed methods of production, impacted profit and determined relative prices. Whereas knowledge capital can be attributed to skilled labour, attributing Indigenous ICH and brand assets fails to capture their subliminal nature. Brand and Indigenous ICH are "man-made" in a different way: they are relational, ethno-generated assets rather than implicit to the worker. The relational aspects of brand include goodwill and customer rapport, value-chain relationships, and the corporate social responsibility objectives, which translate into community presence and participation (Zalesna 2013). Companies develop the relational aspects of brand internally, though they face outward.

Brand's buy-in points are also relational as they are points of access for public and private investors and consumers. The relational aspects of Indigenous ICH are based in kinship and community. Indigenous ICH also presents buy-in points, which are internal to clan and culture in some instances. For example, the transmission of TK and cultural expressions is intergenerational

and generally based on initiation rites and autochthonous and continual learning. A buy-in point for externals presents itself in the form of utilization, where commercial or scientific interests can access it, TK associated with physical and genetic resources, or traditional cultural expressions, subject to the bona fide free, prior, and informed consent and on-going benefit sharing. Rejecting the idea of Indigenous ICH as stuck in time is also part of reconceptualizing it as ethno-generated and not as initially endowed. It is the growth of these assets that raises strategic questions about brand and cultural management, addressed with the model in the third section of this paper (“Brand-led Development and Indigenous ICH”).

In complement to the above analysis, capital deepening describes the increase in the quantity of capital available to each worker (Hirota 1979). It is useful in this context because it describes a process whereby the individual (worker) has greater access to capital, whether the rate of interest enables this process or otherwise (Pasinetti 1969; Robinson 1956). There is only limited benefit in analyzing the capital deepening of intangible capital assets, as there are vagaries in quantifying such deepening, and then allocating them among individuals within a community. Nevertheless, there are also distinct advantages to using capital deepening, in a general sense, to describe the effects of increasing the intangible asset holdings per productive individual. Within the brand construct, capital deepening means an increase in the equity and value of a brand, assuming a workforce remains unchanged in numbers. The ability to increase brand equity and, by extension, brand value depends on the resources available to a company; Raggio and Leone (2009) identify R&D investments, market access, monopolized technologies, and strength in marketing and management as determining factors in this pursuit.

If one considers what capital deepening means within the context of the characterization of Indigenous ICH outlined in the first part of this article, it means increasing ICH with reference to quality and quantity, from the point of view of individual clans, per clan member. Increasing the quality and quantity of Indigenous ICH assets denotes such ideas as increasing cultural connection, creativity and control for individuals as well as for the collective.

All such deepening should be regarded holistically as the Indigenous perspective integrates cultural, historical, and environmental concerns (Janke 1998). Increasing cultural connection could mean the rediscovery of a culture’s folklore, the reinvigoration of language and the return of historically removed or economically displaced persons to their homelands. Increasing creativity could mean developing the capacity of people and communities to continue to develop their inherited cultural knowledge, whether through artistic or scientific practice, for commercial or non-commercial purposes. Increasing control could mean strengthening Indigenous governance structures so as to substantiate People’s rights to self-determination through an effective collective-individual responsibility mix. These governance structures, while embedded within culture, also play a role in establishing transparency and accountability from an external point of view. Capital deepening in relation to intangible brand and ICH assets could support product development and exclusivity over strategic or important cultural technologies. It could also support the management of cultural assets which takes into account both their internal and external relational value. If we could merge our understanding of brand assets and Indigenous ICH assets, we would create unique and untapped commercial opportunities for Indigenous ICH without undermining communitarian systems of value.

Brand as Institution

The socio-cultural dimensions of brand and Indigenous ICH fit comfortably within an institutional economic paradigm that views the economy as a system constantly undergoing socio-cultural and technological evolution (Albelda, Gunn, and Waller 1987). Such evolution shapes methods of economic participation and methods of generating value. According to institutional discourse, socio-cultural and technological factors shape economic participation, as markets themselves are the result of “their institutional structure and its history; the interaction of producers, marketers, customers and workers; and the role of social controls” (Fusfeld 2000: 259). Developing this position, the importance of particular markets in the present day are the

result of productive and consumptive practices that have evolved as such due to the power of the “firm,” the government and technological change. Hence, if firms, government policy, and changes in technology shape markets, it must follow that they also shape the value of the goods bought and sold in those markets. The elements that connect market creation with value-generation include cost-efficiency ratios, corporate and social governance structures, and the socio-community objectives specific to the institution.

The relationship between economic participation and the creation of value is impacted by brand. The power of a firm to shape its own and others’ participation is tied to its brand strength and leveraging potential, which allow it to carve out its own market and generate its own demand. Klein notoriously observes that firms focus on this form of power, as brand penetrates the public space and controls consumer choice; multi-nationals do not focus on producing things, they focus on producing image (Klein 2002: 15-26). However, Cook is apt to point out that Klein makes a concession that the hegemony of a particular brand is often due to its encapsulation of “genuinely utopian ideals of the public—for community, diversity, health and wellbeing, even for intellectual advancement and creativity” (Cook 2001: 158), though the firm may not follow through, or may even be discordant, with those ideals. In this way, generating brand value relies heavily on the “meaning-making activity of consumers” (Arvidsson 2005: 239). Meaning-making extends further than consumption; it includes the circulation and repeated integration of brand into lifestyle to the extent that brand achieves emotional significance, facilitates self-expression, and establishes a community of admirers (Muniz Jr and O’Guinn 2001).

Institutional economics resonates with Indigenous ICH, which funnels economic participation through niche markets and generates value by fostering ethical engagement. Timothy and Boyd observe, “heritage has been a key tool for ... regenerating declining urban rural areas” (Timothy and Boyd 2003: 11). Intangible ICH is particularly agile in the way that it colours product, region, and resource with unique interpretations of the human experience. The UNESCO forum recognizes that the human experience is intrinsically valuable; indeed, this

is part of its characterization of Indigenous ICH. However, recognizing this is only a premise in UNESCO’s endgame: the strategic value of the human experience is its universality, which Bokova (2010) identifies as a foothold for cultural exchange and building peace. Indigenous ICH capitalizes on the strategic value of human experience; it creates a monopoly of product, region and resources based on differentiation, and it permeates public and private space because it trades on the universalism of the human experience. Aside from its intrinsic value, Indigenous ICH generates value on the interface where the non-Indigenous engages with the Indigenous and vice versa. This interface provides intellectual and emotional learning opportunities which, if seized, deepen cross-cultural knowledge and create cross-cultural attachment. The vehicle for integrating this new engagement into lifestyle and identity is ethical consumption. Under the lens of institutional economics, the mechanisms of socializing brand and Indigenous ICH are very similar insofar as they rely on meaning produced in the public domain. This supports the development of brand as an access point to Indigenous ICH. The social function of brand as an institution is to provide access points to a way of life that the consumer considers utopic; ethics are an intractable part of this. Brand’s socioeconomic functions, as a signal, as capital and as institution are in-tune with the character of Indigenous ICH discussed earlier. These demonstrable synergies (Table 2) make brand an appropriate industrial tool to holistically and effectively capture and extend the commercial value of Indigenous ICH.

Overview of Synergies between Brand Functions and Indigenous ICH

Brand-led Development and Indigenous ICH.

Indigenous Sustainable Development

This part argues for a commercial brand-led model as a response to the unique sustainable development concerns of Indigenous communities. The sustainable development problem describes an inter-generational allocation problem, which asks how development can meet the needs of the present without compromising the ability

Brand functions	Characterizations of Indigenous ICH
Brand as signal	Utilized or potential to be utilized (by the modern sciences) Associated with physical inputs Tied to geographic provenance
Brand as capital	Cultural connection Managed according to principles of self-determination as a management principle Collective rights and control Continuous from generation to generation
Brand as institution	Form of Cultural Interaction Central to the human condition Creative and intellectual dimension
Table 2	

of future generations to meet their own needs (Brundtland 1987: 15).¹¹ This allocation problem deals with unconventional capital, including social resources (e.g., culture, community, technology) as well as environmental resources (e.g., air, water, and biological diversity) and economic resources (e.g., finance, currency, intangible, and derivative assets). Today's living Indigenous cultures transcend this pillarization, an often-unacknowledged corollary to the "Indigenous as integrated" perspective found in the literature¹² (Adams, Cavanagh, and Edmunds 2008). Hence, Indigenous peoples face a unique and expanded allocation problem of managing their cultural heritage assets, and intangible heritage in particular. The global policy framework for Indigenous ICH emphasizes certain characterizations that must shape the answer to this allocation problem (see Table 1). The noteworthy synergies between Indigenous ICH and brand suggest that brand is an appropriate industrial tool for realizing ICH in a commercial context (Table 2). The question posed now is how to use this tool to address the unique problem of managing Indigenous ICH sustainably. One answer worth exploring is to incorporate brand into a strategy for Indigenous sustainable development. As this is a context-based exercise, the following case study of Cape York Dreaming Track concretizes the role of brand within a development model.

Case Study 2: Cape York Dreaming Track

Cape York Peninsula is at the northernmost tip of the Australian state of Queensland. It covers a region of 140,000 square kilometres, which is slightly bigger than the size of the American state of Connecticut (Australian Conservation Foundation 2012). Cape York is classified as a very remote region, which means that the road distance between populated localities and service centres is between 10 and 15 km (Australian Population and Migration Research Centre 2006). This is not surprising, as only 0.1 per cent of the Australian population live in Cape York. More than 60 per cent of this 0.1 per cent is Indigenous, reflecting the Native Title victories of the 1990s and a series of land hand-backs by the state government. For Indigenous peoples, the consequences of distance, a low population and historical dispossession are an unemployment rate that is triple the state average and palpable welfare dependency.

The Cape York Dreaming Track project creates a platform that allows Cape York's Indigenous peoples to access a level of sustainable well-being. The project recognizes that tourism is the most suitable industry for this cause because it creates wealth and spreads it broadly (Mitchell and Faal 2008).¹³ Furthermore, the decline of mass tourism and the rise of "a more conscientious traveller" holds great prospect for a niche tourism product (Francis-Lindsay 2009: 151). Cape York's tourism

offering should capitalize on the region's comparative advantage in accessible, nature-based, and environmentally responsible tourism and the ability of Cape York's Indigenous peoples to offer diverse, clan-specific ICH product. The project is designed to use a commercial brand-led concept to manage Indigenous ICH sustainably. The Cape York Dreaming Track brand is an umbrella brand, which means that it creates a "branded house ... under which many of its businesses operate" (Aaker and Joachimsthaler 2000: 15). The branded house strategy is advantageous in this instance because it maximizes brand equity across an extensive product offering. It creates a synergistic theme throughout individual and clan group ventures, but it also allows cultural entrepreneurs to retain their own identity through co-branding and sub-branding arrangements. In context, the brand, Cape York Dreaming Track has three strategies: firstly, promoting ethical engagement, secondly, steering cultural investment and entrepreneurship and thirdly, creating a platform for access and benefit sharing. In combination, these strategies enable the sustainable management of Indigenous ICH in Cape York.

Strategy 1: Ethical Engagement

The brand promotes ethical engagement in a similar way to the Fair Trade brand. This means that the brand provides access to a utopic set of values and visibly follows through with them. Like the Fair Trade brand, which "caught the attention of millions of socially and ecologically conscious consumers through ... awareness-raising efforts," the Cape York Dreaming Track brand targets the tourist who is conscious of their impact and looking to make an impact (Young and Utting 2005: 140). Where the Fair Trade model follows through by adding an ethical price markup and providing technological sustainability support, this brand-led model follows through by delivering capacity-strengthening products to the supply-side learning market. By this I mean that the Cape York Dreaming Track project involves Cape York Indigenous people who have the desire to participate in the tourism industry as suppliers of goods or services though they do not have the capabilities or skills to do so. The project responds to this supply-side learning market with products

that engage with Indigenous ICH assets to equip Indigenous people with capacity to create their own tourism products. The project develops cross-market equity. Even if the learning products are not priced, they create social, emotional equity, which can be leveraged to engage the ethical traveller. Leveraging the tourism brand in the learning market creates commercial equity as publicized values and benefit sharing geared toward employment combat the program-fatigue afflicting welfare-dependent communities. The purpose of this first strategy is to carve out a tourism market niche in order to create commercial viability for Indigenous ICH products.

Strategy 2: Cultural Investment

The Cape York Dreaming Track project's second brand strategy uses the umbrella brand concept to steer entrepreneurship and Indigenous investment in their ICH. This strategy recognizes that Indigenous ICH, as a form of capital, is not endowed, though it is ethno-generated and deepened through reinvigoration and robust cultural transmission. The project's brand focuses on the sustainable development problem because it restricts its implementation mechanisms to the tourism industry, and works on strengthening Indigenous capacity in those areas. Merrilees calls this "bringing discipline to innovation" (2007: 406), which has the advantages of efficient resource-use, facilitating opportunity recognition and increasing access to capital. For Indigenous entrepreneurial ventures in tourism, these three advantages support the sustainable management of Indigenous ICH. The brand name, Cape York Dreaming Track, taps into Indigenous aspirations to access livelihoods on their ancestral lands, but also limits their entrepreneurial ventures to those that cluster, physically or theoretically, around the concept of track. This improves resource efficiency because proponents (the firm and the Indigenous clan communities) develop expertise, such that their limited resources are used with deeper understanding and to greater effect. The project brand also facilitates the recognition of business opportunities because it provides a way of seeing: it is easier to identify gaps in the market with a brand-bundled *pro forma* to process the information. Merrilees identifies improved access to capital as a consequence of

“a better branded/more reputable entrepreneur” (408). Though this prospect applies to Cape York Dreaming Track, the project brand, in an Indigenous sustainable development context, trades on reputation and its cross-market equity to increase the project’s access to Indigenous ICH assets. The brand creates access to the real economy, and thereby generates new commercial incentives for Indigenous People to reinvigorate Indigenous ICH. The commercial incentives work with other socio-cultural incentives and customary laws. This incentive mix maintains the quality of Indigenous ICH product, so long as brand works with Indigenous governance and does not undermine it.

Strategy 3: Access and Benefit Sharing Standards

The third strategy uses brand as a platform for access and benefit sharing. This strategy key for managing Indigenous ICH sustainably because it strengthens the Indigenous position in commercial negotiations and provides a contractual vehicle for protecting Indigenous ICH. On its face, the Cape York Dreaming Track umbrella brand strengthens the Indigenous position because Cape-wide clans and communities can leverage it. This creates a form of collective bargaining, operating on the appearance of unity, to strengthen the Indigenous position against external partners or stakeholders. The project brand can also set substantive standards of access and benefit sharing by implementing indigenous cultural and intellectual property protocols. These protocols specify acceptable uses of Indigenous ICH, traditional knowledge and cultural expressions and are flexible in the way that they integrate customary law, intellectual property rights and ethical standards of consultation and benefit-sharing (Janke 2012). These protocols are typically non-enforceable, though they can effectively establish industry standards. One option is to make the protocols contractually enforceable by integrating them into the brand’s licensing and transactional agreements. Another option is to draw on the agility of brand, on par with the agility of Indigenous ICH, to leverage it across product, region, and resource. By extending brand across communities and throughout the tourism industry, Cape York Dreaming Track

can set the rules of trade and shape social norms (e.g., prior informed consent procedures, royalty payments, and technology and skills transfers). In the event that the project produces its own intellectual property, such as cultural maps, tourism literature and other forms of memorabilia, according to appropriate consent requirements, the benefits from sale can be distributed between self-determined, Indigenous governance bodies to acknowledge collective ICH input.

Final Remarks

Indigenous ICH is a crosscutting theme, evoking multiple characterizations among intersecting global forums. At a conceptual level, commercial brand as signal, asset and institution can support these multiple characterizations of Indigenous ICH.

These synergies lay the foundation for unique commercialization models, which capture the value of Indigenous ICH and also strengthen ICH management and protection. These models inexorably engage with the Indigenous sustainable development problematic, which has integrated heritage management at its core. Cape York Dreaming Track is one such model, which responds to an endogenous set of incentives, geographic complexities and tourism options. The practical applications of commercial brand support ethical engagement, foster cross-market equity and deepen the cultural asset base. The legal underpinnings of brand make it a credible and powerful standard-setting instrument.

In conclusion, a commercial perspective delivers holism and flexibility through a branded interpretation of Indigenous ICH. This is advantageous in a policy environment where limbs of international governance seem intent on dissecting Indigenous ICH according to anthropological, scientific, intellectual, and geographic characterizations. At a grass roots level, Indigenous sustainable development projects should consider using brand assets strategically. A brand that is created in conjunction with Indigenous clans and attuned to their ICH can produce durable social gains and commercial opportunities.

Notes

1. Hebblethwaite writes about the intention of the Maasai, the Indigenous people of Kenya and Tanzania, to re-establish control of their ICH where companies use the Maasai image or name. The advantage in doing this is that it creates a potential income stream where the Maasai image or name has been relied on to create a commercial brand. The NGO, Light Years IP has been facilitating Maasai efforts and similar efforts of low-income IP owners throughout Africa via the African IP Trust since 2010.
2. Puri (2000) discusses the conflict between Western and Indigenous customary legal systems: the Western legal system protects private property and an individual's ability to produce economic value, however Indigenous customary law focuses on the importance of property as the basis of collective identity and community-oriented production.
3. Trilling (1972) understands authenticity as originating in the context of a museum, where inanimate objects are displayed and tested by experts, who have attained their cultural knowledge as an outsider to Indigenous or ethnic communities rather than from the inside. Trilling's notion of authenticity is relevant to modern anthropology because it critiques the correlation between what is primitive and what is valuable.
4. The strongest argument referred to by Straus (2000) was advanced by Joseph Stiglitz, Nobel Prize winner (economics). Stiglitz identifies the monopolistic privileges extended by WIPO and accorded to developed countries at the expense of consumers and communities in developing countries.
5. The divide between rich countries (the northern hemisphere) and poor countries (the southern hemisphere) is commonly cited as the reason for the failure of trade talks at Cancun in 2003. Hussain discusses the purposes of Cancun for LDC and DC nations as divergent in terms of the trading patterns, industries, and assurances that were sought on a multilateral and unilateral basis.
6. Yu (2009) presents the legal case for Articles 7 and 8 as public interest and development safeguards. In his argument he suggests that the articles create grounds for a cause of action, as well as operate defensively to intellectual property protections that could be termed unfair, given a particular country's development situation.
7. Access and benefit sharing is international legal terminology, which stemmed from use in the CBD. Since 1992, it has come to refer to protocols and arrangements, which ensure that Indigenous peoples retain fair control over their resources and secure an equitable share in the benefits of commercialization. Access and benefit sharing terms will vary according to parties and context.
8. Cattaneo et al. (2013) document the rise and significance of global value chains: advanced supply chains link regions rather than nation states and are increasingly determined by business rather than government. The involvement of states in these value chains is profitable depending on the value captured by each state at each stage of the chain. It is this preoccupation with involvement and value capture that is reflected in international trade governance and negotiation.
9. Maulik (2012) argues that the TRIPS framework fails with respect to the protection that it offers for traditional cultural marks. While Maulik identifies that geographic indications are advantageous because they last in perpetuity and provide protection to the collective rather than the individual, she has economic and humanitarian concerns. Maulik identifies problems with producers that free ride off geographic indications, undermining genuine producers through competitive pricing.
10. Wood's (2000) work marries the marketing and accounting understandings of brand to take a multidisciplinary approach to the brand construct. The brand construct refers to how analysts conceive the role of brand as a commercial and social asset.
11. The Brundtland report is the seminal document on sustainable development as it articulates, and came to institutionalize, the limits of human development: i.e., the needs of future generations; the state of technology; environmental capacity; and how society is organized to promote citizenship and responsible consumption.
12. See e.g., Battiste and Henderson (2000), Berkes (1999), Francioni (2003-2004), Howden (2001), Janke (1998).
13. Mitchell and Faal's (2008) analysis of pro-poor tourism in The Gambia presents tourism as an economic growth strategy, which has as its main advantage, its effect on wealth distribution and levels of inequality. The success of this strategy depends on its ability to engage small vendors

and producers in the value chain, while at the same time minimizing income leakages beyond the host country or region. This analysis supports the development of tourism initiatives in low-income regions such as Cape York.

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