

These decentralized and widely distributed technologies have arguably wrought what has been termed an economy of plenty – as opposed to the economy of artificial scarcity upon which IP is typically posited.³ This global era is also characterized by far greater connectivity across territorial and political borders.⁴ So we have decisively entered an era of regulatory complexity, change, and pluralism. As legal scholar Julie Cohen states, “[t]he heterogeneity of intellectual production is a feature, not a bug, and that counsels caution about the optimal institutional form for post-industrial property.”⁵

It is no hyperbole, therefore, to state that IP’s foundational assumptions are in crisis. In short, IP has been hacked. Yet IP has to address effectively this decentralized and globalized post-industrial economy, which is driven and shaped by powerful transnational networks. What kinds of legal hacks can be imagined in turn, in response to this hacking of IP?

This chapter explores the paradox that in an era characterized by plenty of information, we are faced with a scarcity of what this chapter terms “smart” information. This scarcity manifests in multiple ways. First, we experience a scarcity of information about the underlying characteristics or processes of IP-protected products, such as information about where components are sourced, and the working conditions of those involved in manufacture. Second, the scarcity is evident in the consumers’ forced reliance on price or brands (and associated marketing) as the primary indicia of the quality or other characteristics of these products. A third major type of scarcity is due to the fact that consumers are usually isolated from the more detailed information that is available to intermediate suppliers and/or wholesalers who often monitor product quality via contractual and other controls. On a related point, individual consumers lack the leverage that large buyers such as Costco or Wal-Mart could wield to compel production of such information from their suppliers. Arguably, all online purchases are purchases in which information about a product may not be evaluated directly by a consumer, and our purchases (whether on or off-line) know more about us than we know about them.

Taken together, these scarcities comprise significant informational gaps. They rise to the level of a collective market failure, where consumers who would strongly prefer to have this type of information available are faced with a dearth of supply across multiple industry sectors. This situation is arguably a violation of consumer civil rights. As Douglas Kysar has argued:

consumers appear to be expressing preferences not merely for the goods that they wish to purchase, but also for the technological and socioeconomic characteristics that they wish to encourage in the economy’s productive sphere. Most notably, consumer concerns seem premised on a recognition that, as Wendell Berry puts it, “how we eat determines, to a considerable extent, how the world is used.” To that extent, dismissing consumer preferences wholesale simply because they pertain to process characteristics seems as unwarranted today as it would have been during earlier periods of consumer activism. Instead, consistent with the premises of a liberal market democracy, the default response of the government to purportedly unreliable process preferences should not be to suppress process information, but rather to expose it to scrutiny and counterargument.⁶

As it is currently constructed, IP law provides insufficient incentives to create and distribute information that might address these informational scarcities. For example, the widespread copyright industry term “content” (as opposed to information or knowledge) suggests some degree of agnosticism as to truth claims. Of course, content includes subjective fantasy, such as *The Hobbit*. Knowledge, by contrast, contains something of objective verifiability in the realm of fact, often generated through institutional means of quality control. From a knowledge (rather than mere content) standpoint, *The Hobbit* is a book written by the author JRR Tolkien. In order to enjoy the fantasy, we may not need or want to know these facts, although some might seek out books by this particular author upon enjoying his other books. We do need facts, however, specifically verifiable information, in order to structure markets for copyright-protected goods and to coordinate transactions within these markets. Copyright law currently verifies authorship and ownership, but little else.

One might expect trademark law to meet some of the challenges posed by these informational scarcities. After all, one of the rationales for trademarks is supposedly to convey a particular consistent quality to the consumers via a mark indicating source of origin or manufacture. Via the trademark, the manufacturer purportedly guarantees the quality of the product or service to which the mark is attached, upon penalty of possible cancellation of the mark on the grounds of abandonment.⁷ But trademark law also falls short. Assessing a product’s quality largely occurs after purchase; even after purchase, consumers will be unable to evaluate many of a good’s less than visible qualities such as whether it was manufactured in an environmentally sustainable manner.⁸ Moreover, the conflation of objective

3. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 466-68 (2015).

4. Keith Aoki, *(Intellectual) Property and Sovereignty: Notes toward a Cultural Geography of Authorship*, 48 Stan. L. Rev. 1293 (1996).

5. Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 Tex. L. Rev. 38 (2015) [hereinafter Cohen, *Property as Institutions*].

6. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 Harv. L. Rev. 525, 592, (2004).

7. See e.g., 15 U.S.C. § 1064(c).

8. Philip Nelson, *Information and Consumer Behavior*, 78 J. Pol. Econ. 311 (1970).

quality measures with subjective marketing methods is well-documented.⁹ The use of certification marks allows a consumer to access more objective information about the standards underlying a particular good, but as described further below, it is a partial and incomplete solution.¹⁰ And trademark law as it is currently interpreted only makes actionable false or misleading credence claims under narrow circumstances.¹¹

If increasingly invested and interactive consumers demand more reliable information, then the challenge is how to offer it more consistently throughout transnational networks. In this regard, verifiable knowledge should be distinguished from mere content somehow.¹² Verifiable knowledge is what this chapter refers to as “smart information.”

Is it possible that IP could more directly facilitate the production of verifiable knowledge, so that markets for IP-protected goods and services take place within a more redundant, reliable, and robust informational exchange? This smart information is already coming into existence outside of IP’s public law frameworks, for example, through private standards, certifications, and protocols and even user reviews.¹³ The Internet as well as other distributed technologies offers more potential platforms for smart information, especially if the power of crowd-sourcing through consumers and non-profit organizations is tapped. We increasingly have the technological means to sculpt our current networked information environment so as to construct smarter information, but perhaps we have not fully grasped the potential of networked solutions to these informational scarcities. Thus in addition to encouraging innovation (which concededly is the core concern of IP), IP must find methods to encourage innovation in providing verifiable knowledge (or smart information) about goods and services.

Rather than abandoning IP, this chapter relies heavily upon a framework of knowledge governance to re-imagine IP’s functions. The term “governance” suggests the possibility of a regulatory apparatus with a broader set of tools than the useful but ultimately limited incentives provided by IP. Throughout this chapter, the vocabulary for knowledge governance relies on

9. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L.J. 1165 (1948).
10. Margaret Chon, *Marks of Rectitude*, 77 Fordham L. Rev. 101 (2009); Jeffrey Belson, *Certification Marks* 5-6 (in Anglo-American law, a “certification mark is statutorily defined, is an indication that goods, or services, in connection with which the mark is used, are certified by the proprietor in respect of origin of material, mode of manufacture of goods, or performance of services, quality, accuracy, or other characteristics.”) (Sweet & Maxwell 2002).
11. J. Shahr Dillbary, *Trademarks as a Media for False Advertising*, 3 Cardozo L. Rev. 327 (2009) [hereinafter Dillbary, *Trademarks*].
12. Paul A. David & Dominique Foray, *Economic Fundamentals of the Knowledge Society*, 1 Pol’y Futures Educ. 20, 46 n. 1 (2003) (distinguishing between “connaissance” and “savoir” in the context of describing tacit knowledge).
13. Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties*, 17 J. Int’l Econ. L. 739 (2014).

the insights of global governance theorists.¹⁴ One of these insights is that regulation does not occur solely through government regulation, but also through governance by information circulating through transnational networks.

Knowledge governance includes a turn away from pure public forms of code-based regulation (often viewed as hard law) and toward softer forms – what some have called “bespoke” IP,¹⁵ others have called “nudge or notice,”¹⁶ and what will be occasionally referred to throughout this chapter as “legal hacks.” The primary legal hack suggested here is to increase the distribution, transparency, and reliability of more objectively verifiable information – in other words, to move the needle from the frequent default position of dumb information towards more consistent creation and distribution of smarter information.

In sum, the main claim of this chapter is that enhancing the market for smart information about IP-protected goods and services inevitably will extend and improve markets for these goods and services themselves. The key is identifying incentives for moving the information about these global goods and services from the category of mere content to robust, verifiable knowledge – that is, from information for dummies to information for cosmopolitans in a global marketplace.

2.2 NOBODY’S PERFECT: THE PRIVILEGED ECONOMIC ASSUMPTIONS OF IP

IP relies on several powerful economic assumptions about information. These assumptions should be familiar to anyone with a passing familiarity with IP, deeply inflected as it is by law and economics. While most understand that these are merely assumptions, we may forget that they are part of necessarily simplifying economic models that guide us away from understanding the reasons for the informational scarcities we face.

One assumption is that we live in a world of perfect information with zero transaction costs.¹⁷ A second is that information will be disclosed unless there is some sort of boundary around it in the form of a legally enforceable

14. Gráinne de Búrca, *New Governance and Experimentalism*, 2010 Wisc. L.Rev. 227, 232 (2010).
15. Cohen, *Property as Institutions*, *supra* n. 5 at 12.
16. M. Ryan Calo, *Code, Nudge, or Notice*, 99 Iowa L. Rev. 773 (2014); Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 83-87 (Caravan 2008) [hereinafter Thaler & Sunstein].
17. So much so that the joke about the economist’s can opener told to me many years ago by my undergraduate economic professor is familiar still. See, Harvard University Press Blog, *On a Desert Island, with Soup* (2012), http://harvardpress.typepad.com/hup_publicity/2012/04/on-a-desert-island-with-soup-schlefer-assumptions-economists-make.html (accessed April 25, 2015).

exclusive right.¹⁸ IP policy-makers often refer to this the public goods problem, which is based upon the idea that information is too easily shared and therefore overly-appropriable without legal boundaries. The short version of the public goods story is that information is non-rivalrous and non-exclusive; therefore innovators and creators require protection in the form of an exclusive right. Thus, the prevailing IP policy framework contends that enforceable IP rights promote incentives for innovation by preventing free-riding. And a third assumption is that consumers act rationally to maximize their self-interest upon the aforesaid platform of perfect information to purchase IP-protected goods that have been thusly incentivized.

These three presumptions (that information is perfect, that it is easily appropriable, and that consumers are rational actors who maximize their individual welfare through fully informed choices) have dominated IP theory, law, and policy in the late twentieth century. Yet because these assumptions and their underlying simplifying models are snippets of a larger, more complex body of competing economic theories, they are also incomplete. IP scholarship has yet to incorporate fully the insights of behavioral and other branches of economics.¹⁹

For example, economists and others have demonstrated that information is not perfect – in fact, far from it. A market for so-called lemons exists because consumers do not always have access to information to make welfare-maximizing choices.²⁰ Not all goods have qualities that are readily observable, and these types of goods have come to be known as “credence goods.”²¹ Relatedly, a buyer may not be able to evaluate a product until after purchase – these are so-called experience goods.²² Whether credence or experience goods, the distance between buyers and sellers in widely

extended global markets also contribute to the imperfect information environment in which these types of goods are evaluated.

Central to this chapter’s claim is that information about attributes of credence or experience goods (hereinafter referred to as credence attributes) is smart information that consumers seek but often do not find about their transactions – a type of informational market failure. For example, agricultural economists have identified unmet consumer demand for information about humane sourcing of beef products.²³ For a large swathe of goods and services, consumers currently are faced with the choice of either an uncertain loyalty toward a particular product’s claims, or with exit via non-purchase or boycott. There are no consistently meaningful avenues to voice demands for or to receive this type of information, except by firms participating in the so-called supply chain.

Significantly, a number of scholars have identified a high potential for fraud or misrepresentation around credence and experience goods by producers of those goods.²⁴ Legal scholar Katherine Strandburg has recently extended this concern to the context of privacy and “free” online advertising. Those who consume the informational good of the Google search engine are not informed about the types of private information conveyed to the website intermediary as a result. For instance, the consumer’s browsing or purchasing habits are collected without permission. In her view, these types of online exchange are analogous to the purchase of more typical credence goods such as organic food.²⁵ In the context of aggressive and arguably invasive online advertising paradigms made ubiquitous by Google,²⁶ combined with the vast quantities of goods (and their exchange conditions) sold online without prior inspection by the consumer, this is an informational market failure of grand proportions.

In more traditional realms of trademark law, the misrepresentation of a product’s credence attributes could be captured within the ambit of actionable unfair competition.²⁷ In *FTC v. Royal Milling*, for example, the U.S. Supreme Court held as misrepresentation the use of the term “milling” to describe flour not sold directly by grinders, even though the physical characteristics of the flour were no different from flour sold directly from

18. Of course, this second premise is derived upon the famous Arrow paradox that the “fundamental paradox in the determination of demand for information, [is that] its value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.” Kenneth J. Arrow, *Essays in the Theory of Risk-Bearing* 152 (Markham 1971).

19. Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 *Stan. L. Rev.* 761 (2013) (discussing implications of behavioral economics for trademark law); Margaret Chon, *Intellectual Property and the Development Divide*, 27 *Cardozo L. Rev.* 2813 (2006) (relying on insights of development economics and capability theory).

20. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 *Quart. J. Econ.* 488 (1970); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics, Part I*, 47(2) *Am. Economist* 6 (2003).

21. Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 *BYU L. Rev.* 1555, 1563 (2010) [hereinafter Katz, *Beyond Search Costs*].

22. Philip Nelson, *Information and Consumer Behavior*, 78 *J. Pol. Econ.* 311 (1970) (distinguishing between search goods and experience goods with the examples a dress, which can be tried on immediately, versus a can of tuna fish, which has to be opened in order for the fish to be evaluated).

23. Nicole J. Olynyk, Christopher A. Wolf & Glynn T. Tonsor, *Labeling of Credence Attributes in Livestock Production: Verifying Attributes Which Are More than “Meet the Eye,”* 5 *J. Food L. & Pol’y* 181 (2009).

24. Dillbary, *Trademarks*, *supra* n. 11; Kyle Bagwell, *The Economic Analysis of Advertising*, 3 *Handbook Indus. Org.* 1701 (2007); Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 *J.L. & Econ.* 67 (1973).

25. Katherine J. Strandburg, *Free Fall: The Online Market’s Consumer Preference Disconnect*, 2013 *U. Chi. Legal F.* 95 (2013).

26. James Gleick, *How Google Dominates Us* (2011), <http://around.com/how-google-dominates-us-2011/> (accessed April 25, 2015).

27. J. Shahr Dillbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 14 *Geo. Mason L. Rev.* 605, 614-619 (2007); *see also* Dillbary, *Trademarks*, *supra* n. 11 at 341-364.

millers.²⁸ Thus the idea of aligning the subjective marketing of a product with its actual objective credence characteristics (as expected by consumers) is not entirely foreign to existing IP legal regimes. However, U.S. trademark law is heavily premised on a “passing off” model of misrepresentation, and does not currently reach false, deceptive or misleading claims made by a firm with respect to its own brands – what legal scholar J. Shahar Dillbary has called intra-brand confusion:

[T]rademark law protects consumers against intra-brand confusion only where the seller is using a descriptive term or a descriptive mark. Such a use is considered to be “false and misleading” under Section 43(a)(1)(B) of the Lanham Act. Trademark law does not protect consumers against the seller who uses a non-descriptive term that gains a secondary descriptive meaning to mischaracterize its own product. ... [T]rademark law does provide a cause of action against Stevita Co. if it decides to use aspartame instead of the plant Stevia but nevertheless affixes the mark Simply-Stevia to its sweetener. Yet, trademark law does not protect the consumer who associates “Splenda” with a sweetener made from sugar if Johnson & Johnson decides to replace sugar with aspartame. ... [C]ourts and commentators are still conceptually captured by traditional inter-brand thinking. Surprisingly, even today, a seller who uses a non-descriptive mark to mischaracterize the nature of its own product in a way that deceives the public is immune from Section 43(a). This anomaly—protecting consumers against false information conveyed by descriptive terms but not fanciful ones—can be attributed to the focus of the scholarship and the courts on the inter-brand function of trademarks.²⁹

This leads to yet another informational market failure – that of market manipulation.³⁰ This is the tendency (or perhaps intent) of firms to take advantage of the cognitive biases of consumers, by exploiting their cognitive tendencies to confirm their initial understandings of what a product is, or to minimize cognitive dissonance, for example.

As a result of these and other gaps caused by over-simplifying theoretical assumptions, smart information is not as pervasively present within these legal frameworks as demanded by the increasing reach of global markets. The concept of credence attributes as a type of informational transaction cost not fully internalized provides a strong basis to introduce

28. See e.g., *FTC v. Royal Milling*, 288 U.S. 212, 216 (1933).

29. J. Shahar Dillbary, *Getting the Word Out: The Informational Function of Trademark*, 41 Ariz. St. L.J. 991, 1025-1026 (2009) [hereinafter Dillbary, *Getting the Word Out*].

30. Jon D. Hanson & Douglas A. Kysar, *Taking Behaviorism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999) [hereinafter Hanson & Kysar, *Taking Behaviorism Seriously*].

alternative quality assurance mechanisms through the provision of smart information. The next section begins to address this problem.

2.3 BUYER BEWARE: THE TRUST MECHANISMS OF GLOBAL VALUE NETWORKS

This chapter approaches global knowledge governance from a particular angle – through what are typically referred to as global supply chains. For reasons that become clearer later in this chapter, I prefer the term *global value networks*.³¹ Various scholars in the areas of international relations, sociology and/or transaction costs economics have focused on governance of products comprised of component parts or processes (components) within these value networks.³² Many of those components are supplied from multiple sources typically situated across different legal jurisdictions.³³ Rather than being regulated solely through territorially-based forms of public law, global value networks are governed by what could be characterized as transnational, private forms of economic governance.³⁴

For example, scholars have identified the degree of standardization (and codification) in global supply chains as a key to moving away from a vertically integrated firm to a less hierarchical and more modular product assembly that draws components from other firms. But of course, outsourcing risks a loss of quality control. Thus standards governing components could be viewed as a type of soft law, typically enforced through private contracts and sometimes incorporated into public law. These standards ensure that suppliers will provide components that comport with intermediate buyers’ (although not necessarily consumer’s) expectations of quality.

Where intermediate component goods bear a lower degree of standardization and/or codification, far flung firms may still have transactional relationships with each other. In this scenario, “network actors control opportunism through repeat transactions, reputations, and social norms ...

31. Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 UC Davis L. Rev. 935 (2014) [hereinafter Chon, *Slow Logo*].

32. Tim Bartley, *Global Production and the Puzzle of Rules*, in *Framing the Global* 229 (Hilary Kahn, ed., Indiana University Press 2014) [hereinafter Bartley, *Puzzle of Rules*]; Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 *Theoretical Inquiries in Law* 1217 (2011) [hereinafter Bartley, *Layering of Rules*]; Tim Büthe & Walter Mattli, *The New Global Rulers: The Privatization of Regulation in World Economy* 21-22 (Princeton University Press 2011).

33. Gary Gereffi & Karina Fernandez-Stark, *Global Value Chain Analysis: A Primer* (Ctr. on Globalization, Governance, and Competitiveness May 31, 2011); Gary Gereffi, John Humphrey & Timothy Sturgeon, *The Governance of Global Value Chains*, 12 *Rev. Int’l Pol. Econ.* 78 (2005) [hereinafter Gereffi, *Global Value Chains*].

34. Büthe & Mattli, *supra* n. 32.

embedded in particular geographic locations or social groups.”³⁵ These control mechanisms include trust, reputation, and mutual dependence through repeated transactions – abbreviated throughout the rest of this chapter as “trust mechanisms.”

Elsewhere I have argued that trust mechanisms should extend to the point where the consumer buys the final product – the proverbial final mile in these value networks.³⁶ Information-generating activity is not controlled fully by a firm’s production, marketing, and distribution efforts. Rather this value-adding (and sometimes value-subtracting) activity by consumers has become increasingly decentralized and distributed in its own right. Market information about a product is often co-created by both firm and user. Consumers of a particular product add tremendous value through communicative activities, whether signaling “like” on a product’s Facebook page, contributing to user reviews, creating so-called “.sucks” websites, or participating in even more active forms of social media.³⁷ Social theorists have characterized these activities as neither production nor consumption, but rather as “prosumption”³⁸ within an informational network of which I have elsewhere coined the term cognitive capitalism.³⁹ Some have termed this informational activity the “attention economy, the aesthetic economy, and the experience economy.”⁴⁰ These value-related activities, however, are forced to over-rely on subjective impressions of a good or service and are starved for more objective measures that might appeal to a rational consumer,⁴¹ such as smart information about credence attributes.

The term “supply” in “supply chain” or “supply network” in the existing literature does not fully account for the value of intangible components often shaped by IP and by the activities of those who are technically not “suppliers” of component parts, such as highly discerning and participatory consumers who are also embedded within these global networks. Nor does the term “chain” within “supply chain” quite describe the myriad directions and scope of global networked transactions. Multiple and

35. Gereffi, *Global Value Chains*, *supra* n. 33 at 8.

36. Chon, *Slow Logo*, *supra* n. 31.

37. *Ibid.*, at 114-116; see also Anne Barron, *Intellectual Property and the Open (Information) Society*, in *Sage Handbook of IP 4* (Matthew David & Deborah Halbert, eds, Sage Publications 2015).

38. George Ritzer & Nathan Jurgenson, *Production, Consumption, Prosumption: The Nature of Capitalism in the Age of the Digital “Prosumer,”* 10 *J. Consumer Culture* 13, 29-30 (2010).

39. Chon, *Slow Logo*, *supra* n. 31.

40. Jonathan E. Schroeder, *Brand Culture: Trade Marks, Marketing and Consumption*, in *Trademarks and Brands: An Interdisciplinary Critique* 161 (Lionel Bently, Jennifer Davis & Jane C. Ginsburg, eds, Cambridge University Press 2008).

41. David Vaver, “*Brand Culture: Trade Marks, Marketing and Consumption*” – *Responding Legally to Professor Schroeder’s Paper*, in *Trademarks and Brands: An Interdisciplinary Critique* 177, 197 (Lionel Bently, Jennifer Davis & Jane C. Ginsburg, eds, Cambridge University Press 2008) [hereinafter Vaver, *Brand Culture*].

nested informational transactions are required in order for these markets to function without a high degree of misrepresentation or fraud. This complex informational environment is not only a feature of the production core but also of the distribution and consumption ends of the network. While different industries have different nodes and relationships between them, the basic need for creating and maintaining trust mechanisms is constant across otherwise disparate global value networks.

The main lesson that can be drawn from this strand of global governance literature is that the decentralized transactions characteristics of global value networks require higher degrees of coordination through standardization. Or where lower degrees of standardization exist, other trust mechanisms must be robust. In these networked environments, the role of smart information would be to convey either that a commonly recognized standard or specific trust mechanism is satisfied.

2.4 COGNITIVE CAPITALISM: INTELLECTUAL PROPERTY IN GLOBAL VALUE NETWORKS

When IP is involved in the production of physical goods and services it exponentially multiplies the networked transactions described above. It complicates the account in the previous sections. IP adds additional intangible layers that do not necessarily track the tangible components or completed goods in predictable ways. Just as a physical product will be comprised of various components (e.g., a semi-conductor chip may be a standardized supply component part of a PC), the IP-protected intangibles add essential value components to many physical and even digital goods. IP may be in the form of trademarks such as “Intel Inside” for a component chip or “Apple” for a tablet, trade dress protection for the outer design of a PC, and/or semi-conductor chip protection for the design of a chip. IP may also be in the form of patent or copyright protection, either of which may be obtained for the software embedded in the hard drive. And in the consumption ends of the global value network, beyond formal completion of a tangible product, other intangible components add value. For example, the formation of intangible business goodwill depends essentially on the activities of firms vis-à-vis sophisticated end consumers.

Legal scholar Julie Cohen describes this phenomenon as “post-industrial property.” The intangible expression or value protected by the exclusive rights of IP is often:

disaggregated—sliced and diced, fractionated and reused, in ways that land could not be. Clips from news programs and popular audiovisual works appear as featured material or background material in documentary and feature films; public performance rights in popular songs are

licensed for synchronization with films, television programs, and advertisements; visual artworks may appear in the promotional materials for arts organizations; and excerpts from creative works of all types routinely appear in so-called user-generated content, such as videos posted on YouTube for the world to see.⁴²

Internet intermediaries add to the intangibility of these intangible layers, with technologies that enable crowd-sourcing, searching, uploading of user-generated content, streaming of content, storage in digital lockers, and the like.⁴³ The supply-centered narratives of IP, which might be described as hierarchical models of control over IP, are being out-sourced towards the so-called Napsterization of things.

What characterizes most of these IP-specific value-related activities is a lower degree of standardization and/or codification than is available via centralized control. That lower degree intrigues transaction costs economists. Recalling from the previous section that even in these relatively infelicitous conditions for out-sourcing and quality control, firms may still have a transactional relationship with other firms as long as trust mechanisms are relatively robust. As a result, these firms may then engage less through vertical control and more horizontally along network nodes where trust mechanisms are present.

Analogously, the transactional environment in IP has moved decisively from purely supplier-oriented narratives of production and distribution. Many creative activities have shifted away from traditional gatekeepers such as publishers, recording studios, and movie studios. These activities have migrated towards the activities of new information platform-based intermediaries and associated value provided by end-users, aided and abetted by the Internet and other distributed technologies.⁴⁴

These decentralized nodes operate within a more capacious value network, which includes not only the value contributed by the component suppliers (artists, inventors, and others) but also the stakeholders involved in the post-production network transactions of distribution and marketing of goods. These stakeholders include consumers and users of the products and services. Significant value-added activities – the marketing and other kinds of attention-gathering activities – are comprised almost entirely of information. However, they are typically not characterized by high degrees of standardization.

Where standardization is low, then trust mechanisms are often embedded throughout global networks, so as to replicate, even if partially, the

quality assurance mechanisms analogous to face-to-face interaction in more localized and physical environments.⁴⁵ End consumers may expect a rough correlation between price and quality. But unlike a giant bricks and mortar retailer such as Wal-Mart, or a digital intermediary such as Amazon, a typical individual consumer does not have the buying power to force the disclosure of varieties of non-price information that s/he or other consumers are interested in knowing.

Assuming that many consumers are not feckless fools but rather somewhat reasonable and discerning purchasers,⁴⁶ they might desire and even demand smart information about credence attributes such as the sourcing of components (Are they made in sweatshop conditions? Are they made from metals sourced from conflict-free zones? Will they help developing economies? Are they environmentally sustainable?).⁴⁷ Consumers could be interested in the specific characteristics of the components (Are they going to last more than a year? Will they have certain chemicals that the consumer is allergic to?), or other attributes that are not immediately observable.

Typically, an end consumer will not have access to the types of product and process specifications that the intermediate buyer/suppliers rely on in their transactions with each other (and even these firms can experience misrepresentation and manipulation, despite trust mechanisms).⁴⁸ So even if one of the attributes of concern to a consumer (e.g., sweatshop conditions) is something that is known to one of these upstream parties, it is usually not transparent to the downstream buyers, including the consumers. This problem of “dumb information” is so pervasive throughout the value network that it is regarded as a natural and given feature of the current information environment.⁴⁹

Just as significant as this opacity about credence attributes to the consumer is the existence of powerful private actors – huge Internet-based intermediaries – whose primary goal is to increase their market share, revenues, and collection of information for vast databases. Moreover, while it is common to claim that the Internet has dis-intermediated previously

45. Gereffi, *Global Value Chains*, *supra* n. 33, at 81.

46. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 Mich. L. Rev. 2020, 2025 (2005); Graeme B. Dinwoodie & Dev. S. Gangjee, *The Image of the Consumer in European Trade Mark Law* 10 (Oxford Legal Studies, Research Paper No. 83/2014, 2014), <http://ssrn.com/abstract=2518986> (accessed October 25, 2015) (assessing the Court of Justice of the European Union’s articulation of the “average consumer”).

47. Daniele Giovannucci, Elizabeth Barham, & Richard Pirog, *Defining and Marketing “Local” Foods: Geographical Indications for US Products*, 13 J. World Intell. Prop. 94 (2010); Open A.I.R. Briefing Note, *Place-Based Branding for Locally Specific Products* (Open A.I.R. 2014), <http://www.openair.org.za/images/Briefing-Note-Place-Based-Branding-for-Locally-Specific-Products.pdf> (accessed April 25, 2015).

48. Eric L. Lane, *Greenwashing 2.0*, 38 Colum. J. Envtl. L. 279 (2013).

49. Margaret Chon, *Sticky Knowledge and Copyright*, Wisc. L. Rev. 177 (2011); Katz, *Beyond Search Costs*, *supra* n. 21.

42. Cohen, *Property as Institutions*, *supra* n. 5 at 2-3.

43. Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User Generated Content*, 11 Vand J. Ent. & Tech L. 841, 846-850 (2009); Edward Lee, *Warming Up to User-Generated Content*, U. Ill. L. Rev. 1459, 1460 (2008).

44. One example of this in the gaming space is Steam, <http://store.steampowered.com/> (accessed April 25, 2015).

analog-based industries, such as the music recording industry, it is equally true that it has created behemoth global digital intermediaries, such as Amazon, Apple, Google, as well as Microsoft. The danger with these current information intermediaries might not be so much the over-decentralized control over information described in this chapter, but rather overly-centralized and selective control over information gathering and distribution via the practice of tracking consumers on websites through ad clicks.⁵⁰

Thus, an informational market failure of immense proportions exists, either through under-production or hoarding of reliable information by stakeholders, combined with possible manipulation of relevant information data sets by dominant network actors.⁵¹ Furthermore behavioral science literature points to the likely incentive for firms to engage in market manipulation through systematic exploitation of cognitive biases against consumer interests. As Jon Hanson and Douglas Kysar point out in the context of products liability law:

Other things being equal, it is in the manufacturer's interest for consumers to have the lowest estimate of product risks possible: The lower the consumer's risk estimate, the more consumers will be willing to pay for the product, leading to greater sales and increased profits for manufacturers. Generating consumer underestimation of product risks in this manner is simply another means of cost externalization, a practice that manufacturers have every incentive to pursue. Manipulation goes further than just minimizing perceived costs, however. Manufacturers can also attempt to shape consumer views of product benefits. That is, manufacturers may also elevate consumer willingness to pay by manipulating the view that consumers have of a product's benefits (as opposed to its costs). In either case, consumer failure to perceive product attributes accurately can lead to undesirable levels of consumption.⁵²

For purposes of this chapter, all of this suggests that many more incentives for the creation and distribution of smart information are needed, to overcome the collective action problem faced by individual consumers. Smart information can function as partial trust mechanisms not only between arms-length transactors, especially consumers and firms, but also among smaller firms that may not be the dominant information intermediaries within a particular value network. Yet reliable trust mechanisms via smart

information are not yet pervasive. End consumers must therefore rely heavily upon proxies for information about credence attributes.

IP, ostensibly concerned with regulation of knowledge, falls short of creating incentives for the production of smart information. For instance, it has long been observed and more or less accepted as inevitable that trademarks often fall within the realm of subjective marketing rather than objective truth objective claims.⁵³ And of course, because trademarks have evolved to reflect both subjective and objective aspects of goodwill, a consumer will buy a product (and its associated brand image) for reasons having to do with the quality of the good (e.g., iPads are reliable as well as fun), but not necessarily. Most conflation of marketing information with reliable information are not viewed as actionable fraud as long as they are not overtly deceptive.⁵⁴

Of course, one of a trademark's primary functions is a rough guarantee of the qualities of a good, especially if the consumer can benefit from repeated purchases in order to experience these qualities. Thereafter, that consumer may then reward the trademark owner for having controlled qualities that the consumer may appreciate and have reason to purchase again. As analyzed above, however, a trademark typically cannot do this important work with respect to embedded credence components and attributes.

The scholarship examining "supply chains" offers important insights that could be extended to the larger question of knowledge governance along global value networks involving IP. It illustrates workable trust mechanisms through the provision of smart information in the middle production core. The challenge is to bring these information systems to the "last mile" of the networks, towards their distribution and especially consumption ends. The next section addresses various legal means to do so.

2.5 KNOWLEDGE GOVERNANCE: SOME LEGAL HACKS

Of course, public institutions might increase regulation to encourage or mandate disclosure of smart information. Or a more varied and nimble set of legal institutions and innovations might operate independently or in synergy within private legal mechanisms such as contract law, tort law, combined with social norms. End-user license agreements (EULAs) and open source licenses are recent examples of private ordering approaches in the copyright space. According to Cohen, IP consists of "heterogeneous, resource-dependent set of legal and institutional forms shaped by the constraints [and

50. Strandburg, *Free Fall*, *supra* n. 25; Gleick, *How Google Dominates Us*, *supra* n. 26.

51. Foo Yun Chee & Eric Auchard, *EU Antitrust Case against Google Based on 19 Complainants: Sources*, Reuters (April 25, 2015), <http://www.reuters.com/article/2015/04/24/us-eu-google-antitrust-idUSKBN0NF1YX20150424> (accessed April 25, 2015).

52. Hanson & Kysar, *Taking Behaviorism Seriously*, *supra* n. 30 at 724-725; Sheff, *supra* n. 19; but see Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 Tex. L. Rev. 507 (2008) (skeptical of benefits of cognitive science in dilution litigation).

53. Vaver, *Brand Culture*, *supra* n. 41; Brown, *supra* n. 9.

54. Brown, *supra* n. 9.

possibilities] of evolving technology and political economy.”⁵⁵ Especially in periods of extreme dynamism, such as our current technological era, she claims that IP requires a more varied set of legal institutions to manage knowledge resources. She sees evidence of the evolution of IP institutions, for example, in the proliferation of EULAs as “bespoke entitlements”⁵⁶ that alter the nature and distribution of knowledge in the direction of proprietary content. Another example of a bespoke entitlement might be a Creative Commons license, which re-sets the default license options in copyright in order to promote open content.⁵⁷

Analogously, the “legal hacks” suggested in this section have the objective of increasing transparency and verifiability of information-embedded goods, so as to create reliable trust mechanisms via smart information. What follows is not meant to be a comprehensive prescription, but rather some starting suggestions.

Public institutions can exert a powerful impact, in their roles not only as standard-setters but also as conveners and facilitators of information markets. Pursuant to various U.S. statutes, various federal agencies mandate in some manner disclosure of smart information.⁵⁸ Under provisions of the 2010 Affordable Care Act, for example, chain restaurants with at least twenty U.S. locations must display calorie information on their menus.⁵⁹ Additionally, in March 2014, the FDA released revised nutrition fact label requirements, with the goal of implementation by 2017, that mandate calorie content be displayed more prominently.⁶⁰ These labeling initiatives in the U.S. and similar activities in other countries exemplify the recognition that smart information is critical to consumption in global value networks of particular goods and services.⁶¹ Some states and other local governments within the U.S. have also demanded more information about supply chain management within the decentralized global setting described in this chapter. For example, California recently passed the Transparency in Supply Chains Act (TSCA),

which requires companies to disclose whether their operations are free from human trafficking.⁶²

Private non-profit and non-governmental organizations (NGOs) provide complementary oversight through various means intended to increase the level of consumer awareness about credence attributes. Some of these NGOs may have started as voluntary industry initiatives, or have ties to the for-profit sector. One example of this is Social Responsibility International (SRI), which certifies apparel manufacturers for compliance with voluntary industry standards regarding factory safety.⁶³ Other NGOs work independently of industries they monitor, as illustrated by a recent report from Oxfam about agricultural sourcing.⁶⁴

Private NGOs may also work hand in glove with public agencies. For example, the California TSCA compels disclosure of certain forms of information by companies that are engaging in the global out-sourcing of manufacture and production, specifically, whether they engage in audits and can certify to voluntary standards.⁶⁵ The statute itself does not compel the audits or the adoption of standards themselves – those auditing and certification activities are still voluntary. NGOs have piggybacked on these initial public disclosure requirements, to monitor the degree of compliance by covered firms.⁶⁶

Finally, some for-profit firms have begun to disclose their sourcing information as part of their marketing strategies.⁶⁷ Some of these companies have even created a brand around being able to trust the source and quality of goods – for example, to be made under fair labor conditions – and have provided means for consumers to evaluate such information. However, some firms refuse to disclose sourcing information for fear of losing competitive advantage through disclosure of trade secrets, for example.⁶⁸ This concern could be addressed more directly, perhaps through the use of third party verification intermediaries.

55. Cohen, *Property as Institutions*, *supra* n. 5.

56. *Ibid.*, at 42 and 44.

57. Creative Commons, <http://creativecommons.org/> (accessed June 27, 2015).

58. See e.g., Federal Trade Commission, Enforcement Policy Statement on U.S. Origin Claims (December 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims> (accessed April 25, 2015). Other examples include the Textile, Wool, and Fur Act (enforced by the Federal Trade Commission), Tracking Label for Children’s Products (enforced by the Consumer Product Safety Commission), and the Food Modernization Act (enforced by the Food and Drug Administration).

59. Jason P. Block & Christina A. Roberto, *Potential Benefits of Calorie Labeling in Restaurants*, 312 JAMA 887 (2014).

60. *Ibid.*

61. Vaver, *supra* n. 41, at 195.

62. Cal. Civil Code 1714.43 (2010), <http://codes.lp.findlaw.com/cacode/CTV/5/d3/3/s1714.43> (accessed April 25, 2015).

63. Chon, *Slow Logo*, *supra* n. 31.

64. Oxfam, *Behind the Brands Methodology Summary* (2014), <https://www.oxfam.org/en/research/behind-brands-scorecard-methodology> (accessed April 25, 2015).

65. Cal. Civil Code 1714.43, *supra* n. 62.

66. The Corporate Social Responsibility Newswire, *85 firms still “silent” on California Transparency in Supply Chains Act* (February 12, 2014), http://www.csrwire.com/press_releases/36712-85-firms-still-silent-on-California-Transparency-in-Supply-Chains-Act (accessed April 25, 2015).

67. In the apparel industry, the brand PATAGONIA founded by Yvon Choinard is often cited as an early innovator in this regard. Its current website has what it calls a footprint of its suppliers. Patagonia, <http://www.patagonia.com/us/footprint> (accessed April 25, 2015).

68. See, Chapter 10 Sharon K. Sandeen, *Trade Secrets Plus (or Minus?): A Report on International Harmonization Efforts*, in this volume.

Agreement,² the Berne Convention,³ and the Paris Convention.⁴ Such international laws ensure that comparable standards of protection for copyright works and trademarks are available in all Member States – a significant advantage in this internet age in which global trading has become the norm.

By contrast, events management laws tend to provide extensive protections for words and combinations of words, symbols, and logos that a commercial sponsor or managing body claims to own; they do not require originality or distinctiveness to be established in such words, symbols and logos before they can be protected; and the events management laws have only a tenuous link with the public good – which can be summed up as the holding of a major sporting event in any particular country. Most significantly, apart from international regulation of the Olympic Games and the Olympic brand by the Nairobi Treaty and certain other quasi-legal instruments,⁵ events management laws are domestic laws that are developed independently in individual countries and are not the subject of any international treaties or conventions. The lack of international consistency and regulation in domestic events management laws can be problematic in the internet age given the rapid advancement of technology. For instance with the advent of high quality digital cameras and internet video streaming it is now relatively easy for pirate broadcasting to occur over the internet. Thus if a sporting event in country B is broadcast or made available on the internet in country C, which has not passed relevant events management laws for that event, there will no doubt be much ambush marketing from traders in country C. ‘Ambush marketing’ describes the activity of marketers who take advantage of an event without paying sponsorship fees. Ambush marketing takes two primary forms. In the first, ‘ambush marketing by intrusion’ the marketer intrudes into the event itself to advertise its products and brands, for example, by flying a blimp over a sports ground bearing the logo of a competitor of a main sponsor of the event.⁶ In the second, ‘ambush marketing by association’ an advertiser attempts to create the impression in

2. Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].
3. Berne Convention for the Protection of Literary and Artistic Works (last amended 28 September 1979), 1161 U.N.T.S. 31 [hereinafter Berne Convention].
4. Paris Convention for the Protection of Industrial Property (1883, last revised 1967), 828 U.N.T.S. 305 [hereinafter Paris Convention].
5. Nairobi Treaty on the Protection of the Olympic Symbol (adopted 26 September 1981), the Olympic Charter and the Olympic Marks and Imagery Usage Handbook [hereinafter Nairobi Treaty].
6. Richard Blackburn, *Holden blimp ‘un-Australian’* (The Sydney Morning Herald, 10 November 2006), <http://www.smh.com.au/news/news/holden-blimp-unaustralian/2006/11/09/1162661818418.html> (accessed 2 November 2015).

the public’s mind that it is an authorised sponsor of the event. For example, the advertiser could use a logo or symbol similar to the sponsor’s logo, offer a prize draw that included tickets to the event, or even cleverly allude to the event by using imagery of rugby goal posts when the rugby world was in progress.

In this chapter we first describe the international regulatory regime for the Olympic brand and contrast this with domestic laws which have been developed, seemingly on an ad hoc basis, to prevent ambush marketing activities in relation to other sporting events. We then explain why events management laws should be viewed as sui generis laws which are positioned alongside but not within the traditional intellectual property regime. That being so, and acknowledging that many sporting events are now made available on the internet, we argue that international consistency for events management laws should be an objective. We then consider whether the 1981 Nairobi Treaty should be replaced, or extended, by a more expansive international agreement which sets out minimum requirements but also mandates limits to the levels of protection that may be provided to symbols, emblems and words associated with major sporting events.

6.2 INTERNATIONAL PROTECTION FOR THE OLYMPIC BRAND

The Nairobi Treaty is limited in scope to the Olympic movement. It requires Member States to prohibit the use of the Olympic symbol for commercial purposes and to deny any application to register the Olympic symbol as a registered trade mark, except with the authorisation of the International Olympic Committee (‘IOC’).⁷ In addition to the Nairobi Treaty (which admittedly is somewhat weak and cannot be enforced until individual Member States introduce appropriate legislation in their countries), there are two other important documents which regulate the Olympic Games and the Olympic ‘brand’. The Olympic Charter (‘the Charter’) describes itself as a constitutional document which serves as a statute for the IOC and also defines the rights and obligations of International Federations and National Olympic Committees as well as the Organising Committees for the Olympic Games.⁸ Each of these afore-mentioned bodies is required to comply with the Charter, such compliance being monitored and policed by the IOC, presumably under the auspices of contract law. For example, Rule 50 of the Charter

7. Nairobi Treaty, *supra* n. 5, Art. 1. Article 2 provides exceptions for prior use and prior registration and permits use of the Olympic symbol in mass media for purposes of information on the Olympic movement or its activities. For an interesting history of how the Nairobi Treaty came into being see, Robert K. Barney, *An Olympian Dilemma: Protection of Olympic Symbols*, 10 J. Olympic Hist. 7 (2002).
8. International Olympic Committee, *Olympic Charter* 9 (as modified by the 125th IOC Session in Buenos Aires, 9 September 2013) [hereinafter Olympic Charter].

and its bylaw prevent any advertising by non-IOC approved businesses or non-commercial entities in or above any stadia, venues and other competition areas.⁹ Moreover the rule extends beyond commercial matters as it purports to prevent demonstrations or political, religious or racial propaganda in Olympic sites, venues and other areas.¹⁰ The bylaw does, however, allow for the limited use of manufacturers' names and logos, provided the manufacturers' identification is not marked conspicuously for advertising purposes.¹¹ The bylaw goes on to carefully detail exactly what is and what is not allowed for the purposes of manufacturers' identification. For example, for headgear, which includes hats, sunglasses and even gloves, manufacturers' identification must be smaller than 6 square centimetres.¹² The bylaws go on to provide that for a contract of the Olympic Committees for the Olympic Games (OCOG) containing any element of advertising, including the right or licence to use the Olympic Games emblem or mascot, to be valid, the contract must confirm with the Olympic Charter.¹³ And if a mascot is created for the Olympic Games, the mascot is considered to be an Olympic emblem.¹⁴ Positive duties are imposed on the OCOG as it is required to ensure the protection of the Olympic emblem and mascot, both nationally and internationally.¹⁵ Moreover the OCOG and, after the OCOG has been wound up, the National Olympic Committee, is entitled to exploit the emblem and mascot as well as other paraphernalia such as badges, posters, objects and so on connected with the Olympic Games until the end of the calendar year during which the Olympic Games are held.¹⁶ On the expiry of that period all rights relating to the emblem, mascot, badges, posters, objects, and other material belong entirely to the International Olympic Committee.

Although the Rules in the Charter appear rigorous and even overly thorough,¹⁷ for the prevention of any lingering doubt the IOC also produces the Olympic Marks and Imagery Usage Handbook ('the Handbook'), which is intended to address ambush marketing by providing additional guidance and regulation on the use of the marks and imagery of the IOC.¹⁸

Countries that host the Olympic Games may already have in force permanent legal protections for the Olympic symbols and brands. In addition, or alternatively, they will generally pass temporary domestic legislation that complies with the Nairobi Treaty, the Charter and the

9. *Ibid.*, Rul. 50(2).

10. *Ibid.*, Rul. 50(3).

11. *Ibid.*, Bylaw to Rul. 50, Bylaw 1.

12. *Ibid.*, Bylaw to Rul. 50, Bylaw 1.3.

13. *Ibid.*, Bylaw to Rul. 50, Bylaw 2.

14. *Ibid.*, Bylaw to Rul. 50, Bylaw 3.

15. *Ibid.*, Bylaw to Rul. 50, Bylaw 4.

16. *Ibid.*

17. For critique, see, Daniel A. Craig, *Bad Sports: Has Olympic Brand protection Gone Too Far?*, 9 S.C. J. Intl. L. & Bus. 375 (2013).

18. International Olympic Committee, *Olympic Marks and Imagery Usage Handbook* (1997).

Handbook. A commentator warns that domestic legislation, ostensibly designed to comply with the IOC's requirements, is in reality becoming even more expansive.¹⁹ First, there is a trend in more recent Olympic legislation to contain provisions preventing the use of ordinary words which are not directly related to the Olympic brand. These include, for example, the combination of any of the words 'games', 'Two Thousand and Twelve', '2012' and 'twenty twelve' with each other or with any of the words 'gold', 'silver', 'bronze', 'London', 'medals', 'sponsor' and 'summer' during the 2012 Olympic Games in London.²⁰ The London Olympic Games and Paralympic Games Act 2006 extended the existing permanent protections for the Olympic symbols contained in the Olympic Symbol etc. (Protection) Act 1995 (UK) to include preventing 'the use of any word so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or the Olympic movement'.²¹ Second, National Olympic Committees are clamping down on non-commercial use of the Olympic brand, such as 'the knitting olympics' and a children's camp called 'Camp Olympic', and also on clever shop displays such as the London butcher who created Olympic rings made out of sausages²² and in New Zealand, Telecom which produced an ingenious play on the Olympic Rings by using the word RING in the colours and placement of the Olympic symbol.²³

Arguably, the recent expansion of laws protecting the Olympic Games has provided a useful model for events management laws protecting other sporting events. But it is not clear that the strengthened protections for the Olympic brand are proportionate and necessary to any perceived threats to that brand. Alternatively, as has been argued, are such protections too broad, contrary to the Olympic spirit and against the public interest?²⁴ Are they therefore an inappropriate model for other events management laws?

6.3 DOMESTIC EVENTS MANAGEMENT LAWS

Although events management laws in regard to other sporting events differ in detail and scope from country to country, they do have important common features. In particular they set out to address two kinds of ambush marketing. The first is "ambush marketing by intrusion", which is the practice of marketers making use of the opportunity of a major event that is sponsored by another marketer to advertise their own products or brands to the participants and audience of that event. For instance, a company which is not

19. Craig, *supra* n. 17, at 395-398.

20. The London Olympic Games and Paralympic Games Act 2006.

21. *Ibid.*, sch. 3 cl. 3(1).

22. Craig, *supra* n. 17, at 416-417.

23. *The New Zealand Olympic and Commonwealth Games Association Inc v. Telecom New Zealand Limited* [1996] FSR 757.

24. Craig, *supra* n. 17.

an official sponsor of an event might pay people to attend the event wearing clothes which represent that company to the public – such as the mass attendance of women wearing orange dresses paid for by the brewery company, Bavaria, at one of the 2010 FIFA World Cup games. The second kind, “ambush marketing by association”, is the practice of marketers creating the impression in the public’s mind that they are authorised sponsors or organisers of the event. For instance they might use a logo or symbol to advertise their product that is similar to the authorised sponsor’s registered trade mark, or they might run a competition or raffle for which the prizes are tickets to the sporting event.

Ambush marketers are careful to ensure that their advertisements do not infringe trade mark or copyright laws. Whilst their activities might be in breach of consumer laws and/or of common law doctrines such as passing off and, in New Zealand, the Fair Trading Act 1986, the requirement for a complainant to provide survey evidence of consumer confusion and, for passing off, evidence of damage or likely damage, imposes time constraints on such actions. In essence, by the time evidence has been collated and an action can be taken to court, the event itself is likely to be past history. Companies are likely to view any damages they may have to pay after the event as being simply a necessary expense – in the meantime they will have obtained valuable exposure to the public by their ambush marketing techniques. Therefore, as part of the extensive protection given to events under the events management laws, officials may be given greater powers. South Africa, for example, went so far as to create 56 FIFA World Cup Courts staffed by 1,500 people including magistrates, prosecutors, defence lawyers and interpreters.²⁵

Events management laws are divided into two main types, the first, and least common, are events management laws that are generic to all events that qualify in a particular country. For example, in New Zealand the Major Events Management Act 2007 has been used for a diverse number of events that include soccer,²⁶ basketball,²⁷ rowing,²⁸ cricket,²⁹ rugby³⁰ and even ocean racing.³¹ The second type of event management laws are pieces of legislation that protect one (and sometimes two) specific sporting events. Examples include the Sydney 2000 games (Indicia and Images) Protection Act 1996;³² London Olympic Games and Paralympic Games Act 2006

25. Marina Hyde, *World Cup 2010: Fans, robbers and a marketing stunt face justice, Fifa style* (The Guardian, 20 June 2010), <http://www.theguardian.com/football/2010/jun/20/world-cup-2010-fans-marketing-justice-fifa> (accessed 3 November 2015).

26. FIFA Under-17 Women’s World Cup 2008.

27. FIBA Under-19 Men’s Basketball World Championships 2009.

28. World Rowing Championships 2010.

29. Under-19 Cricket World Cup 2010 and Cricket World Cup 2015.

30. Rugby World Cup 2011.

31. Major Events Management (Volvo Ocean Race Auckland Stopover) Order 2012.

32. 2000 Sydney Olympic Games.

(UK),³³ ICC Cricket World Cup West Indies 2007 Act;³⁴ Olympic and Paralympic Marks Act 2007 (Can);³⁵ and the Glasgow Commonwealth Games Act 2008.³⁶

6.3.1 EVENTS MANAGEMENT LAW IN NEW ZEALAND

The following brief analysis of New Zealand’s Major Events Management Act 2007 (MEMA) reveals many similarities to trade mark and copyright laws. However, the MEMA contains little evidence of the balance between protecting the public interest and supporting private property rights which underpins intellectual property laws.³⁷

The initial declaration of a forthcoming event to be a major event is made by Order in Council on the recommendation of the Economic Development Minister, after consultation with the Commerce Minister and the Sports Minister.³⁸ The Economic Development Minister may only make a recommendation if “the Minister is satisfied that the event organiser has the capacity and intention to successfully and professionally stage and manage the event and will use all practicable measures available under the existing law to prevent unauthorised commercial exploitation of the major event and to protect its intellectual and other legal rights”.³⁹ In addition, before the Minister makes a recommendation the Minister must take certain factors into account.⁴⁰ The key factors being that the event will: generate significant tourism opportunities for New Zealand;⁴¹ attract significant sponsorship and international media coverage;⁴² attract large numbers of New Zealanders as participants or spectators;⁴³ and offer substantial sporting, cultural, economic, or other benefits for New Zealand or New Zealanders.⁴⁴

The above requirements appear to be reassuringly stringent and indicate that the declaration of an event to be a major event will be made only in limited circumstances and with the utmost care. However, the list of events that have been declared to be major events since the MEMA came into force in 2007 indicates a more laissez-faire attitude has been adopted by the Minister. Examples include the IRB Junior World Championship 2014; the

33. 2012 London Olympic and Paralympic Games.

34. 2007 Cricket World Cup.

35. 2010 Vancouver Winter Olympic Games.

36. 2014 Glasgow Commonwealth Games.

37. For discussion see, Susan Corbett & Yvonne van Roy, *Events Management in New Zealand: One Law to Rule Them All?*, 4 J. Bus. L. 338, 362 (2010).

38. Major Events Management Act 2007, s. 7(1).

39. *Ibid.*, s. 7(3)(c)(i) and (ii).

40. *Ibid.*, s. 7(4).

41. *Ibid.*, s. 7(4)(a).

42. *Ibid.*, s. 7(4)(d).

43. *Ibid.*, s. 7(4)(e).

44. *Ibid.*, s. 7(4)(f).

Cricket World Cup 2015; the FIFA U17 Women's World Cup 2008; the FIBA U19 World Championship 2009; the U19 Cricket World Cup 2010; the World Rowing Championships 2010; and the Rugby World Cup 2011.

Similarly to trade mark law and copyright law the MEMA protects words and emblems for a certain (albeit more limited) term. However unlike trade mark law, the MEMA does not require a word or emblem to be 'distinctive' in order to qualify for protection.⁴⁵ In addition, unlike copyright law which requires that an artistic work is original before it can be protected by copyright,⁴⁶ the MEMA has no such requirement.

The MEMA provides for an Order in Council declaring protections for certain words, combinations of words, and emblems that are declared to be major event emblems or major event words.⁴⁷ There are two key criteria for recommending such protection. First, that the Economic Development Minister has consulted with Commerce Minister, the major event organiser, and persons whom the Economic Development Minister considers are likely to be substantially affected by the recommendation.⁴⁸ The MEMA, does not, unfortunately, provide any guidance regarding the persons who are likely to be considered "to be substantially affected by the recommendation." Indeed, the MEMA provides that a failure to consult persons in the last category will not affect the validity of an Order declaring an emblem or words to be a major event emblem or words.⁴⁹

The second criterion is that the Economic Development Minister is required to take into account the extent to which, in relation to the major event, emblems and words require protection in order to:

- (a) obtain maximum benefit for New Zealanders;
- (b) prevent unauthorised commercial exploitation at the expense of either a major event organiser or a major event sponsor.⁵⁰

The protection period for any particular major event can begin at any time prior to the major event itself but must end by thirty days after the completion of all major event activities. The Major Events Management (Cricket World Cup 2015) Order 2013 declares the protection period for the

45. Trade Marks Act 2002, s. 18(1)(b), 'The Commissioner must not register ... a trade mark that has no distinctive character'. See also TRIPS Agreement, Art. 15(1) where for a sign, or any combination of signs, to be capable of constituting a trade mark, it must be capable of distinguishing the goods or services of one undertaking from those of other undertakings. And where signs are not inherently capable of distinguishing the relevant goods or services, it is permissible for Member States to make registrability depend upon distinctiveness acquired through use of the sign.

46. Copyright Act 1994, s. 14(1), 'Copyright is a property right that exists, in accordance with this Act, in original works ...'.

47. Major Events Management Act 2007, s. 8(1).

48. *Ibid.*, s. 8(2).

49. *Ibid.*, s. 8(4).

50. *Ibid.*, s. 8(3).

Cricket World Cup 2015 to start on 20 December 2013 and to end on 15 April 2015. The Major Events Management (FIFA U-20 World Cup New Zealand 2015) Order 2014 declares the protection period for the FIFA under-20 World Cup to start on 10 July 2014 and to end on 20 July 2015. The Order declares (and depicts) one major event emblem, eighteen words or combinations of words, and fifteen other words, if used in combination with the word 'football' or the word 'soccer'.⁵¹

Section 10 of the MEMA addresses the practice of ambush marketing by association as follows:

No person may, during a major event's protection period, make any representation in a way likely to suggest to a reasonable person that there is an association between the major event and

- goods or services; or
- a brand of goods or services; or
- a person who provides goods or services.

Section 13 creates a criminal offence, punishable with a fine of up to NZD 150,000, for knowingly breaching section 10 or for importing, selling, or possessing for sale goods which are in breach of section 10. For example, in 2010 a company and its directors were successfully prosecuted under the MEMA for importing 1,374 counterfeit Rugby World Cup tee-shirts.⁵² A court may presume that a representation is in breach of section 10 if it includes a major event emblem, word or words, or a representation that so closely resembles a major event emblem, word or words, as to be likely to deceive or confuse a reasonable person.⁵³ This presumption applies even if the representation is qualified by words like 'unauthorized' or 'unofficial', or other words that are 'intended to defeat the purpose of the provision'.⁵⁴

The ambush marketing by association provisions in the MEMA diverge from trade mark law in two respects. First, the MEMA permits the removal of words and emblems from the public domain during a major event's protection period, without any requirement to consider the effect upon other legitimate users of those words (for this reason a registered trade mark is required to be 'distinctive'⁵⁵ and not descriptive of the particular goods and services it is intended to identify).

Second, the threshold of proof required to establish an offence under the MEMA is lower than that required to establish infringement of a registered

51. Major Events Management (FIFA U-20 World Cup New Zealand 2015) Order 2014, schs 1 and 2.

52. Chapman Tripp, *Major Events Management Act: All Black (and White), or Grey?* (2011), <http://www.chapmantripp.com/publications/Pages/Major-Events-Management-Act-All-black-and-white-or-grey.aspx> (accessed 3 November 2015).

53. Major Events Management Act 2007, s. 11(1).

54. *Ibid.*, s. 11(2).

55. Trade Marks Act 2002, s. 18.

trade mark.⁵⁶ In trade mark law if there is similarity, but not identicalness, of an unauthorised mark to a registered mark and/or the class of goods and services in respect of which the registered mark is registered it must be proven that the use of the challenged mark in trade would be 'likely to deceive or confuse'.⁵⁷ The question of whether there is 'likelihood of confusion or deception' requires proof to the balance of probabilities and is one of fact, often requiring evidence such as consumer surveys to be provided to the court. The question is not straightforward and has led to much case law.⁵⁸

The MEMA takes a much more aggressive approach than registered trade mark law. Although section 11 of the MEMA also requires that a representation which resembles (but is not identical to) a major event emblem, word or words, must be likely to deceive or confuse a reasonable person, the proof and manner of enforcement of this provision is very different from trade mark law. The MEMA empowers the chief executive of the Ministry of Economic Development to appoint enforcement officers⁵⁹ who are required to identify breaches or potential breaches of (*inter alia*) section 10 and section 13,⁶⁰ to seize or cover (including by force) representations in breach of section 10,⁶¹ and to issue formal warnings.⁶² The criteria for an enforcement officer to take one of these steps is simply a belief on reasonable grounds that the relevant breach has occurred or will occur.⁶³ Provided an enforcement officer acted in good faith, in a reasonable manner and with the reasonably held belief that the prerequisites for the exercise of the power had been satisfied, no action lies against the officer.⁶⁴

Elements of copyright law have also been emulated and expanded in the MEMA. It provides extensive protection for major event words and emblems for the declared protected period of a major event which, as noted earlier, can be several years. There is no originality requirement for the conferment of protection. In contrast, copyright law protects neither single words,⁶⁵ nor,

usually, one word in combination with one or two other words, generally because they will be deemed too trivial to be literary works.

Words and emblems related to the Olympic Games and Commonwealth Games are permanently protected from unauthorised use.⁶⁶ Such protection of Olympic and Commonwealth words and symbols is typical internationally.⁶⁷ Although similar arguments to those made regarding major event words and emblems could be raised in regard to the permanent removal of Olympic Games and Commonwealth Games words and emblems from the public domain, the justification is likely to be that the games merit such protection because they are truly international events of great significance to the public. In addition, the Olympic Games are, arguably, an event 'in the public interest', due to the permanent sporting structures which often remain in place for the benefit of local communities after the event itself – and hence there is a more sound rationale for providing restrictive legislation to protect the sponsors and organisers.⁶⁸

The MEMA contains certain exceptions to the protections for both major event emblems and words which have temporary protection (i.e., during the period of a major event) and for permanently protected emblems and words (relating to the Olympic and Commonwealth Games).⁶⁹ However, while the MEMA's exceptions are similar to the fair dealing exceptions in the Copyright Act 1994, the Copyright Act does not restrict the *categories* of persons who may make use of the fair dealing provisions.⁷⁰ Conversely section 30(d) of the MEMA, which relates to the use of words and emblems which have permanent protection, permits the display, exhibition, or use of a permanently protected emblem or word:

for the purposes of, or associated with, the reporting of news or criticism or a review in a newspaper or magazine, or by means of television, radio, film

the Internet or other means of reporting by a person who ordinarily engages in the business of such reporting.

enjoyment', per Stephenson LJ at 143; '[the word Exxon] conveys no information; it provides no instruction; it gives no pleasure that I can conceive' per Oliver LJ, at 144.

66. Major Events Management Act 2007, ss 28-34.

67. See e.g., Olympic Insignia Protection Act 1987 (Australia) and Patriotic and National Observances, Ceremonies and Organizations, title 36 § 220506 (US).

68. But this rationale is not without its critics. See for example, Andrew Zimbalist, *3 Reasons Why Hosting the Olympic Games Is a Loser's Game* (The Atlantic, July 23, 2012), <http://www.theatlantic.com/business/archive/2012/07/3-reasons-why-hosting-the-olympics-is-a-losers-game/260111/> (accessed 3 November 2015).

69. Major Events Management Act 2007, ss 12 and 30.

70. The term 'fair dealing' here refers to the general fair dealing sections under the Copyright Act 1994, s. 42 (criticism, review, and news reporting) and s. 43 (research and private study).

56. *Ibid.*, ss 89-91.

57. *Ibid.*, s. 89(1)(b) and (c).

58. See e.g., *Lacoste v. Crocodile International Pte Ltd* [2014] NZHC 2349, at para. 50 to 55, and *Automobile Club de L'Ouest, ACO v. South Pacific Tyres New Zealand Ltd HC Wellington*, CIV-2005-485-248, 23 March 2006, at para. 12 to 15.

59. Major Events Management Act 2007, s. 38.

60. *Ibid.*, s. 40(a).

61. *Ibid.*, s. 42.

62. *Ibid.*, s. 46.

63. *Ibid.*, ss 42 and 46.

64. *Ibid.*, s. 47.

65. While it is arguable that the English Court of Appeal in *Exxon Corp. v. Exxon Insurance Consultants International Ltd* [1982] Ch. 119 did not say expressly that there can be no copyright in a single word, the Court was clear that it would be almost impossible for a single word to be protected by copyright. 'A literary work would be something which was intended to afford either information and instruction, or pleasure in the form of literary

Curiously, section 12(d)(iii) of the MEMA, which relates to major events whose words and emblems have temporary protection, contains no such restriction and permits the use of a major event emblem or word if in accordance with honest practices in industrial or commercial matters, the representation:

is for the purposes of reporting news, information, criticism, or a review (including promoting that news, information, criticism, or review) in a newspaper or magazine, or by means of television, radio, film, the Internet, or other means of reporting ...

There is no 'fair dealing' provision in the MEMA for research or private study of either permanently or temporarily protected words or emblems although the MEMA permits the use of a major event emblem or word if 'the representation is of personal opinion made by a natural person for no commercial gain'.⁷¹ Would this provision allow an academic to publish an article that includes the protected words in an academic or a professional practitioner journal? Some journal publishers, such as LexisNexis New Zealand, pay authors for their contributions. Although many journal publishers do not pay their authors, arguably the academic author receives an indirect 'commercial gain' through improved promotion prospects leading to an increased salary.

6.3.2 EVENTS MANAGEMENT LAWS IN OTHER JURISDICTIONS

Specific events management laws in other jurisdictions are varied and there is a remarkable lack of consistency. At the relatively benign end sits the Canadian Olympic and Paralympic Marks Act 2007, which is meant to protect 'against certain misleading business associations' and which creates civil liability only. Section 3 of that Act provides that '[n]o person shall adopt or use in connection with a business, as a trade-mark or otherwise, an Olympic or Paralympic mark or a mark that so nearly resembles an Olympic or Paralympic mark as to be likely to be mistaken for it'.⁷² The Olympic and Paralympic marks consists of a number of words and devices, the latter includes the Olympic 5 rings.⁷³ The protection under section 3 is narrow and

71. Major Events Management Act 2007, s. 12(1)(c).

72. Canadian Olympic and Paralympic Marks Act 2007, s. 3(1) and 3(2) also prevents the adoption or use of, in connection with a business, a mark that is a translation of an Olympic or Paralympic Mark.

73. Canadian Olympic and Paralympic Marks Act 2007, sch. 1: Canadian Olympic Committee, Canadian Paralympic Committee, Citius, Altius, Fortius, Comité international

would not protect against ambush marketing where no Olympic or Paralympic marks are used. Section 4 not surprisingly goes on to expand the protection by providing that:

- (1) No person shall, during any period prescribed by regulation, in association with a trade-mark or other mark, promote or otherwise direct public attention to their business, wares or services in a manner that misleads or is likely to mislead the public into believing that:
 - (a) the person's business, wares or services are approved, authorised or endorsed by an organising committee, the COC or the CPC; or
 - (b) a business association exists between the person's business and the Olympic Games, the Paralympic Games, an organising committee, the COC or the CPC.

The protection afforded by section 4, while not limited to the use of an Olympic or Paralympic mark, is still narrow: the defendant must mislead the public into believing that the defendant's business, goods, or services are in some way approved, authorised, or endorsed by the relevant organisation, or that a business association exists between the defendant and the relevant organisations. The threshold to be caught under this section is high. Thus the ambush marketing attempt in *The New Zealand Olympic and Commonwealth Games Association Inc v. Telecom New Zealand Limited*⁷⁴ would arguably not be caught.

In that case Telecom had published a newspaper advertisement which played on the Olympic symbol. The word RING was used three times across the top line and twice across a lower line (five times in total). The word RING appeared in the 'Olympic colours' of blue, black, red, yellow and green. Underneath it said, 'with Telecom mobile you can take your own mobile phone to the Olympics'. The court in declining to grant an interlocutory injunction stated that:⁷⁵

Those who notice the five coloured 'ring' words, then drop their gaze to the next line picking up the reference to Olympics, and then refer back to the five 'ring' words, and then make an association with the five circle Olympic symbol, will be mildly amused. It will then seem like a cartoon

olympique, Comité international paralympique, Comité olympique canadien, Comité paralympique canadien, Faster, Higher, Stronger, International Olympic Committee, International Paralympic Committee, Jeux olympiques, Jeux paralympiques, L'esprit en mouvement, Olympia, Olympiad, Olympiades, Olympian, Olympic, Olympic Games, Olympics, Olympic, Olympien, Olympique, Olympiques, Paralympiad, Paralympiades, Paralympian, Paralympic, Paralympic Games, Paralympics, Paralympien, Paralympique, Paralympiques, Plus vite, plus haut, plus fort, Spirit in Motion.

74. *The New Zealand Olympic and Commonwealth Games Association Inc v. Telecom New Zealand Limited*, supra n. 23.

75. *Ibid.*, at 765.

or a clever device. It is the sort of situation where one pauses for a moment to laugh, and acknowledge the lateral thinking involved. However, it is a long way from that brief mental process to an assumption that this play on the Olympic five circles must have been with the authority of the Olympic organisation, or through sponsorship of the Olympics. It quite simply and patently is not the use of the five circles as such. There is not a circle in sight ... It is not the sort of design like that where the reader would then be likely to pause and say 'that seems; close to the wind. I suppose they must have got permission for that'. The advertisement is perceived as simply too different, on what is before me to this point. I am not persuaded there is a significant likelihood of assumption by readers that Telecom is connected with or a sponsor of the Olympics.

Moreover, under the Canadian Olympic and Paralympic Marks Act 2007, provided no Olympic or Paralympic mark was used, it was arguable that a simple disclaimer was sufficient to avoid the operation of that Act.⁷⁶ What the Act does, however, is make the granting of interlocutory and interim injunctions easier as, unlike the threshold for claiming infringement of a registered trade mark, the plaintiff is not required to prove it would suffer irreparable harm.⁷⁷

The exceptions under the Canadian Act are extensive. The exceptions include the ability of an owner or licensee to use a registered trade mark if the trade mark was used (and registered) before 2 March 2007⁷⁸ and the mark was being used in association with the same goods or services or goods or services within the same general class as those for which the trade mark was used before that date.⁷⁹ Thus people using unregistered trademarks are unable to utilise this exception. In addition, the Canadian Act provides exceptions for the use by an individual or their name,⁸⁰ or the use of a person of their address, the geographical name of the place of their businesses, an accurate indication of the origin or their goods or services or an accurate description of their goods or services to the extent that the description is necessary to explain those goods or services to the public.⁸¹ The media is given exceptions. The use of an Olympic Mark or Paralympic mark in the publication or broadcasting of a news report relating to the Olympic or Paralympic games or for the purposes of criticism or parody relating to the

Olympic or Paralympic games does not infringe because it is not treated as use in connection with a business.⁸²

The London Olympic Games and Paralympic Games Act 2006 went further than the Canadian Act by creating criminal liability for some activities,⁸³ and significantly extending the scope of potential offences. In addition to the standard words and numbers that were protected directly,⁸⁴ the use of combinations of certain other words were actionable such as the seemingly innocuous 'summer' and '2012'.⁸⁵

Schedule 4 created the London Olympics Association Right.⁸⁶ The right confers an exclusive right over the use of any representation that is likely to suggest to the public that there is an association between the London Olympics and the goods or services, or a person who provides the goods and services. The concept of an association is wide, it includes: any kind of contractual or commercial relationship; any kind of corporate or structural connection and any suggestion that a person has provided financial or other support for or in connection with the London Olympics.

'Likely to suggest' is broader than the Canadian requirement that the conduct must mislead or be likely to mislead the public into believing there is an official association or endorsement. So broad is the association right that James and Osborn have described it as 'super IP'.⁸⁷

Granted, there are exceptions to the association right: clause 7 of schedule 4 of the London Olympic Games and Paralympic Games Act 2006 provides that:

'The London Olympics association right is not infringed by—

- (a) the use by a person of his own name or address,.
- (b) the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or of rendering of services, or other characteristics of goods or services,.

82. *Ibid.*, s. 5.

83. Albeit the offences are for advertising and trading, not just ambush marketing, in the vicinity of the London Olympic events, *see*, London Olympic Games and Paralympic Games Act 2006, ss 21 and 28.

84. *Ibid.*, s. 3, cl. 8 'Olympiad', 'Olympiads', 'Olympian', 'Olympians', 'Olympic', 'Olympics', 'Paralympiad', 'Paralympiads', 'Paralympian', 'Paralympians' and 'Paralympic'.

85. *Ibid.*, sch. 4, cl. 2. The combination of any expressions in the first group with any of the expressions in the second group. The first group consisted of 'games', 'Two Thousand and Twelve', '2012' and 'twenty twelve'. The second group comprised: 'gold', 'silver', 'bronze', 'London', 'medals', 'sponsor', and 'summer'.

86. *Ibid.*, sch. 4, cl. 1.

87. Mark James & Guy Osborn, *Guilty by Association: Olympic Law and IP Effect*, 2 *Intell. Prop. Q.* 97, 99-100 (2013).

76. Dana Ellis, Teresa Scassa & Benoit Séguin, *Framing Ambush Marketing as a Legal Issue: An Olympic Perspective*, 14 *Sport Mgt. Rev.* 297, 305 (2011).

77. Canadian Olympic and Paralympic Marks Act 2007, s. 6.

78. The Act came into force on 17 December 2007.

79. Canadian Olympic and Paralympic Marks Act 2007, s. 4(b).

80. *Ibid.*, s. 4(h).

81. *Ibid.*, s. 4(g).

(c) the use of a representation which is necessary to indicate the intended purpose of a product or service;

provided, in each case, that the use is in accordance with honest practices in industrial or commercial matters.

Nor is the association right infringed by the use of a representation:⁸⁸

- (a) in publishing or broadcasting a report of a sporting or other event forming part of the London Olympics,.
 - (b) in publishing or broadcasting information about the London Olympics,.
 - (c) as an incidental inclusion in a literary work, dramatic work, artistic work, sound recording, film or broadcast, within the meaning of Part I of the Copyright, Designs and Patents Act 1988 (c. 48) (copyright), or.
 - (d) as an inclusion in an advertisement for a publication or broadcast of a kind described in paragraph (a) or (b).
- (2) But the exceptions in sub-paragraph (1)(a) and (b) do not apply to advertising material which is published or broadcast at the same time as, or in connection with, a report or information.

FIFA, not to be outdone by the demands of the International Olympic Committee, oversaw Brazil's enactment of the 'World Cup Act'⁸⁹ in preparation for the 2014 FIFA World Cup. In Brazil's World Cup Act the following were all punishable by imprisonment for between three months and one year or a fine: reproducing, imitating or forging FIFA's official symbols;⁹⁰ ambush marketing by association;⁹¹ and ambush marketing by intrusion.⁹²

Ambush marketing was defined in Brazil's World Cup Act as using trademarks, products or services, with the purpose of obtaining economic or marketing advantage, by means of direct or indirect association with events or official symbols, without authorisation by FIFA or by person appointed by FIFA, or inducing third parties to believing that such trademarks, products or services are approved, authorised or endorsed by FIFA. Ambush marketing by intrusion in turn was defined as exposing trademarks, businesses, establishments, products, services or to practice promotional activity not

88. London Olympic Games and Paralympic Games Act 2006, sch. 4, cl. 8.

89. Law 12,663/2012. See, V-Brazil, <http://www.v-brazil.com/world-cup/law/comments.php> (accessed 3 November 2015).

90. Brazil 'World Cup Act' (Law 12,663/2012), Art. 30.

91. *Ibid.*, Art. 32.

92. *Ibid.*, Art. 33. In addition, under Art. 31 the importation, exportation, selling, offering and distributing or exposing for sale, or even to keep in stock FIFA's official symbols or product containing those symbols carried a penalty of imprisonment between one month and three months or a fine.

authorised by FIFA or by a person appointed by FIFA, and attracting in any way the public attention at official event venues, for the purpose of obtaining marketing or economic advantage. There were no exceptions.

Games organisers appear to be demanding and receiving more extensive legal rights from host countries.

6.4 DO EVENTS MANAGEMENT LAWS CONSTITUTE A SUI GENERIS REGIME?

The law dictionary definition of the term *sui generis* is '[f]orming a class of its own kind; unique'.⁹³ In the context of aboriginal rights, the term has also been described as connoting 'uniqueness and difference'.⁹⁴ The question for this chapter, however, is not whether events management laws from different jurisdictions have sufficient similarities that they can be described as constituting a class 'of their own kind'. Clearly this question must be answered in the affirmative. The more important question, we suggest, is whether *any* laws that satisfy the previous requirement can properly be described as *sui generis* whether or not the foundation for such laws is in compliance with fundamental principles of democratic law making. If new laws are not in the best interests of the public, if they are overly paternalistic or coercive, if they do not provide proper acknowledgment of human rights such as freedom of information and so on, should States employ a '*sui generis*' descriptor as a convenient way to ignore their fundamentally flawed nature?

Currently, there are two main areas of law which are commonly described as creating *sui generis* regimes. One is the European Database Directive⁹⁵ ('the EU Directive'); the other is indigenous rights. The EU Directive has similarities to the protections provided for databases by copyright law (and in fact also provides copyright protection for certain databases and replaces the previous copyright laws of Member States for copyright protection of databases).⁹⁶ However, the main thrust of the EU Directive is to introduce a separate *sui generis* regime which has significant differences to copyright protection. The EU Directive extends the protection afforded to 'original' databases by copyright law and takes a more overtly commercial approach to all databases whether they be copyrightable or

93. Johnathan Law & Elizabeth A. Martin, *A Dictionary of Law* (7th ed., Oxford University Press 2009).

94. John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?*, 36 *Alb. L. Rev.* 9 (1997).

95. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [hereinafter EU Databases Directive]. See also, Chapter 9 P. Bernt Hugenholtz, *Something Completely Different: Europe's Sui Generis Database Rights*, in this volume.

96. EU Databases Directive, *supra* n. 95, Art. 3.

non-copyrightable databases. The EU Directive protects a database produced in Europe which has had a substantial investment (whether qualitative or quantitative) in either the obtaining, verification or presentation of the contents – that is, including both economic investment and/or the time and effort of the employees.⁹⁷ Extracting or utilizing data from a protected database, as opposed to copying the data, is an infringement under the EU Directive,⁹⁸ which is intended to acknowledge the high economic value to a business of a database but, arguably, achieves this outcome by protecting the underlying information in a database. Unlike the traditional copyright protections for an original database the EU Directive does not distinguish between protection for the database itself and protection for its contents. Furthermore, although the European Commission had recommended that compulsory licensing provisions should be inserted into the EU Directive to address instances, for example, where ‘the creator of the database is the only source of such Information,’ these provisions were not included in the final version of the Directive.⁹⁹

Although similar to copyright law, the EU Directive provides exceptions to the sui generis rights holder’s rights. Notably, these exceptions are more limited than those provided in traditional copyright laws.¹⁰⁰

The second area of law which increasingly employs the term ‘sui generis’ is indigenous rights, including folklore, traditional cultural expressions and traditional knowledge. The tendency to label indigenous rights as sui generis is evident in several jurisdictions. For example, the Supreme Court of Canada has used the term sui generis to describe various rights pertaining to Aboriginal communities which originate from their cultural differences but which lie alongside and are a part of their common law rights.¹⁰¹ However indigenous rights do differ from country to country and within each country, from tribe to tribe – there are likely of course to be some commonalities but there may also be sufficient differences to ensure that moves to formulate an all-encompassing international sui generis regime for indigenous rights would not be successful. With this limitation in mind, the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organisation has produced three draft Treaties to protect Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property and Genetic Resources respectively.¹⁰² The draft Treaties are situated within the traditional intellectual property framework but arguably have the potential to

97. *Ibid.*, Art. 7.

98. *Ibid.*, Art. 7.

99. See, COM (92) 24 Final- SYN 393, Brussels, 13 May 1992, 3.2.8.

100. EU Databases Directive, *supra* n. 95, Art. 9.

101. See, *Guerin v. R* (1984) 13 DLR (4th) 321 (SCC); *Roberts v. Canada* (1989) 57 DLR (4th) 197 (SCC). For discussion see, Borrows & Rotman, *supra* n. 94.

102. See, WIPO, *Intergovernmental Committee (IGC)*, <http://www.wipo.int/tk/en/igc/> (accessed 3 November 2015).

create sui generis regimes. Johanna Gibson supports the concept of sui generis protections for indigenous rights which she describes as ‘an optimal sui generis system of rights ...’ for indigenous communities.¹⁰³ That is, a system which acknowledges the communal nature of indigenous cultural, biological and technological interests, as well as their inseparable interrelationships (unlike the traditional intellectual property model, which distinguishes between its protections for creative works and industrial properties).¹⁰⁴ Gibson has doubts concerning the current placement of the IGC’s draft treaties within the intellectual property regime and concludes that:¹⁰⁵

National and international obligations to that community to exercise customary management are unlikely to be adequately resolved within a paradigm of Westernised individual property ownership, in that systems based on private intellectual property rights do not address the complex and challenging issues unique to a traditional community.

The main justifications for seeking to protect indigenous rights within a sui generis regime which is outside traditional intellectual property law regimes are that the communal and customary nature of such rights do not easily fit within intellectual property law, although there are many characteristics which align with intellectual property laws. These include works akin to copyrightable works such as music, dance, handicrafts, art works and oral histories, and works akin to patentable inventions such as traditional medicines, tools and processes. Similarly, although the EU Directive creates a sui generis regime which is unashamedly focused on protecting the interests of European businesses, there are some synergies with copyright law but many differences – mainly in the area of permitted uses. Somewhat surprisingly, since ideally the democratic law-making process should be underpinned by a careful consideration and balancing of matters such as societal benefit, State paternalism, as well as upholding of human rights, it appears therefore that the term sui generis may be used as a protective cover-all. It can be employed flexibly to suit Governments and is used to justify laws which are truly new- not only in their subject matter but also in their conceptual foundations. To describe a law as sui generis can mean that the law is similar to an existing more traditional law, but that it nevertheless differs in respects which are in fact contrary to human rights, overly paternalistic and which provide minimal societal benefit. Conversely, a sui generis law may be more benign in its objectives and simply describe a law that addresses a gap in existing laws.

Turning to events management laws, the objective of which is clearly to protect the interest of businesses while paying lip-service to the public good

103. Johanna Gibson, *Intellectual Property Systems, Traditional Knowledge and the Legal Authority of the Community*, 26(7) Eur. Intell. Prop. Rev. 280 (2004).

104. *Ibid.*, at 281.

105. *Ibid.*, at 290.

and freedom of information, the inevitable conclusion must be that they too can be described as *sui generis*, despite their divergence from traditional justifications for copyright and trade mark laws.

6.5 PROTECTION FOR MAJOR EVENTS INTERNATIONALLY- RECOMMENDATIONS

While the creation of “super IP” rights for major events may not satisfy the principles underpinning copyright and trade mark laws, absent the provision of such rights in a country the organisers and promoters of a major event will not agree to appoint that country as host. The reality is that the opportunity to host a major sporting event is sought after by many countries in the belief that it will boost their economy.¹⁰⁶ Although the promised economic benefits rarely meet expectations, there is no doubt that some citizens of a country hosting a big sporting event benefit in other, less tangible, ways such as being caught up in the tension and excitement of the event.¹⁰⁷ However, sponsors and organising bodies insist that stringent events management laws are put in place in order that a country can secure the opportunity, and most countries willingly accede to such demands, including agreeing to ever-increasing escalation in the scope of rights granted.

As we have explained earlier in this chapter, events management laws are passed by countries with little consistency between the laws. There are two potential problems with this situation. First, some events management laws, like those of New Zealand and South Africa, have been aptly described as draconian;¹⁰⁸ others are less so but nevertheless the impact on local businesses of most events management laws can be described as anti-competitive (at the very least).

Second, each event management law is confined to regulating behaviour in a single jurisdiction, yet increasingly one of the most valuable rights linked to a major event is the right to broadcast it over television and radio and now the internet. The official broadcaster will be situated in the country hosting the game and will be bound by contract and also by events

106. The reality may be somewhat disappointing. See, in regard to the Rugby World Cup 2011 held in New Zealand, Jenny Keown, *Rugby World Cup: Bonanza or Bust* (Stuff, January 2, 2012), <http://www.stuff.co.nz/business/industries/6207002/Rugby-World-Cup-bonanza-or-bust> (accessed 3 November 2015), and, in relation to the 2014 FIFA World Cup in Brazil, see Paul Kiernan, *World Cup Hit Brazil's Economy Hard* (July 18, 2014), <http://blogs.wsj.com/moneybeat/2014/07/18/world-cup-hit-brazils-economy/> (accessed 3 November 2015).

107. See, Greg Jericho, *Big Sporting Events Don't Always Translate into Big Economic Events* (The Guardian, 26 July 2013), <http://www.theguardian.com/business/grogono/mics/2013/jul/26/sporting-events-economic-benefits> (accessed 3 November 2015).

108. See for example, Andre M. Louw, *Ambush Marketing & the Mega-Event Monopoly: How Laws Are Abused to Protect Commercial Rights in Major Sporting Events* 702 (Asser Press 2012).

management laws. However, technological advances such as tiny digital cameras and internet video streaming may allow others to engage in unofficial ‘pirate’ broadcasting of the event over the internet, which is accessible in many other countries.¹⁰⁹ Such countries are not bound by the relevant events management laws for that event and the broadcasts they receive might well be accompanied by advertisements for non-sponsoring companies. In addition of course it will be difficult to prevent the filming and posting online of events held in public open spaces, such as marathons, rowing and sailing events.¹¹⁰ (Note that in *National Basketball Association v. Motorola and STATS*¹¹¹ the US Second Circuit Court of Appeals affirmed that there was no copyright in a sporting event as it has no author. The Court distinguished between copying a recorded broadcast, which is a copyright infringement of the recording, and filming or copying the underlying event itself, which is not an infringement. This principle applies in other jurisdictions including New Zealand.)

We suggest that the solution is to create a new international *sui generis* events management treaty which mandates equivalent treatment in all Member States, which provides for international dispute resolution processes and, most importantly, which sets limits to the extent and scope of domestic events management laws. Granted, the use of limits on rights in international treaties is not common – the norm is for floors, not ceilings in international IP agreements¹¹² and the adoption of international treaties is notoriously slow – nonetheless the prospect of potential host countries being required to accede to the legislative demands of rapacious sponsors and organising bodies simply to stage an event may make such an agreement attractive to national States.

Crucially, the Achilles heel of event management legislation, that the protections afforded under the laws do not extend beyond the jurisdiction where the events is being held,¹¹³ could be addressed by borrowing elements

109. Jay Gillman-Wells, *Competitive Spirit Drives New Tech Sponsorship Boom*, 1(4) Eur. Law. 22 (2000).

110. Mary Still, *Olympian Effort Gets Games Off to a Flying Start*, 1(4) Eur. Law. 25 (2000).

111. *National Basketball Association v. Motorola and STATS*, 105 F.3d 841 (2d Cir. 1997).

112. See, Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 Case W. Res. L. Rev. 751, fn 17 (2007), ‘The classical system imposed limits largely by way of floors below which national levels of protection could not fall.’ See, Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. Rev. 469, 491 (2000). Ceilings were rarer, though some arguably do exist. See, Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Patenting Science: Protecting the Domain of Accessible Knowledge*, in *The Future of the Public Domain* 191, 220-221 (Guibault & Hugenholtz eds, Kluwer Law International 2006).

113. Unless, of course, the use in the other jurisdiction would infringe a specific intellectual property right, such as registered trade mark law.

be offensive is not homogenous.¹ Nor is it globally uniform. For example, while the use of the term 'Redskins' by the Washington Redskins represents a cultural clash in the United States,² it is not clear that it would in another state, such as New Zealand.³

Though concerns relate to the intangible, classic intellectual property (IP) forms (such as patent, copyright and trade mark law) are incapable of meeting the interests of indigenous peoples. This is for many reasons, most of which stem from fundamental differences between the knowledge systems of indigenous peoples and classic IP. Generally speaking, indigenous peoples tend to see their relationship with their cultural heritage as one of guardianship rather than ownership. Furthermore, indigenous peoples often have a holistic worldview, meaning that they do not differentiate starkly between their land, culture, products of culture and spirituality. Instead seeing several – if not all – of these categories as being intricately and irreversibly interwoven. These two differences consequent a variety of factors that make IP inappropriate to protect indigenous cultural heritage.

This has led to many academics and indigenous peoples calling for a sui generis solution. So far, discussions over what form such a system would take have not been fruitful. At the national level, few states have successfully implemented comprehensive sui generis protection of traditional knowledge

(TK) or traditional cultural expressions (TCEs). New Zealand is considered to be relatively 'forward' with mechanisms that attempt to interface existing IP regimes with the Māori knowledge system.⁴ These mechanisms are not sui generis, but are integrated into the Trade Marks Act 2002, which requires the Commissioner not to register marks the use or registration of which would likely be offensive to Māori,⁵ and the Patents Act 2013, which requires the Commissioner to decline patentability for inventions derived from Māori TK or 'indigenous plants or animals' the commercial exploitation of which would likely be contrary to Māori values.⁶ At the international level, UNESCO has made some attempts to take into account the interests of indigenous peoples with the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage⁷ and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁸ However, these have been criticised for various reasons, including being subordinate to intellectual property regimes, not creating any substantive obligations on states, being centred on lists rather than protection, being too focussed on cultural expressions, or missing key signatories such as the US.⁹ At WIPO, two separate drafts are being formulated and negotiated for sui generis protection of TK and TCEs.¹⁰ Another is planned for genetic resources (GRs).¹¹ This process has been ongoing for some time and it is unclear what will come to fruition even if the drafts are adopted. The Convention on Biological Diversity (CBD)¹² together with the Nagoya Protocol are arguably the most

1. Sarah McMullan, *Dame Trelise under Fire for Headdress Use* (Stuff, 27 August 2014), <http://www.stuff.co.nz/life-style/fashion/10428600/Dame-Trelise-under-fire-for-headdress-use> (accessed 3 November 2015); Morgan Tait, *Trelise Cooper Says Sorry for Sparking Racist Row* (The New Zealand Herald, 27 August 2014), http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11314942 (accessed 3 November 2015); and *Fashion Week Furore: Top Comments* (Stuff, 27 August 2014), <http://www.stuff.co.nz/stuff-nation/10429783/Fashion-Week-furore-Top-comments> (accessed 3 November 2015).
2. The controversy surrounding the Washington Redskins' federal trade marks has been ongoing for some years. In July 2015, the District Court for the Eastern District of Virginia affirmed the decision of the Trademark Trial and Appeal Board that the marks were disparaging to a substantial composite of Native Americans and brought them into contempt or disrepute as per s. 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), see Memorandum Opinion and Order, *Pro-Football, Inc v. Blackhorse*, Case No. 1:14-cv-01043-GBL:IDD (E.D.Va. 8 July 2015).
3. The term 'redskins' does not have the same historical context in New Zealand as it does in the United States. In New Zealand, trade marks must not be registered if 'the use or registration ... would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori' (Trade Marks Act 2002, s. 17(1)(c)). What exactly constitutes a 'significant section of the community' is unclear. Intellectual Property Office of New Zealand (IPONZ) Guidelines stipulate that a minority made up of a substantial number may be a significant section of the community. It further states that a 'higher degree of outrage or censure among a smaller section of the community, or a lesser degree of outrage or censure among a larger section of the community, may suffice.' See, IPONZ Trade Marks Practice Guidelines (26 January 2010), Ch. 4.4.1. Due to increasing cultural awareness in New Zealand, it is possible that the use or registration of 'redskins' would offend a significant section of the community.

4. On the 'interface' that these mechanisms create, 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* 439-459 (Christoph B. Graber, Karolina Kuprecht & Jessica C. Lai eds, Edward Elgar 2012).
5. Trade Marks Act 2002, s. 17(1)(c).
6. Patents Act 2013, ss 225-228.
7. UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage (adopted on 17 October 2003, entered into force 20 April 2006), 2368 U.N.T.S 1.
8. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted on 20 October 2005, entered into force 18 March 2007), 2440 U.N.T.S 311.
9. The UK, US, Canada, Australia, New Zealand, South Africa are not signatories to the Convention for the Safeguarding of the Intangible Cultural Heritage. With respect to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the US is not a signatory.
10. WIPO IGC, Secretariat, *The Protection of Traditional Cultural Expressions: Draft Articles*, Twenty-eighth Session (WIPO Doc. WIPO/GRTKF/IC/28/6, 2014); WIPO IGC, Secretariat, *The Protection of Traditional Knowledge: Draft Articles*, Twenty-eighth Session (WIPO Doc. WIPO/GRTKF/IC/28/5, 2014).
11. WIPO IGC, Secretariat, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, Twenty-eighth Session (WIPO Doc. WIPO/GRTKF/IC/25/5, 2011).
12. Rio Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993), 1760 U.N.T.S 79; 31 ILM 818 [hereinafter Rio Convention].

specific binding international agreements relating to TK and GRs.¹³ They, however, have a weak enforcement mechanism,¹⁴ with no dispute settlement body or means of forcing compliance. More problematically, the US is not party to the CBD,¹⁵ giving it less political weight, and several countries with large indigenous populations, such as New Zealand, Australia and Canada, are not party to the Nagoya Protocol,¹⁶ which sets out more stringent provisions regarding TK and GRs with respect to local communities.

The failure of nation states and international law to offer adequate protection of indigenous cultural heritage – whether via existing IP regimes or sui generis means – has resulted in the development of many ‘self-help’ remedies. This chapter discusses alternative means of regulation, meaning non-legislative courses of regulating the behaviour of industry or institutes with respect to access to cultural heritage and prevention of offence. It starts by addressing some examples of alternative means of regulation. In particular, it looks at industry codes of conduct of those that deal with media, and policies of institutions with collection and archival roles. The chapter then asks if the only reasonable route – in the absence of applicable IP or sui generis rights – to protect the online interests of indigenous peoples is the same as that which copyright owners are taking, namely, through using Technical Protection Measures (TPMs) and targeting Internet Service Providers (ISPs) based on either codes, policies or protocols, or another kind of right entirely. While the chapter predominantly uses New Zealand examples, the discussion regarding online issues, TPMs and ISPs is inherently more global in nature and the conclusions made should be seen as such.

8.2 ALTERNATIVE MEANS OF REGULATION

8.2.1 INDUSTRY CODES OF CONDUCT IN THE MEDIA

In New Zealand, the entire advertising (advertisers and advertising agencies) and media industries follow a set of Codes of Advertising Practice. The Advertising Standards Authority (ASA) was set up by the industry and its membership is made up therefrom.¹⁷ The ASA drafts and enforces the Codes,

13. 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 (adopted on 29 October 2010), UN Doc. UNEP/CBD/COP/DEC/X/1.

14. Rio Convention, *supra* n. 12, Art. 27.

15. Though the US signed the CBD, it did not ratify it and so is not a Party to it. *See*, CBD, *List of Parties*, <https://www.cbd.int/information/parties.shtml> (accessed 28 July 2015).

16. Australia signed the Protocol, but has not ratified it. New Zealand and Canada have not signed it. *See*, CBD, *Parties to the Nagoya Protocol*, <https://www.cbd.int/abs/nagoya-protocol/signatories/> (accessed 28 July 2015).

17. *See*, ASA, www.asa.co.nz (accessed 3 November 2015).

which apply to the content of advertisements (e.g., alcohol, food, gaming etc.) and the target market (e.g., children). Complaints are made to an independent Advertising Standards Complaints Board (ASCB), with the right of appeal to the Advertising Standards Complaints Appeal Board (ASCAB). A finding of offensiveness would require all advertisements to cease, which in most cases would cause a company to change their marketing scheme. Strictly speaking, the advertiser would be requested to withdraw the advertisement. However, the decisions are made public and historically every decision has been complied with. The ASA’s competence also extends to advertisements used online.¹⁸

Regarding ‘offensiveness’, the Code of Ethics provides that ‘[a]dvertisements should not contain anything which in the light of generally prevailing community standards is likely to cause *serious or widespread offence* taking into account the context, medium, audience and product (including services).’¹⁹ Similarly, the ASA Code for People in Advertising requires that advertisements not ‘portray people in a manner which is reasonably likely to cause serious or widespread hostility, contempt, abuse or ridicule’.²⁰ More specifically, advertisements should not cause serious or widespread offence on the grounds of race, colour or cultural belief.²¹ Advertisements also should not stereotype people or use humour or satire in a way that, ‘taking into account generally prevailing community standards, is [reasonably] likely to cause serious or widespread offence, hostility, contempt, abuse or ridicule’.²² Of course, ‘serious or widespread offence’ is a high standard, limiting its application.

The Code of Ethics could be used by any group of people, including Māori and also other indigenous peoples. A potential difficulty for non-Māori indigenous communities may be reaching a sufficient level of ‘serious or widespread offence’ in the New Zealand context. However, because New Zealand is generally culturally sensitive, the possibility of non-Māori indigenous communities successfully arguing ‘serious or widespread offence’ should not be dismissed.

The Codes apply to any advertising available in New Zealand, even if it originates from elsewhere and is primarily intended for audiences outside of New Zealand, but reaches New Zealand audiences.²³ However, in such a situation, the ASCB and ASCAB will take into account the following:

18. This is clear from the definition of ‘advertisement’, *see*, ASA, *Interpretation*, <http://www.asa.co.nz/interpretation.php> (accessed 3 November 2015).

19. ASA Code of Ethics, rul. 5, www.asa.co.nz/code_ethics.php (accessed 3 November 2015).

20. ASA Code for People in Advertising, rul. 2, http://www.asa.co.nz/code_people.php (accessed 3 November 2015).

21. *Ibid.*, rul. 3.

22. *Ibid.*, ruls 4 and 6. The word ‘reasonably’ was omitted from rul. 6 covering humour and satire.

23. ASA, *supra* n. 18.

1. Compliance with the advertising rules in the country of origin.
2. The size and composition of the New Zealand audience.
3. Whether the advertising is targeted at New Zealand consumers.
4. The accessibility of the product to New Zealand consumers.
5. Whether best endeavours have been made to exclude advertisements which would clearly breach the Advertising Codes of Practice. This could be particularly relevant in the case of live presentations of overseas events to a substantial number of New Zealanders.²⁴

It is clear from this that the ASA Codes are intended for advertisements that are targeted at and reach New Zealand consumers. The Codes are therefore applicable to overseas companies which advertise in New Zealand, but only to a limited extent when New Zealand is not the primary audience or an inadvertent audience. This situation is clearly more prevalent online than when the advertisement media is television, radio or print. The Codes are, thus, not targeted at having extraterritorial effect. Even if they were international, it is not certain that Māori concerns would be 'serious or widespread' in any country other than New Zealand.

Notably, the likelihood of similar codes of conduct being developed in other industries of popular media, such as for films or literature, is low. Advertising is inherently commercial in nature, such that one does not balk at its restriction for social policy reasons.²⁵ Restriction of more artistic or political speech may be more difficult to justify.²⁶ The Standards of the Broadcasting Standards Authority (an Independent Crown entity) represent a

24. *Ibid.*

25. The UN Human Rights Committee (UNHRC) has specifically held that commercial speech (such as in advertising) is also protected under Art. 19.2 of the UN, International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), 999 U.N.T.S. 171 and 1057 U.N.T.S. 407-5 ILM 368 [hereinafter ICCPR]; *Ballantyne v. Canada* (1993) Comm Nos 359/1989 and 385/1989, at para. 11.3. Indeed, the UNHRC has refused to give more or less protection for different types of speech under Art. 19.2, though the type may be relevant in assessing restrictions under Art. 19.3; Nicola Wenzel, *Opinion and Expression, Freedom of, International Protection*, in *The Max Planck Encyclopedia of Public International Law* para. 16 (Rüdiger Wolfrum ed.), www.mpepil.com (accessed 3 November 2015). However, this has not always been reflected at the national level. For example, the New Zealand Court of Appeal has stated that political speech enjoys greater protection than artistic and commercial speech; *Hosking v. Runting* [2005] 1 NZLR 1, at para. 132 per Gault P and Blanchard JJ. The US has even held that there is 'no value' speech, which is completely devoid of any right to freedom of expression; see, Larry Alexander, *Legal Theory: Low Value Speech*, *Nw. U. L. Rev.* 83, 547-554 (1989); and Eric Barendt, *Copyright and Free Speech Theory*, in *Copyright and Free Speech. Comparative and International Analyses* 11-33, para. 2.09 (Jonathon Griffiths & Uma Suthersanen eds, Oxford University Press 2005).

26. *Ibid.*

case in point. In their 'Radio Code of Broadcasting Practice'²⁷ and 'Free-to-Air Television Code of Broadcasting Practice',²⁸ there are the Standards of 'good taste and decency' and 'discrimination and denigration', but no Standard to prevent offence.²⁹ The Standard of 'good taste and decency' does not equate to prevention of offence, as the 'Free-to-Air Television Code of Broadcasting Practice' Guideline for this Standard stipulates that visual and verbal warnings should be considered 'when content is likely to disturb or offend a significant number of viewers'. Thus, something can be 'offensive' but not contrary to 'good taste and decency'. The Standard of 'discrimination and denigration' requires that broadcasters not 'encourage discrimination against, or denigration of, any section of the community', but is not intended to prevent the broadcast of material that is factual or legitimate humour, drama or satire.

It should also be noted that self-regulation of an industry has limits, the most important of which is that there is no recourse for its enforcement. As noted above, the ASCB and ASCAB make requests of the advertisers based on the Codes. Their decisions are not legally binding. Thus, in a way, such codes are merely aspirational. Furthermore, getting an entire industry to agree to follow a code is by no means an easy feat. Industries usually only do so when it is in their own interests or they choose to self-regulate when the alternative would be government intervention.

8.2.2 NGĀ TAONGA SOUND & VISION

Ngā Taonga Sound & Vision (an independent charitable trust)³⁰ has many *taonga* (that which is sacred) in its collection and has a policy and practice that comprises directly the principles of the Treaty of Waitangi.³¹ Ngā

27. Broadcasting Standards Authority, *Radio Code of Broadcasting Practice* (July 2008).

28. Broadcasting Standards Authority, *Free-to-Air Television Code of Broadcasting Practice* (May 2011).

29. The Codes, Standards and Guidelines are available at <http://bsa.govt.nz/standards/overview> (accessed 3 November 2015).

30. Ngā Taonga Sound & Vision was formed by the amalgamation of New Zealand Film Archive Ngā Kaitiaki O Ngā Taonga Whitiāhua, Sound Archives Ngā Taonga Kōrero, and the Television New Zealand Archive between 2012 and 2014.

31. The Treaty of Waitangi is the founding document of New Zealand signed by the British Crown and around 540 Māori chiefs in 1840. The original is both in English and Māori. Both are official versions. The English version of Art. 2 of the Treaty 'guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...'. The modern English translation of the Māori text, however, guarantees 'unqualified exercise of their chieftainship [*tino rangātiratanga*] over their lands, villages and all their treasures [*taonga*].' See, Ministry of Cultural Heritage (with explanatory footnotes by Professor Hugh Kawharu), *Te Tiriti o Waitangi – The Treaty of Waitangi*, <http://www.tiritio>

Taonga Sound & Vision 'sees the Treaty as having specific implications for partnership, participation and protection' and 'work[s] to uphold the Treaty/te Tiriti as a joint partnership between Māori and Pākehā [New Zealanders of European descent] of resources, institutions and decision making which guarantees Māori people rangatiratanga [chieftainship]'.³² Ngā Taonga Sound & Vision only has a custodial role over its collection, such that ownership remains with the depositors.³³ The depositor may also stipulate particular access rights in the deposit agreement and the Ngā Taonga Sound & Vision has a specific Taonga Māori Deposit Agreement, as well as a General Deposit Agreement.³⁴

At the time of writing, Ngā Taonga Sound & Vision had recently started to offer online access to parts of its collection. From its policy document – which makes it very clear that Ngā Taonga Sound & Vision takes Māori interests very seriously – one can presume that it only makes content available online in a manner congruent with the wishes of depositors, the Principles of the Treaty of Waitangi and the interests of Māori. This is clear from the statement that:

The role of Kaitiaki [guardian or steward] for material with significant iwi [tribes] Māori content is of great importance to Ngā Taonga Sound & Vision. The archive works closely with iwi to establish Kaitiaki relationships, and effectively link the collections to identifiable people and places. As Kaitiaki, those descendants will have final say over any commercial use of all images and words of their ancestors.³⁵

waitangi.govt.nz/treaty/translation.pdf (accessed 28 July 2015). The Waitangi Tribunal has made it clear that *taonga* includes all dimensions of a tribal group's estate, material and non-material heirlooms and *wahi tapu* (sacred places), ancestral lore and *whakapapa* (genealogies). See, Waitangi Tribunal, *Treaty of Waitangi*, <http://www.waitangi-tribunal.govt.nz/treaty/> (28 July 2015); and Report of the Waitangi Tribunal on Te Roroa Wai 38, 210 (1992). Though the Treaty does not mention IP or cultural heritage, it is clear that these can be considered *taonga*. See Earl Gray, *Māori Culture and Trade Mark Law in New Zealand*, in *New Frontiers of Intellectual Property, IP and Cultural Heritage – Geographical Indicators – Enforcement – Overprotection*, 71–96, 73 (Christopher Heath & Anselm Kamperman Sanders eds, Hart Publishing 2005).

32. Ngā Taonga Sound & Vision, *Kaupapa*, Principles 1.2–1.3, <http://www.ngataonga.org.nz/about/governance/constitution-and-kaupapa> (accessed 13 April 2016).

33. See, Ngā Taonga Sound & Vision, *Partnership with Iwi*, <http://www.ngataonga.org.nz/about/our-partners/partnership-with-iwi> (accessed 13 April 2016), which states: 'Ngā Taonga Sound & Vision maintains its custodial role over the collections, ensuring that kaitiakitanga and ownership of the original items remain with the depositors, and that copyright and intellectual and cultural property rights are protected.'

34. Ngā Taonga Sound & Vision, *Deposit Agreement: Taonga Maori* (16 March, 2015), www.ngataonga.org.nz/assets/Images/Site_PDF/NTSVTaonga-Maori-Deposit-Agreement.pdf (accessed 13 April 2016).

35. Ngā Taonga Sound & Vision, *Partnership with Iwi*, *supra* n. 33.

The National Library of New Zealand (part of the Information and Knowledge branch of the Department of Internal Affairs) recognises that Māori have a special relationship with much of its collection³⁶ and that *mātauranga Māori* (traditional knowledge) belongs primarily with *iwi* and Māori.³⁷ It therefore actively collects all published resources relevant to Māori.³⁸ The New Zealand National Library has a policy of partnership with Māori, which seeks to connect 'Māori with information important to all aspects of their lives and in a way that is meaningful to Māori'; ensure that *taonga* 'are cared for, protected and made accessible in collaboration with iwi and Māori'; and '[r]elationships between iwi, Māori and the National Library are enhanced, created, shared and valued'.³⁹

Protocols for the treatment and access to Māori resources were developed in conjunction with experts and the National Library's Komiti Māori.⁴⁰ The developed 'Principles for the Care and Preservation of Māori Materials' recognise that *taonga* have *mauri* (life force) connecting it to the kinship group that created it, creating an ever-lasting relationship of guardianship that exists parallel to intellectual property.⁴¹ As the guardian of its collection, the National Library seeks to collaborate with the families and descent groups of works in their collection when making decisions regarding conservation, copying, exhibition and attribution.⁴² Within the context of attribution, the National Library's policy is to explore and record the *mauri* of *taonga* and their connection to *iwi* and *hapū* (sub-tribes). Finally, the Principles state that staff shall have access to *kaumātua* (elders) or Māori staff that have the ability to promote effective relationships with *iwi* and *hapū*.

Overall, the National Library's policy documents indicate that it takes *tikanga Māori* (culture and protocol) into account when considering the conditions under which access is permitted,⁴³ and how *taonga* should be preserved and cared for, as:

The integrity and meaning of an object should be recognised as the combination of a number of values and types of information; including aesthetic, historical, technological, social, and spiritual. Preservation of the object therefore requires an understanding that these aspects of the

36. National Library of New Zealand, *Collections Policy*, 3.

37. National Library of New Zealand, *Te Kaupapa Mahi Tahi A Plan for Partnership 2005-2010*, 7. A more recent version is not available.

38. National Library of New Zealand, *supra* n. 36, at 7.

39. National Library of New Zealand, *supra* n. 37, at 12. A more recent version is not available.

40. National Library of New Zealand, *Access Policy (vers. V2A)* (2003), para. 8.18.

41. National Library of New Zealand, *Preservation Policy: Principles for the Care and Preservation of Māori Materials* (2004), 6.

42. *Ibid.*, and National Library of New Zealand, *Copying Standards* (2008), 9–10.

43. National Library of New Zealand, *supra* n. 40, at para. 9.

object must be considered in the same way as the basic chemical and physical characteristics.⁴⁴

A key aim of the National Library is making its collection accessible, including digitally. Between 2005 and 2010, the National Library sought to 'build the most representative, comprehensive and accessible collections of digitised Māori materials representing mātauranga Māori.'⁴⁵ Similarly, the Strategic Directions up until 2017 include promoting the national digitisation of *taonga*.⁴⁶ The reason that digitisation is an aim is clearly the perceived association with increased accessibility, the low cost of transfer and also that originals will not be damaged. This can of course be of great value to Māori. Digitisation, however, comes with certain dangers. Namely, the possible loss of control. Given the National Library's policies of collaborating on matters of conservation, copying, exhibition and attribution, it is likely that the National Library would not digitise a work against the wishes of the associated family, *iwi* or Māori. Furthermore, digitisation does not necessarily mean that the works would be placed online. The problem lies more with the potential for accidental proliferation. Digitalised works are easily placed online but once there, it can be very difficult to stop or control multiplication.

8.2.4 TE PAPA

Over the last thirty years, there has been a general trend towards reconceptualising and revaluing Māori collections and the relationship between museums in New Zealand, such collections and the traditional communities affiliated with them. This has involved moving beyond seeing items and documents as mere static ethnological curiosities to viewing them as *taonga* and part of the living cultural heritage of Māori. Overall, this has affected the way that such items and documents are displayed, often involving input from Māori,⁴⁷ and the general mentality towards allowing Māori access to that pertaining to their cultural heritage.⁴⁸

The Museum of New Zealand Te Papa Tongarewa (Te Papa) takes into account Māori concerns from its highest level of governance.⁴⁹ Set up under statute,⁵⁰ the Board (an Autonomous Crown Entity)⁵¹ must 'endeavour to ensure both that the Museum expresses and recognises the mana [authority or power] and significance of Māori, European, and other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a statement of New Zealand's identity'.⁵² There is neither a specific requirement that there be Māori representation on the Board of Trustees (a Crown entity) nor any mention of the Treaty of Waitangi. Nevertheless, the Board has had at least two Māori members (out of eight) since its founding.⁵³ Generally, the museum's governance takes into account the Treaty of Waitangi in its constitution,⁵⁴ such as to recognise principles of partnership, protection and participation, because there is a 'professional and moral responsibility to ensure inclusivity and responsiveness to Māori throughout [the] museum's management, operational and governance policies and practices.'⁵⁵ It is believed that inclusion of Māori at the governance level will: facilitate stronger relationships between the museum and tribes; increase effective communication between them; ensure the development of appropriate policy in all areas of the museum's activities, especially the care and use of *taonga*; ensure that museum practice accords with Māori customary law; ensure that representations of Māori are not abstracted from contemporary realities; and will increase cross-cultural communication and understanding.⁵⁶

At the operational level, it is believed that *iwi* must be involved in the interpretation, exhibition and care of *taonga*.⁵⁷ One of Te Papa's three key philosophies is *mana taonga*, which:⁵⁸

recognises that *taonga*, which includes objects, narratives, languages, as well as all forms of cultural expression have mana; that *taonga* have

49. The Waitangi Tribunal was recently very positive about Te Papa's policy and practices with regard to involvement of Māori and compliance with the Treaty of Waitangi; Report of the Waitangi Tribunal on Claims Concerning New Zealand Law and Policy Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Wai 262, 509-510 (2011) [hereinafter Wai 262 Report].

50. The Museum of New Zealand Te Papa Tongarewa Act 1992 (NZ).

51. *Ibid.*, s. 6; and Crown Entities Act 2004 (NZ), Sch. 1, Part 2. As an Autonomous Crown Entity, the Board must have regard to government policy when directed by the responsible Minister; Crown Entities Act 2004 (NZ), s. 7.

52. The Museum of New Zealand Te Papa Tongarewa Act 1992 (NZ), s. 8(b).

53. Te Papa, *Governance Guidelines* (2011), *supra* n. 47, appendix 1, 41.

54. *Ibid.*, at 11-12 and 16. See also, Museums Aotearoa, *supra* n. 47, at 2.

55. Te Papa, *Governance Guidelines* (2011), *supra* n. 47, at 2.

56. *Ibid.*, appendix 1, 43.

57. Te Papa National Services, *A Guide to Guardians of Iwi Treasures (2001) He Rauemi*, 8, at 1.

58. Museum of New Zealand Te Papa Tongarewa, *Statement of Intent 2013/14, 2014/15, 2015/2016*, 9.

44. National Library of New Zealand, *Conservation Standards* (2008), 5, which also states that 'We will observe tikanga', recognising that preservation requires more than the protection of the basic chemical and physical characteristics of an object. For example, the observance of tikanga Maori is essential for preservation of *taonga*. It is further acknowledged that tikanga Maori is relevant for consideration of digital preservation (at 28).

45. National Library of New Zealand, *supra* n. 37, at 10.

46. National Library of New Zealand, *Strategic Directions to 2017*, 4.

47. See, National Services Te Paeranga, Museum of New Zealand Te Papa Tongarewa, *Honon ki Te Papa. Working Together with Te Papa: Governance Guidelines* (2011), appendix 1, 40 [hereinafter Te Papa, *Governance Guidelines* (2011)]; and Museums Aotearoa, *Code of Ethics. For Governing Bodies of Museums and Museum Staff* (adopted 15 April 2003), paras 1.1.d and 1.2.b.ii-iv.

48. Museums Aotearoa, *supra* n. 47, at paras 1.1.a and 3.4.a.

whakapapa [ancestral] relationships with their source communities, as well as connections to the environment, people and places. Mana taonga recognises the authority derived from these relationships and the innate spiritual values associated with them. Respecting and expressing knowledge, worldviews and learning systems including mātauranga Māori – the views, explanations and perspectives of the nature of the world, as known and informed by Māori, is an important dimension of mana taonga. The principle is an empowering one that enables Te Papa to acknowledge the richness of cultural diversity and to design and disseminate models of co-operation, collaboration and co-creation that shares authority and control with iwi and communities, whilst recognising, embracing and representing the changing demographics of Aotearoa New Zealand.

As part of its 'Statement of Intent' for 2015-2016, Te Papa noted that partnership with *iwi* is critical to the museum's success in fulfilling its role as *kaitiaki* (guardian or steward) of the nation's *taonga*, collections and stories. It stated that such partnerships are necessary to develop a better understanding and sharing of knowledge about *taonga*, allowing Te Papa to undertake effectively its *kaitiaki* role.⁵⁹ The museum has an Iwi Exhibition Programme that allows *iwi* to exhibit their *taonga* and stories in a national forum. The *taonga* may come from the *iwi* or from that held by Te Papa or other New Zealand museums. How the exhibition is displayed is decided upon through a collaboration between Te Papa and the *iwi*. While the exhibition is running, *kaumātua* from the *iwi* may reside at the Museum and carry out any ceremonial/traditional duties required.⁶⁰ Te Papa also has an active programme of loaning *taonga* to regional museums and even to *marae* (Māori meeting houses).⁶¹

Te Papa's onsite policy is to restrict photography, filming and videoing within the museum to general scenes within the museum and of the building itself, restricting the direct photography or filming of works or objects.⁶² Such videoing, filming or photographing can only be for private study or research, and cannot be sold commercially or displayed publicly (e.g., via the

internet).⁶³ This is another means by which Te Papa seeks to control images of *taonga*. However, as there is no entry fee and thus no ticket purchased to enter Te Papa, and visitors are not otherwise directly made aware of this policy, its effectiveness (particularly as a contractual condition of entry) is questionable. Photography, filming and videoing may be prohibited with certain exhibitions, which 'will be clearly communicated through signage at the entry to the exhibition.'⁶⁴ Finally, in attempting to address indigenous concerns, Te Papa's online policy states that '[i]mages of *taonga* are of significant cultural importance to *iwi* Māori. Te Papa requests that these images and associated information be used for research, personal use and study and educational use only.'⁶⁵ This is only a request, meaning that the policy has no legal force.

8.3 ALTERNATIVE REGULATION VERSUS LEGAL REGULATION

There can be a tension between museum or archive practices and/or protocols that take into account indigenous interests, on the one hand, and legal norms, including copyright law, contract law and fundamental or human rights, on the other hand.

As noted above, museums may prohibit reproduction (photography and filming) of exhibits either via museum staff and security guards or by indicating these restrictions on signage or on a ticket. Analogously, visitors of museum websites may be asked to confirm that they will not copy any content before being permitted to view digital libraries. By entering such exhibitions or accepting the terms and conditions of the website, visitors are contracting themselves out of rights to use non-copyrighted works in the public domain and to undertake permitted uses, such as for research or private study.

Restricting the access and/or use of public domain works may be more controversial when the works in questions are held by a publicly funded institution,⁶⁶ as members of the public arguably have an interest in accessing works not copyright-protected and therefore in the 'public domain' (e.g., historical information contained in pictures, writings or recordings of now deceased authors for which the copyright term has expired) that were purchased with taxpayers' money. However, there is no explicit or positive protection of a right to reproduction and use of information in the public

59. *Ibid.*, at 18. Te Papa has also released guidelines for other museums to use for creating partnerships with *iwi*; Te Papa National Services, *supra* n. 57, at 8. It also has guidelines for other museums to express *mātauranga Māori* or to facilitate and express that which is essential to Māori – their values, concepts, culture and worldview. It essentially recommends understanding key principles of Māori culture and worldview before proceeding to work in partnership with Māori communities; Te Papa National Services, *Mātauranga Māori and Museum Practice* (2006) *He Rauemi*, 31.

60. For information on past Iwi Exhibitions, see Te Papa, *Work with Iwi and Museums*, <http://www.tepapa.govt.nz/AboutUs/Pages/Workwithiwiandmuseums.aspx> (accessed 29 August 2014).

61. *Wai 262 Report*, *supra* n. 49, at 510.

62. Te Papa, *Copyright and Privacy*, <http://www.tepapa.govt.nz/Pages/Termsandconditions.aspx> (accessed 29 August 2014).

63. *Ibid.*

64. *Ibid.*

65. *Ibid.*

66. Marie C. Marano & Ildiko Pogány DeAngelis, *A Legal Primer on Managing Museum Collections* 215 (3rd ed., Smithsonian Books 2012). In terms of human rights law, state-funded institutes may also run into issues over favouring one religion over another.

domain in international or national law.⁶⁷ The public domain exists as a corollary to copyright law rather than being something positively protected, as we justify copyright protection on the basis of temporary protection to incentivise the creation of works, which will eventually fall into the public domain and which will be greater for having copyright. The negative nature of the public domain is clear from the example that owners of art works or rare manuscripts no longer under copyright protection are under no obligation to allow others access to those works. This is regardless of whether the works are owned by publicly funded entities.

As to works still protected by copyright, policies that restrict permitted uses (e.g., taking a photograph for the purposes of research or private study, or specific exceptions for museums/libraries/archives to make a copy for a user for the purposes of research or private study) from being undertaken to meet the interests of Māori can also be seen as running contrary to copyright law policy. We have permitted uses in order to balance the interests of users and owners.⁶⁸ When we restrict users from undertaking permitted uses to prevent cultural offence, we upset the balance away from the interests of users. Furthermore, exceptions for museums/libraries/archives to assist users to undertake their permitted uses exist to ensure that the balance is not thwarted by issues relating to physical access.⁶⁹ If museums/libraries/archives refuse to make copies of certain works for an individual's research or private study because it would be offensive to the Māori, physical possession and control over works can override the policy aim of ensuring user access to works regardless of physical limitations. In either case, we see that policies that accord with Māori interests may actually clash with copyright law policy.

Regarding the nature of the relationship between users and museums, it is unclear whether there are legally enforceable contracts created by terms and conditions on entry tickets, signage in front of exhibitions and, in particular, online 'click' agreements.⁷⁰ Such contracts could be challenged on several grounds. First, there may be no real offer and acceptance, e.g., if visitors receive the terms and conditions of entry on the ticket, they receive it after purchase and there was no offer and acceptance of the terms and conditions. In any case, control of a physical space comes with certain privileges, including a great deal of say over what takes place in that space.

'Click' agreements are more suspect because there are no privileges associated with physical property involved, making the existence (or lack) of a contract more significant. There are arguments that the boilerplate terms and conditions that few people read cannot or should not constitute contracts, as they are not negotiated nor truly freely entered into.⁷¹ On a more theoretical basis, one could even argue that, when all users are bound by the same contract, the contract starts to appear to be more property-like, as it looks more and more like a right against the world rather than only binding upon the parties to the agreement.⁷² Second, the 'contracts' override explicit statutory copyright exceptions and Susan Corbett and Mark Boddington have stated that it is not clear if one can validly contract out of statutory exceptions.⁷³ Of course, there is a difference between agreeing to certain terms and conditions of access in order to freely access a work, and contracting out of permitted uses when purchasing a copy of a work. At any rate, arguably users contracting out of their permitted acts is analogous to authors contracting away their ownership (such as through sale, employment or commissioned works) or waiving their moral rights (allowed in most common law, but not civil law, countries). For now, this is a grey area.

With respect to fundamental or human rights, preventing access to information or knowledge could be contrary to freedom of expression and information,⁷⁴ particularly when the institute is a state agency.⁷⁵ It is also possible that museum/archive policies may create a divide between respecting indigenous culture and general rights of non-discrimination.⁷⁶ As an illustration, in October 2010, Te Papa invited regional museum staff to on a 'behind-the-scenes' tour of some of their collections, including sacred Māori objects. The museum recommended that women who were pregnant or menstruating not partake, as many of the objects had *wairua* (a spirit). No one was forbidden to attend, as it was only a recommendation based on consultations with Māori associated with the objects, who believe that pregnant and menstruating women are sacred and should be kept safe from these objects. Furthermore, the power associated with the female reproductive area is also believed to be capable of affecting objects. Many people, including feminists, were disgusted and believed that the policy was too

71. For a critique of 'click' boilerplate agreements, see, Margaret J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).

72. Raymond T. Nimmer, *Breaking Barriers: The Relation between Contract and Intellectual Property Law*, Berkeley Tech. L.J. 13, 827-889 (1999); and Niva Elkin-Koren, *Governing Access to User-Generated-Content: The Changing Nature of Private Ordering in Digital Networks*, in *Governance, Regulation and Powers on the Internet* 318, 319. (Eric Brousseau, Meryem Marzouki & Cécile Méadel eds, Cambridge University Press 2012).

73. Corbett & Boddington, *supra* n. 67, at 14.

74. As protected under The Bill of Rights Act 1990 (NZ), s. 14.

75. ICCPR, *supra* n. 25, Art. 19.2, which consists of the freedom to 'seek, receive and impart information and ideas'.

76. As protected under The Bill of Rights Act 1990 (NZ), s. 19; and Human Rights Act 1993, s. 21.

67. Susan Corbett & Mark Boddington, *Copyright Law and the Digitisation of Cultural Heritage* (Victoria University of Wellington, Centre for Accounting, Governance & Taxation Research Working Paper No. 77, 2011), 13.

68. Bronwyn Lee & Minter Ellison, *Australia: Contracting Out Of The Copyright Infringement Exceptions*, (Mondaq Australia, 15 October 2007), <http://www.mondaq.com/australia/article.asp?articleid=53260> (accessed 3 November 2015). Robert Burrell & Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005).

69. Copyright Act 1994, s. 53.

70. Corbett & Boddington, *supra* n. 67, at 12.

'politically correct' and that religious and cultural beliefs should be irrelevant in a taxpayer-funded museum.⁷⁷

Of course fundamental and human rights are not infallible. International law and New Zealand law accept that there are certain situations where such rights may be constrained because there are competing interests or values. Namely, under the New Zealand Bill of Rights Act 1991 (NZBORA), rights and freedoms 'may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁷⁸ It is important to contextualise the discussion by noting that copyright is also considered to restrict freedom of expression,⁷⁹ but is generally considered to be a legitimate restriction.⁸⁰ This is in large part due to it being 'the engine

77. See, Kirsty Johnston, *Pregnant Women Warned off Te Papa Tour*, (*The Press*, 12 October, 2010), <http://www.stuff.co.nz/the-press/news/4221920/Pregnant-women-warned-off-Te-Papa-tour> (accessed 3 November 2015); and *Te Papa Defends Request to Pregnant Women*, (*The Dominion Post*, 12 October, 2010), <http://www.stuff.co.nz/dominion-post/news/wellington/4221940/Te-Papa-defends-request-topregnant-women> (accessed 3 November 2015).

78. The Bill of Rights Act 1990 (NZ) [hereinafter NZ BORA], s. 5. See also, *MOT v. Noort; Curran v. Police* [1992] 3 NZLR 260 (C.A.); *Solicitor-General v. Radio New Zealand Ltd* [1994] 1 NZLR 48 (H.C.); and *Moonen v. Film and Literature Board Review* [2000] 2 NZLR 9 (C.A.).

The same wording exists in the Canadian Charter of Rights and Freedoms, s. 1, such that, the courts initially decided to draw on Canadian case law. More recently, courts have been cautious not to be influenced by any other jurisdiction; see, for example, *Lange v. Atkinson* [1998] 3 NZLR 424 (C.A.) at 467. Thus, though the test used often appears similar to that used in other jurisdictions, its application is different. See, Alex Conte, *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: the United Kingdom, Canada, Australia and New Zealand*, Heidelberg, 347-356, especially at 351 (Springer 2010); and Richard Clayton & Hugh Tomlinson, *Privacy and Freedom of Expression*, paras 15.469 and 15.473 (Oxford University Press 2010); and Ivor Richardson, *The New Zealand Bill of Rights: Experiences and Potential, Including the Implications for Commerce*, 10 Canterbury L. Rev. 259, 263 (2004). The New Zealand courts have seldom been willing to be convinced by European case law. Indeed, in recent years, the courts have even been reluctant to follow UK case law in many cases because of its perceived 'Europeanisation', and because of general constitutional and political differences; for example, *Lange v. Atkinson* (No. 2) [2000] 3 NZLR 38 (CA) para. 40. Cf. ICCPR, *supra* n. 25, Art. 19.3.

79. Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property. Mapping the Global Interface*, Ch. 4 (Cambridge University Press 2011). See also, *Copyright and Free Speech. Comparative and International Analyses*, (Jonathon Griffiths & Uma Suthersanen eds, Oxford University Press 2005); and *Copyright and Human Rights. Freedom of Expression – Intellectual Property – Privacy* (Paul L.C. Torremans ed., Kluwer Law International 2004). Trade marks and internet domain names can also restrict freedom of expression; see, Vaios Karavas & Gunther Teubner, *www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law*, 12 Constellation, 262-282 (2005).

80. This is the case in New Zealand (*TVNZ Ltd v. Newsmonitor Services Ltd* [1994] 2 NZCA 91 (H.C.) at 95 per Blanchard J, under the European Convention of Human Rights (Helfer & Austin, *supra* n. 79, at 260-261; and Michael D. Birnhack, *Copyright Speech: A Trans-Atlantic View*, in Torremans, *supra* n. 79, at 54-58); and in the United States

of free expression' through incentivising speech,⁸¹ and its internal private-public rights balance, specifically with regard to the idea/expression dichotomy (that only expressions are protected and not the ideas they hold) and the existence of permitted uses.⁸² Notably, the ability of the idea/expression dichotomy to ensure the correct balance for freedom of expression is controversial.⁸³ The situation with alternative means of regulation is made complicated by the fact that they often stem from private entities, where many rights have limited application at the civil level (particularly the right to freedom of expression). For example, NZBORA does not apply to the ASA and Ngā Taonga Sound & Vision because they are private entities.⁸⁴ In contrast, as a statutory entity that performs public functions conferred to it pursuant to law,⁸⁵ Te Papa's Board is subject to NZBORA.⁸⁶

Eldred v. Ashcroft, 537 US 186 (SC 2003), affirmed 239 F 3d 372 (DC Cir 2001)). All these jurisdictions have largely refused to acknowledge any conflict between copyright and freedom of expression: Paul L.C. Torremans, *Copyright as a Human Right* (Torremans), *supra* n. 79, at 2-3 and 11.

81. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), 558 per O'Connor J.

82. See, Torremans, *supra* n. 79, at 2-3 and 11; Eric Barendt, *supra* n. 25, at 11-33, paras 2.06-2.07, and Kevin Garnett, *The Impact of the Human Rights Act 1998 on UK Copyright Law*, in Griffiths & Suthersanen, *supra* n. 79, at 171-209, at paras 8.02-8.15.

83. There exists case law in the UK, EU and US which either acknowledges or leaves open the possibility that there may be rare situations where the 'public interest' outweighs copyright, but cannot be met by the idea/expression dichotomy or a permitted use. See e.g., *Ashdown v. Telegraph Ltd* [2002] EWCA 1142 (Civ) at para. 31, 33, 39, 43, 45; *Ashby Donald and others v. France* (2013) ECHR Appl. No. 36769/08; and *Eldred v. Ashcroft*, *supra* n. 80.

Moreover, there are valid arguments that the idea/expression dichotomy is not as well-defined as inferred in *TVNZ Ltd v. Newsmonitor Services Ltd*, *supra* n. 80 and is not on its own capable of protecting freedom of expression. See, Jo Oliver, *Copyright, Fair Dealing, and Freedom of Expression*, 19 NZLJR 89 (2000); Susy Frankel, *Protecting 'Killer Crows' and 'Fantasy Football'. The Ethics of Copyright Law*, 28 VUWLR 191, 197-198 (1998); Patrick Masiyakurima, *Fair Dealing and Freedom of Expression*, in Torremans, *supra* n. 79, at 92; and Barendt, *supra* n. 25, at para. 2.06.

84. See, NZ BORA, s. 3, which states that the Bill only applies to acts done '(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.'

85. See *ibid.*, on the application of NZ BORA.

86. On the relationship between the executive and parliament with respect to regulation that affects human rights and the extent to which regulating powers should be delegated to the executive, see, Petra Butler, *When Is an Act of Parliament Appropriate form of Regulation? – Regulating the Internet as an Example*, in *Recalibrating Behaviour: Smarter Regulating in a Global World*, 489-528 (Susy Frankel & Deborah Ryder eds, LexisNexis 2013), who argues that regulation that has widespread effects on human rights and that requires the balancing of different interests should not be delegated away from parliament. This is not an issue with the Board of Te Papa, which has statutorily been given the right to carry out its functions 'hav[ing] regard to the ethnic and cultural diversity of the people of New Zealand' and 'endeavour[ing] to ensure both that the Museum expresses and recognises the mana and significance of Maori, European, and

Fundamental and human rights are constantly in conflict. This is nothing new. In this situation, we are seeing the conflict of rights pertaining to culture⁸⁷ with other rights. It is not the purpose of this chapter to delve into rights relating to culture, their relationship with other rights, the extent to which states are obligated to protect them, or their enforceability against private entities as opposed to the state or agents of the state. Suffice it to say that one should consider or at least keep in mind other rights and interests when developing alternative forms of regulation, because rights must always be balanced against one another.

8.4 FOLLOWING IN COPYRIGHT OWNERS' FOOTSTEPS?

At the end of the day, though all these non-legal policies and mechanisms may have real and positive effects with respect to the interests of Māori in their cultural heritage, it is a weakness that they are not hard law or perhaps even contrary to law or legal policy. In many cases this makes them without legal enforceability and sometimes potentially even legally challengeable.

At the same time, the online world can be so difficult to regulate, that one could argue that laws are no more enforceable online than policies and codes of conduct. All things considered, it could very well be that the flexibility afforded by non-law-based ordering could be preferable and even more effective than legal doctrines, whether legislative, common law or equity based. In other words, unless one is willing to go to court every time his/her copyright is infringed, enforcing copyright may not be so different than enforcing codes of conduct or protocols and policies in the online environment.

As noted throughout this chapter, the online environment is not like the real world. The ease with which one can disseminate information and knowledge online cannot be matched in the offline world. This can, of

other major traditions and cultural heritages, and that the Museum provides the means for every such culture to contribute effectively to the Museum as a statement of New Zealand's identity' (The Museum of New Zealand Te Papa Tongarewa Act 1992 (NZ), s. 8). This gives the Board a significant amount of leeway to make policies and decisions relating to cultural diversity and cultural conflicts.

87. ICCPR, *supra* n. 25, Art. 27, which protects ethnic minorities from being 'denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. For the definition of 'culture' see Human Rights Committee, *The Rights of Minorities (Article 27)*, CCPR General Comment No. 23 (UN HRC Doc. CCPR/C/21/Rev.1/Add.5, 1994), para. 7.

See also, UN, International Covenant on Economic, Social and Cultural Rights (CESCR) (1976) GA Res. 2200A (XXI) (16 December 1966, entered into force 3 January 1976), Art. 15.1(c), which states that everyone has the right '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

course, be a positive tool for indigenous peoples to disseminate information and knowledge that they wish to publicise, to promote certain products of their culture, to ensure that certain information or knowledge is not lost, or to allow members of a community strewn around the world to remain connected to their culture, for example.⁸⁸ However, that the Internet has an uncontrollable and sometimes proliferating nature can make it difficult to control information and knowledge once online. As an illustration, in 2007, upset was caused when a video was created for marketing purposes by the Bakery Industry Association of New Zealand to promote the Bakery of the Year Award, which depicted gingerbread cookie men performing the haka, with high-pitched, squeaky voices, before being crushed by a sack of white flour.⁸⁹ Though not intended by its creators, many Māori found the video to be inappropriate and culturally offensive. The video would fall under the definition of 'advertisement' within the purview of the ASA. No complaint was brought to the ASA, however even had the ASCB or ASCAB determined that the video was likely to cause serious or widespread offence and the Bakery Industry Association stopped using the video, it can still be easily found online, e.g., on YouTube, having been uploaded by private citizens.

What the ease of reproduction of works online has meant in the copyright world is that copyright owners have more or less stopped targeting individuals, finding that it is over cumbersome, does not generally work as a deterrent to others and makes the copyright owners unpopular to the masses. Instead, copyright owners are continuing to rely on TPMs and are focussing on ISPs. To highlight the relationship between right owners, infringers and ISPs, if we take the gingerbread example assuming that the ASCB/ASCAB had ruled that the Bakery Industry Association should no longer use the advertisement, the only way that the online presence of the advertisement could be removed is if the Bakery Industry Association asserted their copyright against each individual uploader or if they asked the ISPs hosting the video (e.g., YouTube) to take down or filter out all copies. YouTube and other large ISPs will take down content on the basis of copyright infringement and removal from the main content holders would significantly reduce access. The problem is that much traditional cultural heritage is not protected by copyright and there is of yet no *sui generis* protection upon which indigenous peoples could base their interests on.

This raises the question of whether the only way we can meet Māori interests in controlling the use of their works online is through similarly using TPMs and focussing on ISPs, but based on codes of conduct, policies

88. This has been discussed elsewhere. See, Catherine E. Bell, Jessica C. Lai & Laura K. Skorodenski, *Loi autochtone, loi sur la propriété intellectuelle et politique muséale: des diverses méthodes de protection du patrimoine immatériel autochtone*, 38(3) *Anthropologie et Sociétés* 38(3) 25 (2014).

89. Mike Knott, *Gingerbread Haka Causes Upset* (North Shore Times, 31 July 2007), <http://www.stuff.co.nz/national/14479> (accessed 3 November 2015).

and protocols. This is followed by an analysis of the 'right to be forgotten', which was recognised in 2014 by the Court of Justice of the European Union (CJEU). This right raises an interesting possibility for the deletion of personal data from the Internet or at the least the removal of access to webpages through search engines. This part of the chapter questions if – in the absence of enforceable copyright or codes of conduct or policies, or *sui generis* protection – the right to be forgotten could form the basis for indigenous peoples to bring their interests to ISPs.

8.4.1 TECHNICAL PROTECTION MEASURES

As noted in the foregoing, codes of conduct, policies and protocols may have very little effect in the online environment. For example, if the National Library were to place its digital library online, it may not matter that its policy is to take *tikanga Māori* into account when considering the conditions under which access is permitted. Perhaps they would consult with the relevant Māori individual or group and decide that access is permissible, but not reproduction or further dissemination. A licence or terms of use agreement, which the user would have to assent to before gaining access, would probably indicate this. However, free of technical restrictions, there is nothing to stop users from copying the content anyway, whether via accessing the computer's cache or another means. Such copying would be difficult if not impossible to monitor. Even if a breach of licence or terms of access were detectable, the user could potentially argue that the licence is invalid because of the reasons discussed above. The situation is the same regarding Te Papa's online policy that certain *taonga* works only be used for research, personal study or educational use.

The question then is what the role of TPMs may be. Rather than simply requesting that users only use images from their online collections under certain conditions, Te Papa and the National Library of New Zealand and similar entities may wish to consider the use of technologically controlling access and use of certain images. TPMs can be used to prevent the unwanted access and reproduction of works in many cases. The TPM could even be tailored to the specific nature of a work, e.g., not allowing an image to be saved (because any use of the image would be offensive), only allowing a low-quality version of an image to be saved (because private use of that work is acceptable, but not commercial use). It is important, however, not to over-state the ability to refine TPMs. While they can be tailored, they are blunt instruments⁹⁰ that do not have the capacity to distinguish between private/commercial or non-offensive/offensive use, for example. They are

90. See e.g., James Grimmelmann, *Regulation by Software*, 114 Yale L. J. 1719 (2005); Sonia K. Katyal, *Filtering, Piracy, Surveillance and Disobedience*, 32(4) The Colum. J. L. & Arts 401 (2009); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73

advantageous because most people would not have the know-how to hack TPMs, or would not expend the effort to gain such know-how. However, as copyright owners have discovered, there is no such thing as an unhackable TPM.⁹¹ Furthermore, it only takes one person to hack a work and place it online for control to be significantly reduced and open the door for potential offensive use. As a consequence of the hackability of TPMs, the copyright industry has moved away from simply using TPMs and turned towards getting ISPs to assist them. If enough large and globally integrated ISPs (such as YouTube and Google) cooperate with copyright owners, the control of access and use of works is considerably restored, as it is harder to source copies from less-popular websites that are not as likely to be found or prioritised highly by search algorithms.⁹²

8.4.2 USING ISPs

Initially, copyright owners targeted ISPs in a narrow sense, wanting them to delete copyright infringing materials, terminate the accounts of copyright infringers and to divulge user-account information of such infringers so they could enforce their copyright. According to the Copyright Act 1994, if users store copyright infringing materials with an ISP, the latter will be found to infringe copyright if it knows (e.g., through a notice of infringement) or has reason to believe that the material is copyright infringing and does not delete the material as soon as possible.⁹³

In New Zealand:

Internet service provider means a person who does either or both of the following things:

- (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing;
- (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user.⁹⁴

Chi.-Kent L. Rev. 1257, 1287 (1997-1998); and Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 Fordham L. Rev. 537 (2005-2006).

91. Jonathan Zittrain, *The Future of the Internet and How to Stop It* 105 (Yale University Press 2008).

92. Niva Elkin-Koren, *After Twenty-Years: Revisiting Copyright Liability of Online Intermediaries*, in *The Evolution and Equilibrium of Copyright in the Digital Age* 29, 44-45 (Susy Frankel & Daniel Gervais eds, Cambridge University Press 2014), who notes that the fact that there are only a few large players means that there can be no 'effective alternative for posting content that was removed', which is problematic when the content was removed erroneously.

93. Copyright Act 1994, s. 92C(2)(a).

94. *Ibid.*, s. 2(1).

The definition of ISP is quite broad, particularly through subsection (b), extending beyond mere providers of internet. In 2011, the Copyright (Infringing File Sharing) Amendment Act 2011 introduced special provisions for file sharing and for 'internet protocol address providers' (IPAPs), which are:

a person that operates a business that, other than as an incidental feature of its main business activities,—

- (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; and
- (b) allocates IP addresses to its account holders; and
- (c) charges its account holders for its services; and
- (d) is not primarily operated to cater for transient users.

Under the new sections, IPAPs are required to assist copyright owners to issue infringement notices to its users, under a 'three-strikes' model, starting with a detection notice, a warning notice and, finally, an enforcement notice.⁹⁵ Only after the final notice can the right holder actually enforce the copyright. They may do so through the Copyright Tribunal, which can require the user to pay the right holder up to NZD 15,000.⁹⁶

In order to enforce and protect their copyright against individual infringers, copyright owners went after providers of internet connection (i.e., IPAPs) to suspend access to repeat offenders. However, targeting providers of internet is controversial as it is viewed as being disproportionate to disconnect internet connection as a result of copyright infringement. This rhetoric is mostly based on freedom of expression and information arguments because the internet represents access to information and a key media for making expression.⁹⁷

After discovering the inefficiency and non-functioning preventative role of going after individual infringers and that doing so only made copyright owners unpopular, copyright owners changed tact and started to target 'bottleneck' ISPs, such as YouTube and Google, before starting to work with them to monitor and police copyright infringement.⁹⁸ The dealings between powerful copyright owners and ISPs have resulted in private regulation, whereby the ISPs not only take down material upon request, but also use technical means to track and prevent copyright infringement. For example, YouTube has a 'fingerprint database' of copyrighted works from large copyright-owning companies that it automatically compares uploaded videos

95. *Ibid.*, s. 122B(3).

96. *Ibid.*, s. 122O.

97. UN Human Rights Council (HRC), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, 17th Session (UN Doc. A/HRC/17/27, 2011), paras 19-27 and 49-50.

98. *See*, Elkin-Koren, *supra* n. 92, at 31-34 and 45-48.

against.⁹⁹ Depending on the copyright owner's wishes, audio is muted, the video is automatically removed, or the uploader is given the choice of keeping it online with advertising (some of the revenue of which then goes to the copyright owners) or having the video removed by YouTube.

This is a form of private ordering. Companies like YouTube are usually not required to assist copyright owners to monitor and police the use of copyrighted works in this way, not even in the US.¹⁰⁰ They do so because it is in their interest to work with large copyright-owning companies. If not, they risk having to take down a lot more copyright-protected content owned by powerful copyright owners, which they do not want to do because such content is popular, attracts visitors/users and earns them income.¹⁰¹ Furthermore, they risk powerful copyright-owning companies lobbying governments to extend secondary liability to such ISPs. All these large companies are happier to self-regulate and to do so in cooperation with one another when under the threat of government regulation.

The pertinent question for the purposes of this chapter is how this translates into the discussion of Māori interests in controlling their *taonga* works online. The automated nature of ISPs ability to track and take down content has the advantage that it is efficient and does not require a request for every takedown. However, like TPMs discussed above, it is a blunt approach that cannot take into account the different interests that Māori have in relation to different *taonga* and that certain uses may be offensive whereas others are not. Nevertheless, keeping in mind that some uses would be offensive and it is desired that they be removed, even if through a notice and takedown (rather than automated) mechanism, it is worth questioning whether codes of conduct, policies and protocols relating to Māori *taonga* could be similarly taken to ISPs the way that copyright owners brought their interests. In other words, could such codes of conduct, policies or protocols be used to convince entities like YouTube to take down content in an analogous manner as copyright owners have used their copyright? In a sense, such an approach is not as far-fetched as it might sound. As noted, the ISPs are not usually responding to legal obligations when they undertake the role of monitoring and policing the use of copyrighted works. We could consequently expect that ISPs could similarly reflect certain policies and protocols that take into account indigenous peoples' interests in their works. However, as desirable as that may be, though there may be no legal obligation for ISPs to cooperate with copyright owners, they do so because

99. *See* Youtube, *How Content ID works*, <https://support.google.com/youtube/answer/2797370?hl=en> (accessed 3 November 2015). *See also*, David Kravets, *Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars* (Wired, 21 November 2011).

100. On the 'safe harbour' position of ISPs and the rationale behind it, *see*, Elkin-Koren, *supra* n. 92, at 34-39.

101. On the dangers of private ordering between ISPs and copyright owners, especially to freedom of information and expression, as a result of ISPs becoming active participants and, consequently, publishers and distributors, *see*, Elkin-Koren, *supra* n. 92, at 40-42.

it is in their interest financially and because ISPs would rather partake in private ordering than be regulated by the state. Furthermore, the existence of copyright plays a role, albeit an indirect one. It obviously lies behind the threat that copyright owners might lobby governments to regulate ISPs. Māori and other indigenous groups, even together, would not have enough influence or power to convince ISPs to address their interests, whether via notice and takedown, or automated mechanisms. Naturally, while codes, policies and protocols may not form enough of an incentive for ISPs to work with indigenous peoples, the situation would be different if there were *sui generis* protection of indigenous cultural heritage upon which the basis of a working relationship between ISPs and indigenous peoples could be formed.

8.4.3 EUROPE'S 'RIGHT TO BE FORGOTTEN'

As discussed in the foregoing, the advantage of getting ISPs to cooperate would be that they are large global entities with services that are far reaching. Perhaps even more advantageous is that they use automated processes to monitor and police the use of copyrighted works. However, given that it is unlikely that ISPs would have any impetus to address indigenous interests in their *taonga* works in the absence of copyright or *sui generis* rights, Māori would need to base their interests in other legal rights. The question then becomes what right this could be, particularly for the online context.

As discussed elsewhere, cultural rights are weak, particularly in comparison to political rights.¹⁰² In the balance of interests (such as against the political right to freedom of expression and information), cultural rights seldom win. This is in most part due to the fact that cultural rights are ill defined (e.g., what is 'culture'?) and tend to conflict with one another. As such, cultural rights found in international law are never implemented into national laws as such, but rather through indirect means. As an illustration, the protection of copyright is considered to be an embodiment of the Article 15(c) International Covenant on Economic, Social and Cultural Rights right to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.¹⁰³ Thus, the broad-stroke cultural rights found in international law do not have any real effect. We must then look for a more specific and implemented right that indigenous peoples could base their interests on.

It is interesting to analyse whether the EU 'right to be forgotten' online might be of service. The EU is considered to have one of the strongest

102. Jessica C. Lai, *The Protection of Māori Cultural Heritage: Post-Endorsement of the UN Declaration on the Rights of Indigenous Peoples*, (2011) University of Lucerne, Switzerland, i-call Working Paper No. 02, Sect. 3.

103. *Supra* n. 87.

protections for personal data through the Data Protection Directive,¹⁰⁴ which has the aim of 'protect[ing] the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'.¹⁰⁵ In May 2014, in the *Google Spain* case, the CJEU ruled that search engines are responsible for the content that they display to users and so must comply with EU data privacy-laws.¹⁰⁶ In this case, the applicant lodged a complaint against a daily newspaper and Google Spain and Google Inc. regarding two online pages held by the newspaper that were listed in the results of a Google search of his name. These pages contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by the applicant. It was requested that the pages be removed or altered, or that Google make them non-searchable because the attachment proceedings had been resolved for many years and were no longer relevant.

The CJEU held that search engines are responsible for the processing that they carry out with personal data that appears on web pages published by third parties. In effect, this means that search engines have to make personal data unsearchable (i.e., not in the search results) on the request of a data subject under certain circumstances. Namely, personal data must be: processed 'fairly and lawfully'; 'collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes'; 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed'; 'accurate and, where

104. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995 P. 31-50, Arts 12 and 15. The Directive only covers the processing of personal data of natural persons, not legal entities. The Directive on Privacy and Electronic Communications 2002/58/EC was adopted to protect the fundamental rights of natural persons and particularly their right to privacy, as well as the legitimate interests of legal persons. It supplements the Directive 95/46/EC. The Directives were implemented differently in different EU Member States making it difficult to offer transnational services. A new Regulation is being created that should simplify compliance procedures for multinational firms. Directive 95/46/EC would be superseded by this new regulation, whereas 2002/58/EC would stay in effect. The Regulation would strengthen data protection for individuals. See, European Commission, *Protection of personal data*, <http://ec.europa.eu/justice/data-protection/> (accessed 3 November 2015); Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: the New Framework of the European Union*, 36(2) Harv. J. L. & Pub. Policy 605, 616 (2013); and Françoise Gilbert, *Proposed EU Data Protection Regulation – Issues to Consider when Planning for the Future Regime*, 17(2) J. Internet L. 1, 1 and 13-24 (2014). For a comparison of the US and EU, see Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126(1) Harvard L. Rev. 1966 (2013).

105. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995 P. 31-50, Art. 1.1.

106. *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (2014) C-131/12 (CJEU) [hereinafter *Google Spain*].

necessary, kept up to date'; and 'kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed'.¹⁰⁷ Additionally, personal data may only be processed if 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed',¹⁰⁸ which may include the business interests of search engines,¹⁰⁹ 'except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject' particularly the right to respect for private life and right for protection of personal data as per the Charter of Fundamental Rights of the EU.¹¹⁰

Upon breach, the information and links concerned in the list of results must be erased,¹¹¹ because the Directive states that Member States have to guarantee that data subjects can obtain from processors of data (the 'controller') 'as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive', i.e., the right to be forgotten.¹¹² Furthermore, data subjects have the right to object 'on compelling legitimate grounds relating to his particular situation to the processing of data relating to him', the consequence of which can be to stop the controller from processing the data.¹¹³

According to the CJEU, the right to respect for private life and right to protection of personal data generally override not only the economic interest of the operator of a search engine but also the interest of the general public in having access to that information upon a search, depending on a variety of factors.¹¹⁴ The determination depends on the nature of the information and its sensitivity with respect to the subject's private life, and also the interest of the public in having access to that information and if the subject has a certain public role that makes the information of public interest.¹¹⁵

The right to be forgotten seems to be a significant right for the subjects of information collection, storage and processing. It could potentially constitute a right with which indigenous peoples could base their interests in works that overcome the threshold of 'personal data', which means 'any information relating to an identified or identifiable natural person'.¹¹⁶ Under such a definition, only works specifically connected to an individual through

authorship, genealogy or history could be considered. In other words, any information (including TK or TCE) that relates to and can be tied to a specific individual could constitute personal data and could ground a request for the removal or blocking of that information. If enough individuals were to apply to search engines, like Google, for the removal of links to such content in a well-reasoned and coherent manner – expressly outlining how it is that the work is personal to the individual, why its online publication is harmful and why there is no or little public interest in the data – it may become in their interest to simply work with them. For example, using their search algorithms to filter out any content that matches works from a fingerprint database that they develop together with indigenous peoples.

Of course, New Zealand is not in the EU and thus also not a Party to the Data Protection Directive nor the Charter of Fundamental Rights of the EU. Nevertheless, the laws that the CJEU decision was based on are not so unusual. New Zealand is a Party to the UN International Covenant on Civil and Political Rights (CCPR),¹¹⁷ which states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'¹¹⁸ However, New Zealand does not specifically protect privacy or personal data within NZBORA.¹¹⁹ It does protect against unreasonable search and seizure, and against being arbitrarily arrested or detained.¹²⁰ This has been interpreted as protecting privacy or a 'right to be let alone', however only against intrusion from the state.¹²¹

The Privacy Act 1993 regulates the collection, use and disclosure of personal information relating to a living natural person, which is defined broadly as 'information about an identifiable individual'.¹²² The Act applies to any agency, whether private or public, that holds personal information.¹²³ The Privacy Act includes twelve 'Privacy Principles', which includes the requirement that all such agencies provide a subject with the information they hold on him/her when requested by the subject.¹²⁴ Agencies are also to correct information on request to make sure it is accurate, up to date, complete, and not misleading,¹²⁵ where 'correct' means 'to alter that information by way of correction, deletion, or addition'.¹²⁶ It is also a principle that agencies must not keep personal information for longer than is

107. Directive 95/46/EC, *supra* n. 104, Art. 6.

108. *Ibid.*, Art. 7(f).

109. *Google Spain SL*, *supra* n. 106, at para. 73.

110. Articles 7 and 8 of the Charter of Fundamental Rights of the EU. *Google Spain SL*, *supra* n. 106, para. 74.

111. *Google Spain SL*, *supra* n. 106, at para. 94.

112. Directive 95/46/EC, *supra* n. 104, Art. 12(b).

113. *Ibid.*, Art. 14(a).

114. *Google Spain SL*, *supra* n. 106, at para. 81.

115. *Ibid.*, at paras 97 and 99.

116. Directive 95/46/EC, *supra* n. 104, Art. 2(a).

117. ICCPR, *supra* n. 25.

118. *Ibid.*, Art. 17.1.

119. Problems relating to this are discussed by Petra Butler, *The Case for a Right to Privacy in the New Zealand Bill of Rights Act*, 11 NZJPI 213 (2013).

120. NZBORA 1990, ss 21-22.

121. *Hamed v. R* [2011] NZSC 101, para. 10 Elias CJ.

122. Privacy Act 1993, s. 2(1).

123. *Ibid.*, s. 2(1).

124. *Ibid.*, s. 6 Principle 6 and s. 33.

125. *Ibid.*, s. 6 Principle 7.

126. *Ibid.*, s. 2(1).