Is there a right of collective personality?

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*485 The emergence of a so-called “right of personality” seems to epitomise the law responding to the modern cult of celebrity and the exploitation of individual identity as a mass-media commodity. Because, in practice, it privileges dominant cultures and the iconic images generated by commercial celebrity in a global market, a right of personality (or of publicity) may be suspected as promoting cultural homogenisation.¹ Yet, just possibly, “given appropriate and well-balanced boundaries, a right of publicity is more likely to foster cultural diversity than to further cultural impoverishment”.² How? It depends on the nature of the “personality” that is protected, and what one means by “protection”.

Can a community be considered to have a collective personality, as a way of characterising a shared, but distinctive, cultural identity? If so, how should its integrity be protected? Some recent normative guidance is offered by the Declaration on the Rights of Indigenous Peoples, which requires states, inter alia, to

“provide effective mechanisms for prevention of, and redress for … any action which has the aim or effect of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities”.³

It also acknowledges indigenous peoples' “right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”.⁴ The 2005 General Comment on Art.15(1)(c) of the International Covenant on Economic, Social and Cultural Rights recognises the collective “interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge”, and proposes “measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes” and the prevention of “the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties”.⁵

But how might a “right of personality” respect or protect the collective interests of non-dominant cultures and communities? If the law protects atomistic “personality”,

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might it be coaxed into recognising the collective personality of diverse cultural groups against unwanted appropriation and commercial exploitation? Could the same legal principles and legal system that apply when OK! and Hello! magazines vie for a share of the media action at a Hollywood wedding also assist indigenous communities to sustain their very cultural identity in the face of dominant cultural and commercial influences? Even to phrase this question may seem offensively overweening and culturally reductionist. Yet it provides a fresh vantage point from which to examine critically the dynamic, unsettled law of personality. The public interest, changing commercial practices and shifts in cultural values can seem out of alignment with the lines of development of the law of personality, and the glare of celebrity litigation can obscure or distort the underlying policy principles. To focus solely on the opportunistic use of IP law by a relatively narrow band of commercial interests may provide an inadequate basis to assess fully the relevance, utility and cultural fit of broader legal principles against the values and interests of more diverse communities and their collective personalities; it may unwittingly inhibit the broader application of legal remedies for the benefit of more diverse communities.

The manifold causes of action loosely grouped together as a right of personality do roughly mirror the diversity of the multifarious forms of misappropriation, free-riding and unjust enrichment, intrusion, illegitimate invocation of identity, and cultural offence and damage claimed by indigenous, local and other traditional cultural communities. Hence this polyvalent quality of the law of personality is not in itself problematic; to the contrary, it may offer the flexibility and adaptability needed to address diverse claims for legal recognition, respect and protection for traditional knowledge (“TK”) and traditional cultural expressions (“TCEs”). Protection of TK and TCEs can be construed in terms of respect for the collective personality or identity of a community: as recognition of a right of collective personality. After all, the significance of TK and TCEs—what makes them “traditional”—is their integral role in defining a community as an entity (legal, social, cultural or simply existentially), and thus in helping to form that community's collective personality.

Contemplating a right of collective personality as a clarifying mechanism for dealing with claims of appropriation and misuse of TK and TCEs raises challenging legal questions:

• Do the remedies clustered under the right of personality respond, at least partly, to the forms of misappropriation, prejudice to collective identity and other damage that are of concern to communities?

• Can the necessary “personality” be attributed to a community's shared cultural identity as such, inasmuch as the law of personality does assume or construct a protected persona?

• Can a right of personality be influenced by the customary law that is integral to the collective personality of many indigenous communities?

Communities articulate a general sense of violation or intrusion in the debate over protection of TK and TCEs, a broad claim that covers a wide sweep of factual circumstances; in seeking the common thread or cause of action, can this claim be
construed as the appropriation of their collective personalities as communities, as a coherent means of legal protection for their cultural integrity?

The right of personality has an unsettled, hybrid quality, lacking coherence as a distinct legal doctrine. One may query the utility of this omnibus concept, given the diverse areas of law ushered beneath this umbrella: personality cases include statutory rights to privacy and publicity; conventional and expanded passing off; privacy; confidentiality; equity providing a fusion of confidentiality and human rights law; unfair competition and trade practices (including trade descriptions); moral rights; libel; malicious falsehood and trespass to the person; and trade marks.

The general right of personality is therefore retrofitted to a cluster of different legal mechanisms, and is not a simple creature of statute or even a conscious, positivist construct of policy. Hence it might more easily accommodate a collective identity than if it were a doctrinally rigid, statute-bound “right”. Diffuseness offers useful flexibility--rather than imposing on communities a restrictive conception of personality, can the law be guided by the experience and collective character of these communities to acknowledge a form of collective personality?

A “right of personality” refers to legal mechanisms that preclude third parties from making use, particularly commercial use, of certain aspects of personality. This hybrid “right” centres on an entitlement to say whether, and how, one's identity should be exploited commercially, through various forms of association with a product or service, such as endorsement, evocation or branding, or through activities that intrude upon, wrongly benefit from or distort aspects of one's personality or personal life.

A “right of privacy” may include not merely privacy in the intuitive sense, but also (somewhat incongruously) the right publicly to commercialise one's identity, or more strictly to prevent others from doing so. The classic formulation of the right of privacy in the United States identifies three strict privacy aspects (intrusion upon solitude, disclosure of private facts, publicity placing in a false light) and a fourth element, typically termed a “right of publicity”: appropriation of name or likeness for the defendant's advantage; “likeness” is now read broadly, e.g. to include a distinctive voice, musical style, nickname or catchphrase. While distinguished from strict privacy, the “right of publicity” is not a right to publicise. It entitles one to exclude others from intruding on the commercial domain associated with one's individual persona or defining one's public face, and thus allows one to authorise commercial or public use of one's identity. As in IP law, the core legal character of a right of personality is as a means of setting bounds for third-party behaviour; it should not impose unwanted cultural or commercial choices, but would rather preclude third-party use of protected elements of identity. Ideally, the IP right, even or especially in the hands of TK holders and bearers of TCEs, should be seen as a right to say “no”, the entitlement to have a say in how knowledge and cultural expressions are used--especially by third parties for commercial ends, rather than as compelling the commodification and trivialisation of traditional cultures.

The right of personality responds to shifting commercial and social patterns, notably commercialisation of celebrity, the systematic appropriation of the market value of reputation and the evolution of celebrity endorsement. This phenomenon is symptomatic of two trends: the intrusion of commercial values into domains formerly
conceived as non-commercial, personal, or private; and a cult of individual identity and the prospects for profiting from one's own identity, to the exclusion of others. These trends--globalised commercial culture and atomistic individualism--seem at odds with the world-view and values of many traditional communities, at a time when their collective cultural identities are threatened by the homogenising impact of this very dominant global culture.

Many communities express concern that their very collective survival is at stake, in part thanks to the impact of the very commercial phenomena, global pop culture and mass media obsession with ephemera, that the right of personality seems to privilege. Tawdry profiteering from shallow celebrity seems the very antithesis of the deep-rooted intergenerational cultures and gravitas of indigenous communities, a world away from contemporary pop culture. The superficial flavour of the personality right is evident from the celebrity cases shape the law: a TV comic's catchphrase is used to brand portable toilets; Winston cigarettes hitch a ride on a celebrity racecar; a gameshow hostess is spoofed to sell cars. Such cases track the evolution of popular culture:

“[c]ommercial speech has a profound effect on our culture and our attitudes. Neutral-seeming ads influence people's social and political attitudes. In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared.”

This fusion of commercial and non-commercial might be welcome cultural dynamism, or lamentable homogenising cultural impoverishment. But it is telling that the entitlement to parody celebrity discourse for commercial gain is cast in terms of freedom of speech. It highlights the three-way tension between respect for integrity of personality, a robust public domain, and legitimate commercial and user interests. Disney's cultural-commercial dominance provoked parody as a critical response, setting copyright in tension with freedom of speech; but it also led to calls to limit use of traditional sources for works such as Pocahontas, potentially setting claims of cultural integrity at odds with user rights. Should cultures which are yet to enter the commercial mainstream enjoy exceptional respect and deference? When does the mocking or lighthearted use of discourse for “commercial” or “entertainment” purposes tip the balance from culturally desirable parody and free speech to become cultural harm, misappropriation of collective personality? The need to suppress negative racial stereotyping in advertising is a clear case, which could illuminate a broader right of integrity of a collective personality. Even the seemingly respectful invocation of an Indigenous identity may violate a collective personality (including failure to recognise diversity and individuality within communities, the collective personality right construed in part as an entitlement not to be typecast; a collective persona characterised also by its plurality). This may be so when an indigenous aura is appropriated for commercial gain, and may violate the cultural values of a community, or a general sense of right behaviour.

This broader policy perspective helps round out an often narrowly construed right of personality, in particular clarifying how the “privacy” and “publicity” aspects fit into a broader whole. It illustrates how the right of publicity is not merely commercial or utilitarian in nature, but has a basis in the integrity of personhood, akin to the moral right of integrity in copyright law. Exercising a right to prevent offensive or
derogatory forms of commercial appropriation does not require a positive interest in commercialising the personality, or in limiting other's use for other than commercial reasons. This applies especially to the defence of the collective personality of traditional communities; arguably, this defence of collective personalityagainst inappropriate commercialisation is a unifying element of past IP cases concerning appropriation of indigenous artworks, symbols and TK, when legal action was taken to defend traditional personae from intrusions by third parties, not to win commercial advantage.

A coherent account of the right of personality would reconcile personal privacy with gaining legitimate benefit from commercialisation of one's public identity, through the exercise of exclusive rights. It may be easier to reconcile these aspects--the truly private and the public-commercial--by accepting the loss of any firm or systematic distinction between private life and commercial interests. This could then relieve the plaintiff of the burden to show commercial loss when defending their persona against commercial appropriation; a "commercial interest" may simply be the negative interest not to be the involuntary subject of others' commercial activities, not as the interest of a commercial competitor.

The blurring of private and commercial domains may, after all, be an involuntary--indeed unwelcome or profoundly unwished--consequence of how others choose to attach commercial value to one's identity; an experience incongruously shared by Western royalty and indigenous communities, the subject of unwanted interest, curiosity or prurience of sectors of the public, and ensuing commercialisation. Bourgeois fascination with indigenous identity and cultural forms, and media fixation with the private lives of royalty, are disparate instances of commercial pressures to appropriate and exploit the value of private personae.

There are external and internal aspects to the sense of violation that arises when traditional personality is appropriated. External exploitation of TK and TCEs is seen as misappropriation--a taking, theft or even conversion--of cultural or intellectual property; but it is also sensed as intrusion on the community itself. Failure to recognise this internal aspect leads to improper responses, such as assuming that an equitable share of a royalty stream sufficiently remedies the appropriation of TCEs/TK: commercial exploitation may itself breach customary law or values, so it may be offensive merely to offer a slice of the commercial action as a remedy to the original misappropriation, when the very crux of the concern pivots is the trivialisation of a vulnerable culture through inappropriate commercialisation.

Reconciling the external/publicity aspect with the internal/privacy aspect is essential in establishing a systematic law of personality. It could broaden the right of publicity beyond “just” another market-driven form of propertisation of intangible subject-matter. This area of law has developed with little direct policy guidance from the legislature, and is shaped by those who have the resources and the motive to defend their personality through litigation; hence case law is dominated by “celebrities” with the capacity to pursue legal actions. This plaintiff-led evolution of the law is naturally skewed towards celebrities' commercial interests. But cases have balanced an inherent right to celebrities' privacy with public interest disclosure of their doings; writ large, the law of personality is not a law of celebrity as such. Judicial commentary can even suggest that celebrities effectively “ask for it”, that anyone
enjoying the benefits of celebrity is fair game for public intrusion (indeed, that there is a specific public interest attached to revealing private details about a celebrity qua celebrity\footnote{55} ). Yet human rights and public policy considerations may influence the judicial construction of protectable persona so as to emphasise the privacy aspect.\footnote{56} Moreover, “[c]elebrity is not a self-defining role: many who seek it do not achieve it, many who achieve it are unable to retain it, and many, so to speak, have it thrust upon them”.\footnote{52} Equally, celebrity does not confer an entitlement to censor one’s public persona of unflattering truths.\footnote{58} To broaden the perspective further, the pivotal factual basis is not mere celebrity as such, but a third party’s appropriation of a commercially valuable persona, whether or not the possessor of the persona desired this outcome, a revaluation of persona which is “often generated by the actions of others; most notably the media”.\footnote{59} Similarly, an act of misappropriation of TK, TCEs and genetic resources is, in a backhanded way perhaps, a realisation of the ex situ value of this material.

“Personality” cases and cases of misappropriation of TK and TCEs share a curious duality, reflecting a true existential dilemma for traditional communities: where does the call for privacy stop, and the right to control publicity start? If “personality” is a legal artefact, not a full expression of a holistic identity, is the protected persona to be conceived principally as the public face (what we want the world to see) or the private one (what we do not want it to see)? The common integer seems to be that there is an acceptable level, or acceptable modes, of dissemination of elements of a persona, even a collective persona, to the global public, and even of commercial engagement with a globalised economy; but with clear bounds set by private and public interests in equipoise.

Indigenous communities express diverse needs and expectations concerning third-party use and dissemination of their TK and TCEs, and engagement with the commercial domain. Is the concern simply to be left in peace (“the right to be left alone”\footnote{60} ), to sustain a threatened collective identity, and the social, legal, spiritual and environmental context which shapes that identity? Or is there interest in making consensual commercial use of selected public aspects of reputation, of image, of cultural identity--but on one’s own terms, in one’s own time? To resist cultural-commercial globalisation and to reject the loss of “the line between commercial and noncommercial”\footnote{61} ; or to ride the momentum of globalisation, to deploy external commercial and cultural interest in traditional collective persona for the benefit of the community? This dilemma has different operational contexts: allow genetic resources and TK to be feedstocks for biotechnology products,\footnote{52} or sustain pristine in situ integrity; maintain an unaltered authenticity of TCEs, or adapt to modern modes and technologies\footnote{63} ; oppose patents that misappropriate TK or unfairly benefit from it, or actively patent aspects of one’s own TK? Only the community itself can resolve such dilemmas by determining what aspects of its collective personality should be kept private unto the community, and what should form the face the community presents to the world. The right to object to others’ commercialisation does not amount to an obligation to commodify oneself or to realise any inherent commercial value of one’s persona; the “right of publicity” has both dignitarian and commercial aspects.\footnote{64}

This dilemma corresponds to a central uncertainty as to whether protection of personality pivots on a true right “to be left alone” or on a right to enjoy exclusive domain over the commercial penumbra surrounding one’s identity. This equivocation
is apparent in *Douglas*: the injury occasioned by invasion of privacy was lessened (but not negated) by the prior choice to commercialise the wedding:

“[t]his intrusion was by uncontrolled photography for profit of a wedding which was to be the subject of controlled photography for profit … Thus the major part of the claimants' privacy rights have been the subject of a commercial transaction: bluntly, they have been sold.”

A direct parallel is present in the debate about whether IP mechanisms are appropriate for protecting TK. The same limiting assumption is made that the existence or recognition of exclusive rights—rights that exercise a say about how others use intangible property—is in itself a form of commodification or commercialisation; that such rights pre-empt and exhaust choices over entry into the commercial realm, rather than empowering the right holder (or interested party) to authorise or prevent third-party acts. Overwhelmingly, in practice, IP rights are exercised and defended to serve commercial goals, but that does not capture the inherent legal character of the rights. Some IP cases concern resistance to commercialisation and prevention of cultural harm, directly opposing commodification of traditional materials. Similarly, the right of personality, as a legal notion, is distinct from a choice to commercialise one's persona. The *Douglas* celebrity couple chose to commercialise their wedding, so electing to present the event as part of their public face; this reduced damages for their claim of invasion of privacy. The bulk of monetary damages went to OK! because it bore the brunt of the commercial loss from its rival's exploitation of what had, in effect, already been conceded by the celebrities to be a legitimate element of the public face of their persona.

The law of personality is evolving away from a narrow, wholly commercial reading of the interests engaged, perhaps because of lost distinction between commercial and non-commercial. Commercial trends mean that “common field of activity” is no longer required for passing off. The tort now concerns misrepresentation as such, not appropriation of goodwill. The cause of action goes beyond “classic” misrepresentation, selling goods “under the pretence that they are the goods of another man”, to something closer to misappropriation of identity in commercial activities: a trader should not give:

“a false message which would be understood by a not insignificant section of his market that the goods had been endorsed, recommended or approved by the claimant … because it is that misrepresentation which enables the defendant to make use or take advantage of the claimant's reputation”.

Yet misappropriation of identity is more than bare use of an image or other reference, absent any misrepresentation. Trade mark law similarly sets bounds to what can be construed as a misappropriation of identity: one “celebrity” case required that for use to be deceptive or confusing, the reference to the identity had to bear an “imprimatur of endorsement”, more than mere “connotation”; the public would need to assume that the personality concerned was in the business of endorsement.

Might passing off offer a remedy when the collective personality of a community is appropriated, where the community has neither commercial presence nor active commercial interest? In *Koala Dundee*, misrepresentation entailed appropriation of a
distinctive character appearing in a “work”. Drawing on the parallel expansion of performers' rights to embrace performances of expressions of folklore as well as literary and artistic works, one might speculate that misrepresentation could include the appropriation of characters from a community's traditional stories or narratives? But the plaintiff in Koala Dundee was still in business—the business of exploiting that very character. Writers and actors can have sufficient commercial personality to claim passing off. Indigenous communities not relevantly engaged in commerce may yet be similar in character to collective entities such as unincorporated charitable bodies and other charities which have been accorded sufficient standing and reputation to establish passing off. The interests protected in passing off have diversified, as the conception of “commerce” broadens and as the line between commercial and non-commercial blurs, but remain essentially commercial in character, suggesting the need for a conscious choice to present a public face to the world. The reputation defended may still need to be considered as a “saleable commodity”, which may inherently stand at odds with the values and interests of many indigenous communities—but again, from whose perspective need it be “saleable”? That of the agent, or that of the victim, of misappropriation?

The possibility of a right of collective personality also depends on the recognition of identity of collective entities; this goes to the legal personality and standing of a community as such, but also the construction of a collective personality as a distinct subject for legal protection. The nature of the protected “personality” is broader than simply that of a natural person: progressively extending to the personality of a couple, a fictitious human character and fantastic fictitious characters. The collective personality of indigenous communities has been recognised in sui generis IP measures to protect the arts and craft of recognised tribes. Corporations as such may be denied a right of privacy, but passing off can recognise the personality of non-commercial collective entities.

The right of publicity has been broadly construed, protecting against an invocation of a civil rights activist in a musical work; this development, while criticised, again highlights the dignitarian, non-commercial aspect of the publicity right. The law of passing off has recognised entities and activities beyond mainstream commerce and eliminated the requirement to be actively in the business of product endorsement. The law of confidentiality may also protect the privacy of indigenous communities from use of TK and TCEs in breach of customary law. There is no need for a specific confidential relationship between the parties, so that there is a:

“duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential … The essence of the action is better encapsulated now as misuse of private information”. This test concords with the claim for inherent respect for the privacy of TK and TCEs and community consent for their use.

It is sufficient for the information to have a “badge of confidentiality”, or for “disclosure or observation of information or conduct [to] be highly offensive to a reasonable person of ordinary sensibilities”. This test concords with the claim for inherent respect for the privacy of TK and TCEs and community consent for their use.

The strengthened notion of privacy as a discrete form of protection against intrusion “upon the privacy or seclusion of the claimant … which causes the claimant harm or distress” should embrace a collective right of privacy. Collective cultural harm can
be recognised in copyright law. As noted, confidentiality can arise from the customary law binding an indigenous community. This collective aspect and the harm caused by breach of customary law could be weighed in a privacy case. Violation of a community's customary law associated with TK or TCEs, or related images, documentation or recordings, could be argued to be a form of intrusion upon the privacy of a community, causing harm or distress, offensive to a person of ordinary sensibilities (particularly if that “person” could be deemed to be a member of the community concerned, or at least not unsympathetic to its particular sensibilities).

The inadequacy of financial penalties in remedying breach of personality rights finds an echo in the need for suitable remedies when aspects of the identity of traditional communities are appropriated. Damages for misappropriation of their collective personality, based on commercial value of this use, may be seen as “cashing out” what is private to the community, breaching customary law—ironically, an indirect form of commercial gain from the misappropriation of a community's cultural identity. But by analogy with copyright infringement, aggregated damages may be awarded for the distinct notion of “cultural harm” when appropriation of collective personality breaches customary law. Injunctive relief and delivery up and destruction may also redress the incursion on the community's identity. Restitution may also be guided by the community's own customary protocols, to help restore the harmony or sense of integrity disturbed by the incursion on that community's collective personality.

**Conclusion**

The right of personality includes the entitlement to choose what face is presented to the public unless the public interest trumps private interests; it is a right not to have a public personality imposed upon one, but to retain control over one's public identity. In a parallel manner, indigenous communities claim control over their collective cultural persona as a form of self-determination. The right of privacy does not enforce total seclusion, and the right of publicity is not just about profiting exclusively from one's identity; a nuanced, holistic view of the law of personality reconciles public and private faces of the protected persona. Equally, protection of a community's collectively held TK and TCEs does not mean simply closing off links with other cultural communities or the commercial domain, but about choosing what aspects of the collective identity may be used and disseminated beyond the community, and on what terms—including the recognition of customary law constraints on the use of elements of a community's cultural identity. The multifaceted law of personality offers legal tools to protect the more pluralist collective face of a traditional community, and to give the control these communities claim, often on the basis of a custodial obligation under customary law.

*492 In a plaintiff-led field of law, marginalised communities are unlikely to have the resources to extend the law in the direction of recognising their collective personality and identity; a body of law dominated by the travails of individual celebrities seems on first glance to be an ill fit for defending such communities' interests. But the recognition of the collective interests of indigenous communities and customary law within the IP system was largely plaintiff-led. Recognising a collective right of personality—systematically, or through the concretion of case law—may help restore the public interest dimension to the law of personality, deliver equity to the culturally
dispossessed, and deploy the law of personality and general IP law to promote, not
stifle, cultural diversity.

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as Senior Lecturer, Australian Centre for Intellectual Property and Agriculture
(“ACIPA”), College of Law, Australian National University); this article is based on
personal research only, is not connected with the author's official position, and
should not be construed as representing the views of WIPO, its Secretariat or its
Member States, nor as a suggestion that options for protection of traditional
knowledge and cultural expressions should be limited in any way.

1. Echoing critical concerns that suggest that copyright might act in practice to protect
dominant cultural industries, although in practice its effect may be the opposite; the
long-awaited and now further-postponed entry of Mickey Mouse into the public
domain (Eldred v Ashcroft 537 U.S. 186 (2003)) may inhibit certain forms of cultural
references, riffing and culture jamming within a mainstream Western cultural context,
but arguably would do relatively little to promote cultural diversity in other cultural
environments, compared with legally sanctioned inaccessibility to the original works
which may help create demand for alternative forms of expression. cf. Douglas v
Hello! Ltd [2005] EWCA Civ 595 (obiter: injunction should not have been lifted as
damages are rarely sufficient in addressing breach of privacy; injunction the only real
remedy).

2. Daniel Biene, “Celebrity Culture, Individuality, and Right of Publicity as a
& T Textiles Pty Ltd, fn.41 above.

3. United Nations Declaration on the Rights of Indigenous Peoples, adopted by the
Human Rights Council (June 29, 2006), and recommended for adoption by the United
Nations General Assembly (document A/HRC/1/L.10), Art.8.2(a).“Control is what
gives you privacy”; see “Douglas defends ‘trivial’ Hello! Case”, BBC News, February

4. ibid. , Art.31.

5. Committee on Economic, Social and Cultural Rights, General Comment No.17
(2005), “The right of everyone to benefit from the protection of the moral and
material interests resulting from any scientific, literary or artistic production of which
he or she is the author”, adopted November 21, 2005, document E/C.12/GC/17, at
para.32.


7. For recent discussions of some current controversies, see Biene, fn.2 above, and
Waelde and MacQueen, “Privacy, Property and Personalities: Whatever Happened to
the Public Interest?”’, publication forthcoming.

8. Without limiting the legal character or cultural identity of these diverse
communities, they will, for the sake of brevity, hereafter be referred to as
“community” and “communities”.

9. These terms are employed here in line with contemporary usage; a discussion of
their implications and shortcomings (in particular the need to consider them as part of
a broader whole, including also genetic resources) is beyond the scope of this article;
“TCEs” is used as a neutral synonym for “expressions of folklore” in deference to
communities who find the latter term inappropriate or offensive, and in line with emerging international practice.


11. This “personality” should be distinguished from the legal personality of indigenous peoples under international and municipal law, which this article does not address.

12. e.g. California Civil Code §3344: Misappropriation of likeness; New York Civil Code §§50-51 (“Right to privacy”).


16. Douglas v Hello!, fn.6 above (per Lindsay J.).


26. “In an age of globalized mass media, entertainment, and other forms of popular culture, the commercial exploitation of celebrity identity plays a key role”: Biene, fn.2 above.

27. An indigenous community leader once remarked to the author “our kids all want to look like Michael Jordan now”.


29. In re Carson, fn.19 above.


31. White v Samsung Elecs Am, Inc 989 F.2d 1512, 1516 (9th Cir. 1993).

32. Judge Kozinski dissenting, ibid.


38. For instance, the European ice-cream company Australian Home-Made invokes Australian Aboriginal cultures in the design and branding of its outlets and products, with the following exegesis: “The robust nature of Australia and its original inhabitants, the Aborigines, are the source of our inspiration. Their culture was the origin in the development of our premium ice-cream and chocolates.” “Roots: Think Australian Home-Made, think Aboriginals: Australian Aboriginals come of age in a distinctive culture alive with fascinating ceremonies, a unique mythology and sacred works of art. And don't forget the didgeridoo, a strange and wonderful wind instrument found only in this corner of the world. Mix this Aboriginal imagery with the fireworks of high-tech architecture and you get a venue that reflects the special appeal of AustralianHomemade … each rich square of chocolate magic bears an ethnic aboriginal image.” www.australianhomemade.com (last visited December 30, 2005).


40. Characterised as “dignitarian” in Waelde and MacQueen, fn.7 above. See also Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 N.Y.U. L. Rev. 962.


42. New Zealand Trade Marks Act 2002, providing that the Commissioner of Trade Marks may not register a trade mark if the use or registration of a mark is likely to be offensive to a significant section of the community, including Maori, and establishing a Maori Trade Marks Advisory Committee to assist the Commissioner to make determinations about offensiveness in relation to marks based on Maori text and imagery. As of March 2004, the committee had assessed over 250 and found six likely to be considered offensive to Maori.

43. e.g. US Patent 5,401,504 (Use of turmeric in wound healing), re-examined under 35 U.S.C. 307, claims 1 to 6 cancelled.

44. See fn.10 above.

45. White v Samsung (Judge Kozinski, dissenting), fn.31 above.

46. See Henderson v Radio Corp Pty Ltd, fn.12 above (misappropriation of reputation is an injury in itself); Hogan v Koala Dundee Pty Ltd, fn.13 above (a creator of a character may prevent others from commercial use of the character “even where he has never carried on any business at all, other than the writing or making of the work in which the character appears”).

47. Prince Albert v Strange (1849) 41 E.R. 1171.


49. Executors of the Estate of Diana, Princess of Wales v Masterton [2001] 50 I.P.R. 264 (Princess Diana “during her life, appears to have carefully avoided the
commercialization of her name”).


51. e.g. the use of Saami costume by non-Saami tourism companies is seen as offensive and demeaning, and, critically, as destructive of cultural integrity and sustainability of community identity, rather than as a lucrative licensing opportunity: “Who wants to identify him or herself with a culture that is not only already fragile, but that is made to seem old-fashioned and ridiculous by the outside world?” (WIPO/GRTKF/IC/4/14 (May 6, 2002)); again, see fn.10 above.

52. Von Hannover v Germany (App No.59320/00) (right of privacy for private life for well-known royalty but beyond official functions and sphere of legitimate interest for public); Douglas v Hello!, fn.6 above (commercial dealings with wedding photographs reduced but did not eliminate liability of third parties who took unauthorised photographs; i.e. celebrities seeking the limelight and profiting from it does not eliminate the private sphere altogether).

53. Campbell; Theakston, fn.14 above (both cases distinguishing between disclosures of private matters that exceed the public interest, and disclosures that further it).


55. Theakston, fn.14 above.

56. Von Hannover v Germany, fn.52 above.

57. Waelde and MacQueen, fn.7 above.

58. Rosa Parks v LaFace Records, 2003 FED App. 0137P (6th Cir.): “We do not mean to imply that Rosa Parks must always be displayed in a flattering manner, or that she should have the ability to prevent any other characterization of her. She is a celebrity and, as such, she cannot prevent being portrayed in a manner that may not be pleasing to her.”

59. Waelde and MacQueen, fn.7 above.


61. Judge Kozinski’s dissent, White v Samsung, fn.31 above.

62. See Arts 16 to 19, Convention on Biological Diversity.


64. Pace Waelde and MacQueen, fn.7 above, who comment that in the United States “common law expansionism begat a right of privacy which, in turn, spawned a separate right of publicity. The first is largely dignitarian in outlook, the second, purely commercial”.


67. Contrast Von Hannover v Germany, fn.52 above (truly private life of royalty).
71. ibid.
73. *Irvine*, fn.70 above, at [38].
75. *Executors of the Estate of Diana, Princess of Wales* v*Masterton*, fn.49 above.
76. It is now the law of Australia that the creator of a sufficiently famous character having certain visual or other traits may prevent others using his character to sell their goods and may assign the right so to use the character; furthermore, the inventor may do these things even where he has never carried on any business at all, other than the writing or making of the work in which the character appears; *Hogan v Koala Dundee Pty Ltd*, fn.13 above, at 323.
79. *Kaye v Robinson*, fn.18 above.
82. *Henderson*, fn.12 above, at 645.
83. *Henderson*, fn.12 above.
84. *Hogan v Koala Dundee*, fn.13 above (Crocodile Dundee).
86. Indian Arts and Crafts Act 1990.
87. Database of Native American Tribal Insignia maintained by the US Patent and Trademark Office.
88. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] H.C.A. 63 (developments in the field of privacy will be to the benefit of natural, not artificial, persons).
89. See fnn.80 and 81 above.
90. *Rosa Parks v LaFace Records*, fn.58 above (holding that “reasonable people could find that the name was appropriated solely because of the vastly increased marketing power of a product bearing the name of a national heroine of the civil rights movement”).
91. As discussed in the section on passing off above.
92. *Irvine*, fn.70 above.
93. fn.48 above.
94. *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109 at 281 (per Goff L.J.); protection of undisclosed information under the WTO TRIPs Agreement also extends beyond a confidential relationship to include “the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that [certain illegitimate] practices were involved in the acquisition” (fn. to Art.39(2)).
95. *Campbell v MGN Ltd* [2004] UKHL 22 at [14].
96. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 A.L.R. 1 at 13, cited in *Campbell v MGN Ltd*, fn.95 above, at [93].
97. *Grosse v Purvis*, fn.54 above.
Echoing critical concerns that suggest that copyright might act in practice to protect dominant cultural industries, although in practice its effect may be the opposite; the long-awaited and now further-postponed entry of Mickey Mouse into the public domain (Eldred v Ashcroft 537 U.S. 186 (2003)) may inhibit certain forms of cultural references, riffing and culture jamming within a mainstream Western cultural context, but arguably would do relatively little to promote cultural diversity in other cultural environments, compared with legally sanctioned inaccessibility to the original works which may help create demand for alternative forms of expression. cf. Douglas v Hello! Ltd [2005] EWCA Civ 595 (obiter: injunction should not have been lifted as damages are rarely sufficient in addressing breach of privacy; injunction the only real remedy).


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