

## **Introducing the TK License and Label Platform**

**Jane Anderson and Kim Christen**

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### *Background*

1.1 My thanks to Wend Wendland and Brigitte Vezina for the invitation to present this project in this special side event.

1.2 The License and Label Platform is developed with respect and regard to the Declaration on the Rights of Indigenous Peoples. The two articles that are particularly important are Article 31 and Article 3 on self-determination. This forms an integral part of the international legal context in which we have been developing this platform. It informs how we have started and how this platform is to proceed.

1.3 It is important to emphasize from the beginning that the platform we are developing is a needs-based response. It is derived from very specific concerns that Indigenous and local communities have been experiencing in relation to their expressions of culture in a digital environment.

1.3 Let me tell you a little more about its evolution. There are a growing number of digital archiving projects that are emerging around the world. These projects seek to connect Indigenous peoples back to cultural materials that were made and removed from Indigenous communities and have resided in cultural institutions, in some cases for hundreds of years. This return of cultural materials raises a range of difficult and challenging questions about ownership, authorship and future use.

1.4 At the same time as this return of material has been occurring – so too has there been a need to develop management systems that can deliver this material in ways that correspond to Indigenous knowledge frameworks and forms of classification. Mukurtu is one such system. It was developed by Kim Christen in close collaboration with the Waramungu community of Tennant Creek, Australia. Amongst many other things, including functioning as a tool to facilitate trust, Mukurtu establishes a safe environment for community-based management of returned cultural materials alongside those currently being created by the community themselves. What is unique about Mukurtu, in terms of how it was developed and has evolved, is the attention to community-specific knowledge management practices, how these differ from the dominant logics of classification within European cultural institutions and the significance of cultural protocols as well as the local and contextual nature of these.

1.5 As part of the development of this free open-source platform for managing and sharing digital heritage which was built for Indigenous communities and their

engagement with libraries and archives, was a desire to provide a range of options for how Indigenous communities made their work available to the public. Whilst communities can avail themselves of standard copyright options as well as those offered by creative commons, it became very clear that something was missing. This was an licensing system that could accommodate and respond to indigenous specific needs in relation to the circulation of the already existing and new representations of cultural knowledge.

1.6 What has been missing in copyright and creative commons is attention to the specific needs and concerns of Indigenous peoples regarding ownership, access and control of cultural materials and the very specific conditions of circulation that these are governed under. These interests have historically been overlooked, especially and problematically by those alternative intellectual property advocates. Within Indigenous communities not all knowledge is considered as ‘common’ or public and there are a range of complicated governance structures that seek to manage knowledge circulation and use.

1.7 As a response to the rising amount of requests from Indigenous users via Mukurtu, and more recently through some other digital return and digital repatriation projects like the ‘Inuvialuit Living History Project’ in Canada, Kim and I began to think very seriously about how we could develop an additional licensing framework to respond to Indigenous needs within a digital environment. Of course, it became very apparent to us that it couldn’t be a licensing system alone. This is because Indigenous communities actually own very little of the materials that are being returned to them. But more on that in a moment.

1.8 It is also worth saying – or emphasizing – that this is a work in progress. It is by no means complete or finalized. We bring it to WIPO today to get some important feedback. WIPO representatives, nation state delegates and ngo representatives form an important stakeholder group. It is one of various groups we are talking to and are interested in garnering feedback from. I also want to emphasize that this platform, as it develops further and before it is publicly released, will be subject to extensive testing in Indigenous communities across multiple continents, and within various selected cultural institutions. This is a critically important component of this project and Kim and I are very happy to talk further about the program of testing that we are developing. We understand the testing to be integral to the development and success of this platform and it also follows our commitment to many of the principles from the Declaration on Indigenous Rights, namely that Indigenous peoples are involved and participate in any projects that have or are likely to have effects upon lives and the ongoing production of culture.

### *Why TK?*

2.1 Before I go any further I want to address a question of terminology and the reason why we use traditional knowledge phrase and the tk acronym. In no Indigenous community that we have collaborated with or worked within have we ever come across the division of Indigenous knowledge systems that we find within the WIPO context. As

the Vice Chair of the UNPFII Valamaine Toki began her talk on Monday in the Indigenous panel, she gave the pertinent example that the Maori make no division between tangible and intangible knowledge systems. Instead, the word matauranga – explains the integrated whole of inseparable knowledge systems.

2.2 There are multiple reasons for the production of this division within WIPO, which as the Australian delegation in their response to the Panel's presentations admitted were somewhat arbitrary. I am sure almost everyone in this room is aware of the reasons for these divisions, but also, that this is not how Indigenous peoples view their knowledge systems.

2.3 From the outset we recognize that the choice of acronym for this licensing and labeling system is political. In all the contexts in which we have been regularly engaged we have found that TK (traditional knowledge) is either used regularly or recognizable to communities themselves. TK is not only a bureaucratic term within WIPO but is also a generic term that is circulated much more widely and with a greater depth of meaning.

2.4 We use the generic term as for decades it has been circulating, used and appropriated for specific purposes in Indigenous contexts. We were recently told by Victoria Wells, from the First Peoples Council in Canada that when she showed the TK icon from our platform to a member of her community, he became very excited as he knew what TK meant and that it suggested that it was specifically designed for him and his communities needs. This is exactly what we hope it will signify for Indigenous users.

2.5 While we are certainly aware of the challenges that this raises at an international polity level, we will be addressing this clearly at the platform entry page. This platform is developed for and with the interests of Indigenous and local peoples at the forefront. Thus it is not appropriate for the arbitrary divisions and classifications of inter-related knowledge systems to be perpetuated in this context.

#### *Historical issues with TCEs and TK*

3.1 In general, the work that Kim and I, among many many other Indigenous and non-Indigenous scholars and activists, continues to involve the interaction between various historical events and their contemporary and future effects. In particular much of this work centers on the historical recording and documentation of Indigenous and local peoples knowledge; its historical and contemporary storage in archives, museums and libraries across the world; the unequal terrain of the legal entitlements that make those with the equipment, with the privilege and with the institutionalized inquiry as the authors of much of this material; and, the continued effects of documenting and recording Indigenous cultures and cultural expressions in the contemporary present – where many of the historical problems repeat and transform themselves alongside the changing technology.

3.2 While thankfully, not all Indigenous, local and traditional peoples and knowledges have been recorded and placed either out of reach of the original custodians,

or entered into the brave new world of endless circulation and use by anyone at anytime, there is a significant proportion of indigenous and local knowledges that are found under these conditions. That is, it is either existing within the copyright periods of protection, or has expired resulting in enormous collections of Indigenous materials being found in the public domain.

3.3 The 500 year fixation on studying and documenting Indigenous and local peoples lives, environments and cultures has produced an incalculable amount of material representations – and as the technology developed – sound recordings, film recordings and photographs also become the documentation medium of choice. For example, one anthropologist, Margaret Mead made 35,000 photographs and over 33,000 feet of film in a two year period in Bali Indonesia. All this material, now held at the Museum of Natural History in New York is authored and owned by Mead. This was just one anthropologist over a two year period in the 1930s. It should give us a moment to pause and just think about how much material is out there in institutions and increasingly digitally circulating around the globe.

3.4 This recording and documenting colonial legacy has produced a range of ongoing questions that require attention, some of which will obviously be addressed by the work in this WIPO IGC forum, and others that are beyond the scope of this forum:

These questions include but are not limited to:

- What to do with legacies of documentation projects of the past?
- How to deal with these collections within the institutions that now hold them?
- How to return them to proper custodians?
- How to deal with the lack of Indigenous authority and autonomy over these materials?
- How to incorporate missing information that connects this material back to source communities?
- How to deal with the public domain status of much of this material – a status that does not easily correspond to Indigenous rules and expectations
- How to help manage the increasing material being made by Indigenous communities according to customary law and cultural protocols of access?
- How to let users of these materials know if and when there are special and important considerations about use that could inform their decisions?

The TK License and Label platform is trying to address some of these issues.

### ***Current and future legal status***

4.1 In terms of the legal status of the photographs, sound-recordings, films and manuscripts that are the primary focus of the TK license and Label platform, it is possible to say that these fall into the following four main categories. The vast majority of these recorded works fall into the public domain, followed by those authored by non-Indigenous peoples, orphan works where the author is unknown or uncontactable.

Indigenous authored material counts for much less in the proportion of materials. As my friend Stephen Kinnane makes note:

Until the early 1990s when Aboriginal people such as myself started documenting our communities in film, there was an estimated six thousand hours of material created *about* our communities, of which perhaps ten hours actually involved some Aboriginal input. It is the same with the images that were taken to document our communities in missions, in Settlements and in camps – they are not the images that we would have chosen to represent ourselves. (Kinnane, *Shadow Lines* 2002)

4.2 Fortunately, as noted by Stephen Kinnane, the dominance of non-Indigenous peoples making recordings about Indigenous peoples is slowly changing. In the future, we can expect a shift in the legal status of materials to move more towards Indigenous authored materials.

4.3 Dealing with the past, the present and the future status of recorded Indigenous cultural materials presents a challenge. For if we are to properly deal with the older, public domain material alongside the new rights that are being asserted by Indigenous and local peoples as the rightful owners, custodians, holders and authors of the cultural expressions, we needed to develop a multifaceted approach. This approach culminates in the combined license and label platform.

### ***Aims of the TK License and Label Platform***

5.1 The TK License and Label platform is a project initiated by – myself, Kim Christen (Mukurtu) and Michael Ashley (CoDa). It seeks to respond to many of the above issues and to do so by strategically combining formal legal and non-legal educative approaches. The licenses AND the labels. The complexity of the issues that we are dealing with and the fact that Indigenous, local and traditional peoples continue have very limited rights over their cultural materials, necessitates a more innovative strategy than a new licensing framework alone.

5.2 The TK License and Label Platform focuses on the development of a strategic solution to a very specific issue: the management of already existing and circulating digital and analogue material such as photographs, sound-recordings, films and manuscripts that embody and/or represent traditional Indigenous knowledges, cultures and practices. It will develop new options for addressing issues of ownership, access and control of traditional cultural expressions documented and recorded by non-Indigenous peoples and researchers and that now resides in numerous cultural institutions worldwide and/or exists as public domain material. Importantly, it also contributes to an enhanced management of material increasingly being made by Indigenous peoples and local communities for community-based archival projects, for cultural heritage preservation purposes, and for projects where Indigenous communities maintain a leading role in determining what cultural traditions and practices can be shared with multiple audiences outside the community.

5.3 The TK License and Label Platform is an online site that will provide legal license and non-legal label options for the appropriate management of Indigenous

cultural knowledge and traditional cultural expressions. It is delivered digitally because so much of the material that communities are dealing with is being repatriated in digital form. The platform is also designed as an educative framework to help non-Indigenous people understand the cultural parameters governing control, access and use this kind of material.

5.4 The aim of TK License and Label Platform is to support Indigenous, traditional and local peoples' rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

5.5 Its vision is two-fold. Firstly for Indigenous, traditional and local peoples to be recognized and acknowledged as the proper custodians and authorities for making decisions about how their cultures can be shared with others. Secondly, to help users of traditional knowledge and traditional cultural expressions develop and increase capacities for cultural awareness, cultural sensitivity and respect for different rules regarding the access and use of specific kinds of knowledge.

### ***The TK License and Label Platform***

6.1 The Platform has three specific components.

6.2 Firstly it will offer several new license options for Indigenous creators, custodians and beneficiaries to manage their community-owned and generated cultural content with third-parties and external-community users. These licenses can only be used by copyright authors and owners, and they create additional agreements regarding the ownership of material by the source community or multiple communities, apart from the individual and also provide attribution for the individual, family community or multiple community – depending upon who has the responsibilities and obligations to make certain decisions about the knowledge representation. Other license options include non-commercial-use; commercial-use of community owned material and a special category that facilitates use within an educational context only.

6.3 For example, where an Indigenous individual, on behalf of his community, makes a new film recording of a ceremony and places that recording in the public-access part of the community's digital archive, he can assign his automatic copyright rights to his community under a TK license and help establish the conditions of access and use. He might choose Education-only. A professor at a university, who accesses the archive decides to use that recording in her undergraduate general education class of 200 students. Through the terms of the Education-only license she is obligated to only use that material within her educational context. She is also obligated to enter into a conversation with the holders about any reciprocal benefits that could be developed for the community, especially and importantly facilitating access to educational materials that the community might otherwise find it difficult to access.

6.4 Secondly, alongside the licenses, the Platform offers a series of 'fair-use' labels that are designed to illustrate culturally-specific conditions of access and use for certain

kinds of cultural expressions, some of which could be circulated without it being known that this material is not to be circulated outside the community because it contains secret/sacred information and/or it could have gender-restrictions on access. These labels are educative and are developed with specific attention to the extensive collections of cultural expressions that are found in the public-domain. The labels provide additional and often missing information about this material and help users make an informed decision about the best and most appropriate way of using this material, especially helping to avoid derogatory treatment.

6.5 For instance, if a non-Indigenous musician comes across a public domain sound-recording at the Smithsonian Institution that has the Community-use Men-Restricted label (CU MR) explaining that the content has been designated as containing men's secret ceremonial material, that musician is given information that will help her make an ethically and culturally appropriate decision about the best way of using that material. With the label, she is given more information about cultural conditions governing use of the material and is therefore much more likely to respect the conditions of access and use requested by her as a user thus preventing misuse and derogatory treatment of the traditional cultural expression.

6.6 Finally, the Platform will offer various educative and instructional tools for both Indigenous and non-Indigenous users of these licenses and labels. For instance, it will provide online tutorials to provide accurate and accessible assistance to Indigenous and local peoples in their decisions to use either a license or a label. It will also provide accessible information about relevant intellectual property laws to help facilitate informed decision-making for Indigenous users of the site.

6.7 The Platform will also have relevant educational material for non-Indigenous people about the Platform, especially in regards to changing social practices and creating new conditions for the respectful treatment and use of Indigenous traditional cultural expressions. It will also contain educational and informational detail for cultural institutions seeking to work with Indigenous communities to utilize the fair-use labels.

6.8 The Platform is designed to focus on interactions between Indigenous people/communities and third parties. It is not designed for intra-community interactions.

6.9 While this Platform is currently being developed in English we plan to make it available in multiple languages – this will initially include the five other official UN languages of Arabic, French, Chinese, Russian and Spanish. The Drupal software that we are using can accommodate this kind of translation and it is one of the reasons we have chosen to use it. We are also expecting to be able to incorporate Indigenous languages into this Platform over time.

6.10 The TK Licenses are not seeking to change already-existing national or international copyright law. They are offered as a set of additional agreements that Indigenous copyright owners can use to convey culturally specific concerns about the material that they already legally own and control. These licenses concern general

attribution of the source community alongside that of the copyright owner; direct negotiation over the integrity of the work when used in a commercial context; and, the negotiation over reciprocal benefits from use within an educational context. The TK Licenses can only be used and applied by (or in agreement with) the original holder of the copyright.

6.11 The TK Labels seek to inform a misinformed public about what constitutes fair and equitable use and access to TCEs for Indigenous and local communities. The labels are not (at this stage) legally binding and therefore have no basis in any formal law. They serve an educative function and are designed to begin the creation of new social norms about the use of cultural knowledge and traditional cultural expressions. The labels incorporate customary expectations regarding access and use of specifically designated material.

6.12 The licenses and labels encourage the creation of dialogue between Indigenous peoples and external users of cultural knowledge and traditional cultural expressions. There is an onus placed on the licensor to provide accurate information for correct attribution and acknowledgement details and to maintain current contact information for someone wishing to license the material. These conditions will need to be fulfilled before the license itself can be generated and attached to the copyright material. This will be built into the processes of ‘creating a license’ on the site.

6.13 We are not expecting competing claims with the labels as these are voluntary, educational and are not legally binding. We are currently compiling reference material on experience from Creative Commons competing claims and disputes. We feel this will help us understand the extent of possible competing claims as well as options for dealing with these when they arise.

6.14 Licensors will be Indigenous and local peoples and communities. As per self-determination principles embodied within the Declaration on the Rights of Indigenous Peoples (2007) the *TK License and Label Platform* leaves decisions about who can create the licences up to the governing structure of each Indigenous and local community. However, we will build a specific filter into the section that generates the license that requests specific information about the Indigenous community from which the individual is from before creating the actual license. This information provided as part of the process of generating a license will make contact easy if there is a problem. This filter is designed to stop non-Indigenous people passing themselves off as Indigenous or local community representatives. To this end we will be building a security system that is compatible with DRIPS principles.

6.15 We currently have options if material is owned/shared between multiple communities. These licensing and labeling options recognizes that there is some material where multiple communities have responsibilities of custodianship and/or ownership. Moreover it recognizes that no singular community has explicit control over the material. Rather it indicates that the rights and responsibilities for use are spread across multiple communities through already existing community protocols and ongoing cultural

relationships.

6.16 Where competing claims exist we will provide individual assistance with these on a case-by-case basis. We are also incorporating ADR/mediation clauses into the licenses from the beginning.

6.17 Licensees will be non-Indigenous users of traditional cultural expressions and/or Indigenous users not affiliated, recognized or from that specific community. Licensees could also include any of the following: cultural institutions (like archives, museums, libraries), educational institutions, the general public, researchers, artists, the media, and/or entertainment industry.

6.18 Labels can be generated by Indigenous and local community users in collaboration with cultural institutions and/or specific researchers. Specific instructions on this process will be provided in the Platform.

### ***The TK License and Label Platform in the International Legal Context***

7.1 Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* constitutes the current international legal framework providing for Indigenous peoples' rights to maintain, control and protect their cultural heritage, traditional knowledge and traditional cultural expressions. This proposal aims to provide a practical expression of this Article in international, national and localized contexts.

7.2 This proposal is in tune with the developments occurring within the World Intellectual Property Organization in relation to the drafting of international legal instruments. This is in particular reference to the current draft of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions *Protection of Traditional Cultural Expressions – Draft Articles* (WIPO/GRTKF/IC/19/4 19 May 2011).

7.3 At first instance the TK License and Label Platform provides a practical manifestation of the objectives found in the Preamble of this Draft international instrument (i-xii) especially with regard to the following: iii) Meet the actual needs of communities, iv) Prevent the misappropriation and misuse of traditional cultural expressions, v) Empower communities, vi) Support customary practices and community cooperation, viii) Encourage community innovation and creativity, ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms, xii) Promote the [community] development of Indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities, xii) Preclude unauthorized IP rights.

7.4 The TK License and Label Platform finds specific articulation with Article 3 *Scope of Protection Article B ‘Rights Secured for Other [Protected] Traditional Cultural Expressions’* (Alternative 1, 2 and 3) wherein the TK License component of the Platform provides an adequate legal measure to ensure that the relevant beneficiaries are provided with the exclusive and inalienable right to authorize and prohibit the fixation,

reproduction, public performance, distribution, commercial use of traditional cultural expressions. The TK Label component within the Platform provides for beneficiaries to have the right to be acknowledged as the source of the protected traditional cultural expression and to object to any distortion, mutilation or other derogatory action that could be prejudicial to the local communities reputation or integrity.

7.5 In addition the TK License and Label Platform also offers itself as a practical manifestation of Article 4 ‘Collective Management of Rights’ Article 1, wherein Indigenous peoples designate a competent authority to grant licenses after appropriate consultation and prior informed consent in accordance with traditional decision-making and governance processes; Article 2, wherein a competent authority so requested by and in consultation with Indigenous communities may ‘a) conduct awareness raising, education, advice and guidance functions, b) monitor uses of traditional cultural expressions for purposes of ensuring fair and equitable use, and d) provide assistance in any negotiations for the use of traditional cultural expressions.

7.6 The *TK License and Label Platform* is being developed with special regard to exceptions and limitations – both those current in Berne and the WCT and those being developed in Article 5 of the *Protection of Traditional Cultural Expressions – Draft Articles*.

7.7 In Article 5 ‘Exceptions and Limitations’, we believe that the licenses and labels provide greater clarification of what Article 5 Option (2a) refers to as according with ‘normal utilization’.

7.8 Correspondingly in Article 5 Option (2b) wherein ‘Parties may adopt appropriate exceptions and limitations provided that the use of traditional cultural expressions is compatible with fair practice, acknowledges the Indigenous or local community where possible and is not offensive to the Indigenous community’, both the licenses and labels create the conditions for meaningful and practical understanding of what ‘fair-practice’ entails. The licenses and labels also incorporate increased options for acknowledging and attributing the Indigenous or local community. They also have specific elements that encourage dialogue about the use of traditional cultural expressions in order to curtail or limit offensive or derogatory treatment.

7.9 We believe these TK License and Label Platform actually gives greater clarification to the intentions embodied within these Draft Articles and perhaps even makes them more workable and realizable.

### ***Testing***

8.1 At this stage testing of the Platform will be offered to Indigenous and local communities, especially those working with and in the stages of developing their own digital archives of traditional cultural expressions.

8.2 Through Mukurtu we are currently testing the TK Licenses and Labels Wiki

([http://www.mukurtu.org/wiki/Manual:Traditional\\_Knowledge\\_Licenses\\_and\\_Labels](http://www.mukurtu.org/wiki/Manual:Traditional_Knowledge_Licenses_and_Labels)) with ATSIDA and the Dharriwaa Elders Group, the Potawatomi Citizen Band Nation, Musqueam Indian Band, Ahtna Heritage Foundation, the Smithsonian's National Museum of the American Indian, Zuni libraries and the American Phil Society with the Leech Lake Tribal.

8.3 As part of our funding from IPinCH we are testing this Platform with the 15 Indigenous specific case studies that constitute this project. We are already working with Kate Hennessy and her Inuvialuit collaborators to test the licenses and labels in their online project “Inuvialuit Living History” that recontextualizes the MacFarlane collection from the Smithsonian Institution’s National Museum of Natural History.

8.4 Testing in cultural institutions is an important component of the Platform. We have been in conversation with the Smithsonian Institution including Global Sounds and Folkways about this future testing. We have also received significant interest from AIATSIS for future testing. We plan on developing testing sites in 7 cultural institutions in different countries on 7 specific collections.