THE ROLE OF COPYRIGHT IN SUPPORTING INTANGIBLE CULTURAL HERITAGE

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Introduction

Good morning. Let me begin my presentation by first thanking the organizers for inviting me to take part in this forum and to afford me the opportunity to experience firsthand the hospitality and the intangible cultural heritage of the people of St. John's and the province of Newfoundland and Labrador.

I have been invited to speak about the role of copyright in supporting intangible cultural heritage. In this context, I have been asked to address the question: who owns intangible cultural heritage? My presentation will address these issues by focusing on copyright in relation to expressions of folklore or traditional cultural expressions.

The role of Canadian Heritage and Industry Canada in copyright law and policy

When discussing copyright it is important to have some basic understanding of copyright law and policy.

The responsibility for the development of copyright law and policy in Canada is shared between two departments:

- the **Department of Industry** is responsible for the administration of federal intellectual property legislation, including copyright;
- the **Department of Canadian Heritage** is responsible for the formulation of cultural policy as it relates to copyright.[1]

Policy objectives of copyright law

Copyright is one of several branches of intellectual property law. Other branches of intellectual property law include patents, trade-marks, industrial designs, integrated circuit topographies, geographical indications, and plant breeders' rights.[2]

The evolution and growth of modern intellectual property law, including copyright, has been driven in large measure by the need to keep up with international trade and the development of new technologies. As such, intellectual property regimes are, for the most part, economic marketing laws in regard to cultural and technological innovations.

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[1] Paragraph 4(2)(*j*) of the *Department of Canadian Heritage Act*, S.C. 1995, c.11, states that the mandate of the Minister of Heritage includes the formulation of cultural policy as it relates to foreign investment and copyright.

[2] Information about the various branches of intellectual property law can be obtained by visiting the Canadian Intellectual Property Office (CIPO) web site at http://www.cipo.gc.ca.

The policy objectives of most branches of intellectual property law, including copyright, are to support human creativity and innovation. In the case of copyright, we want to encourage people to go out and create new literary, dramatic, musical and artistic works. At the same time, we seek to ensure dissemination of information.[3]

Copyright, like most other types of intellectual property rights, is subject to a number of limitations and exceptions. An important limitation on copyright protection is the time limit placed on copyright protection.[4] An exception placed on copyright protection is the right, for example, of libraries, archives and museums to make copies of a work in certain prescribed circumstances.

When copyright protection ends, the work is said to fall into the "public domain." The expression public domain is a "term of art." It is not defined in the Canadian *Copyright Act* or in any international copyright treaty. The public domain generally refers to subject matter that is no longer protected by the intellectual property system.

In addition, many things have never been protected by the intellectual property system. Together with works now in the public domain they form what some people refer to as the "intellectual commons." What are some examples from the public domain/intellectual commons?

- As I mentioned a few moments ago, a work that has fallen into the public domain when its term of protection expires.
- As a general rule copyright law does not apply retroactively. Accordingly, many traditional Newfoundland songs may never have been protected by the intellectual property system because they were first sung many decades or centuries ago.
- Copyright protects the expression of an idea, but not the idea itself. This means that if I come up with an idea to write a new history book about Newfoundland and Labrador, I acquire copyright protection in my history book about the province, but not in the idea itself. Nor does copyright protect factual information contained in my book. Accordingly, from a copyright perspective ideas and pure factual information are not protected by copyright and form part of the intellectual commons. Other subject matter that is not protected by copyright includes, for example, languages in general and artistic style *per se*.

Copyright policy seeks to find a balance between those who want more protection, often the creators of new works and/or the owners of such copyrights; and users of copyright protected material, such as researchers and students, who often want greater access to copyright protected works. In this debate it is sometimes forgotten that we are often both creators and users of works.

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[3] WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, April 2001, p. 32.

[4] Section 6 of the *Copyright Act* states that the "term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year."

Intellectual property and the debate surrounding the protection of traditional cultural expressions

The debate surrounding the protection of traditional cultural expressions has been around for some thirty years if not longer. In the 1980s the debate expanded to the protection of traditional knowledge. Traditional cultural expressions are sometimes considered to form a subset of the broader term "traditional knowledge."

In Canada, the Royal Commission on Aboriginal Peoples called on the federal government to review Canada's national intellectual property system with the goal of ensuring "that Aboriginal interests and perspectives, in particular collective interests, are adequately protected."[5]

A number of international organizations are looking at the protection of traditional cultural expressions and traditional knowledge. I am, for example, a member of the Canadian delegation that is taking part in an intergovernmental committee established by the World Intellectual Property Organization, also known as WIPO.[6] The WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been mandated to look at the relationship between intellectual property and genetic resources, traditional knowledge and traditional cultural expressions.[7]

One of the domestic steps that the Copyright Policy Branch of Canadian Heritage and other federal departments, most notably Industry Canada, have taken to better understand these issues is to accept invitations from Aboriginal communities and organizations to undertake intellectual property workshops. The goals of these workshops are twofold: first, to explain the benefits and limitations of the intellectual property system; and second, to better understand the practical concerns of these communities regarding the protection of their traditional cultural expressions.

Copyright and traditional cultural expressions

With this background activity in mind, a starting point to look at the role of copyright in supporting traditional cultural expressions is to understand how copyright in its present form offers support for traditional cultural expressions.

Canada does not have a single national intangible cultural heritage policy framework. Instead, Canada has, through national laws such as the Charter of Rights and Freedoms, *Official Languages Act*, *Canadian Multiculturalism Act*, *Museums Act*, and *Library and*

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[5] *Report of the Royal Commission on Aboriginal Peoples, Gathering Strength*, vol 3, 1996, Ottawa, Supply and Services Canada, p. 601.

[6] WIPO is a specialized agency of the United Nations. WIPO's mandate is the promotion of the protection of intellectual property "throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization." Supra, footnote 3, p. 15.

[7] Information about the WIPO IGC can be obtained by visiting the WIPO IGC page on the WIPO web site at http://www.wipo.int.

Archives Act, established a legal framework that collectively seeks to reflect our common values and sustain our intangible cultural heritage.

In addition to this legal framework, the federal government supports a number of practical initiatives that seek to preserve, protect and promote our intangible cultural heritage.

In a similar manner, the *Copyright Act* does not contain a specific section that focuses exclusively on the protection of traditional cultural expressions. Nor does the *Copyright Act* distinguish between the traditional cultural expressions of one community and another. New works based on traditional cultural expressions from any community in Canada are accorded the same copyright protection and are subject to the same exceptions and limitations.

In this context, copyright protection can help someone who seeks to promote a form of traditional cultural expression such as the singing of traditional Newfoundland music by allowing the singer to enjoy the economic benefits of copyright that attach to his or her musical works such as a musical recording. I would add that such protection is often available in other countries because Canada and these countries are signatories to a number of international copyright agreements.

In addition to the possible economic benefits, copyright law also recognizes that the author of a new work has moral rights in his or her work. Moral rights "allow an author to protect the integrity of his or her work from prejudicial alterations and to be associated with the work as its author by name or under a pseudonym or to remain anonymous."[8]

In a way that is not always recognized or understood, copyright law supports traditional cultural expressions through the limitations and exceptions that it places on copyright and its acknowledgment of the public domain/intellectual commons.

To paraphrase professor Lawrence Lessig in his book -*"The Future of Ideas"* - copyright protection does not seek to give authors perfect control over their copyrighted works, but a balanced right.[9] Accordingly, while I may obtain copyright in my history book about Newfoundland and Labrador, I cannot stop other people from writing their own history book about the province, quoting from my history book, or using the same factual information that I used in my history book. Thus copyright protection allows me to enjoy copyright in my history book and perhaps make a living as a writer, while at the same time encouraging the creativity of other writers who may also wish to write a history book about the province that takes a different interpretation of the historical record. In a similar manner, copyright and its exceptions and limitations combine to protect a new work based on traditional Newfoundland music while also allowing for the creation of other works that may also be based on traditional Newfoundland music.

This creative freedom is further encouraged because subject matter, such as ideas, factual information, artistic style and many traditional cultural expressions are considered from a copyright perspective to be in the public domain/intellectual commons.

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[8] Government of Canada, *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act, Ottawa*, October 2002, p. 4.

[9] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House, New York, 2001, pp. 109-110.

One of the interesting aspects of the discussions surrounding the possible role of intellectual property to further protect traditional cultural expressions concerns how one should define the contours of the public domain/intellectual commons, and whether anyone beyond the author or rights holder of a new work "owns" traditional cultural expressions that are now considered to be in the public domain/intellectual commons.

On the one hand, the public domain/intellectual commons may be viewed as a source of inspiration that allows someone to take an idea, a fact or a traditional cultural expression and use it as the basis of a new literary, dramatic, musical or artistic work. For example, the importance of the public domain was acknowledged in a 2002 decision of the Supreme Court of Canada, when the court (Binnie J.) stated that "[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."[10]

On the other hand, the public domain/intellectual commons is sometimes criticized as a western construct that allows an individual from outside the originating community, or in some cases a member of the originating community, to take, for instance, a traditional Newfoundland song and use it to create a new, tradition-based song, with no obligation on the part of the author of the new tradition-based song to remunerate or even acknowledge the originating community as the source of the traditional song. This may happen despite the fact that the originating community may have kept the traditional music alive, in some cases over many generations.

Many Aboriginal communities in Canada and abroad have expressed the view that their traditional cultural expressions have never been subject to free and unacknowledged exploitation and have never formed part of the so-called public domain/intellectual commons. According to their traditions, such traditional cultural expressions are held or owned by the community in perpetuity and their use governed by their customary laws and protocols.[11] Using such traditional cultural expressions without the permission of the originating community is not an example of artistic creativity, but instead an example of cultural misappropriation.

A number of countries taking part in the WIPO Intergovernmental Committee (IGC) discussions have expressed the view that their traditional cultural expressions form part of the patrimony of their respective communities, Aboriginal and non-Aboriginal, or belong to the nation as a whole. They believe that traditional cultural expressions in the public domain/intellectual commons should be afforded intellectual property protection. In other words, the traditional cultural expressions of "indigenous and local communities" are not part of the public domain/intellectual commons but legally belong to the relevant community or the nation as a whole. In addition, there are calls that such protection should be perpetual.

[10] *Théberge v. Galerie d'Art du Petit Champlain inc*., [2002] 2 S.C.R. 336, 2002 SCC 34, para. 32.
[11] For example, see WIPO IGC Report, WIPO/GRTKF/IC/5/15, August 4, 2003, pp. 27-28.

Who owns traditional cultural expressions?

Legal ownership of traditional cultural expressions suggests a number of positive benefits for the owner of such works. For example, having a legal interest in a traditional song raises the possibility of royalties for the owner of the traditional song by either selling the copyright in the traditional song or licensing its use.

Having an ownership interest in the traditional song may also address a concern expressed by many Aboriginal communities and by some countries, namely the issue of respect.

For many Aboriginal communities, for example, an important concern is not to make money from their traditional cultural expressions, although that may be the case in some instances of their choice. Instead, it is to ensure that such traditional cultural expressions are not used in an inappropriate manner. In other words, making money is not the issue if, for example, it involves using a traditional song having great cultural or spiritual significance to sell a lawnmower or alcohol.

Moving to a community-based ownership of traditional cultural expressions

Intellectual property law already recognizes the possibility of "collective ownership." For example, copyright recognizes joint authorship of a work. Copyright also recognizes that the author of a work may assign the copyright of the work to his or her community. Moving to a community-based ownership of traditional cultural expressions that are now considered to be in the intellectual commons raises a number of new legal and policy issues.

For example, which communities should be afforded such protection? During the most recent WIPO discussions I attended, the term "indigenous peoples and traditional and other cultural communities" was used in some of the WIPO documents. Such a broad description of "community" suggests that all communities are *prima facie* deserving of such protection.[12]

Recent surveys have identified more than 200 different ethnic origins in Canada, ranging from First Nations, Inuit, and Métis communities to communities created by recent immigrants to this country. Many people reported having multiple ethnic ancestries as a result of increasing intermarriage among ethnic groups.[13] Many people also reported "Canadian" as their ethnic or cultural identity. Regional identities such as Québécois, Acadian and Newfoundlander were also reported.[14] Many of those surveyed expressed a strong desire to retain their customs and traditions.[15] In addition, work by WIPO identified "local communities" based on a shared religious belief or a shared activity, such as trapping and hunting.[16]

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[12] Some member states taking part in the WIPO IGC have expressed the view that the nation state should qualify as a "community" so as to permit the nation state to legally hold the traditional cultural expressions of the country on behalf of all its citizens.
[13] Statistics Canada, *2001 Census: Analysis Series, Canada's Ethnocultural Portrait: The Changing Mosaic*, January 2003, p. 12.
[14] Statistics Canada, Ethnic Diversity Survey: Portrait of a Multicultural Society, September 2003, p. 14.
[15] Ibid., p. 12.
[16] Supra, footnote 3, p. 118.

As different communities may share elements of the same or similar traditional cultural expressions, moving to a community-based ownership of traditional cultural expressions may raise questions about the legal relationship between communities in Canada and between some of these communities and their ancestral homelands in regards to shared traditional cultural expressions.

For example, if a community in Europe claims that traditional Celtic music forms part of its cultural patrimony and is protected by intellectual property law, how does this impact communities in Canada and elsewhere that may share the same Celtic tradition? At this point it is not clear whether we are talking about one Celtic community or a number of different Celtic communities. This distinction is important as one characteristic of intellectual property ownership, like other forms of property ownership, is the legal right to exclude others from using the protected subject matter, in this case traditional Celtic music.

Apart from addressing technical issues that may arise from moving to a community-based ownership of traditional cultural expressions now in the public domain/intellectual commons, there are also broad policy issues that may also need to be considered. For example:

- What happens to the public domain/intellectual commons and its role as a source of inspiration if an intellectual property fence is placed around a substantial number of traditional cultural expressions?
- Will all communities gain or will some lose economically if traditional cultural expressions no longer form part of the public domain/intellectual commons?
- What happens to the notion of a "common heritage of humanity" if we end up commodifying in perpetuity our traditional cultural expressions?

These questions hopefully illustrate some of the issues and concerns that may arise if there is a movement to a new community-based ownership of traditional cultural expressions now in the public domain/intellectual commons.

Concluding remarks

In conclusion, increasing attention is being paid to intellectual property law, including copyright, as a possible tool to preserve, protect and promote traditional cultural expressions.

Canada has stated during the WIPO IGC meetings that the term "protection" of traditional knowledge, including traditional cultural expressions, can have several different meanings.[17] The following example hopefully illustrates the various forms of protection that may be required to support traditional cultural expressions.

Suppose a community wants to protect a traditional parable to pass it down to their children. The parable is in a language that only a few people now speak in the community, and is recorded on a piece of parchment that is several hundred years old and is now slowly falling apart. Depending on the objective of protection, protection of the parable may take on a variety of forms.

[17] WIPO/GRTKF/IC/5/3, Annex, p. 6.

- In some cases a community may view protection as taking the form of keeping certain elements of the parable secret if they have significant cultural or religious meaning that is only to be shared within the community.
- Archivists and museum specialists may protect the parable by ensuring that the parchment is cared for and people have access to the parchment and any related material in a safe environment.[18]
- Protection may take the form of language instruction in community schools to ensure that the young people in the community learn the language that the parable is written in.
- Protection may take the form of community leaders going into the schools to explain the underlying message of the parable.
- Researchers and academics may protect the parable by undertaking research about the parable and its history.
- Protection may take the form of intellectual property law, including copyright, and other laws if the intent is to use elements of the parable as the basis for a commercial venture.
- And protection may take the form of artists sharing knowledge of the parable through various forms of artistic expression so that the world can gain a greater appreciation of the parable and the originating community.

In other words, communities and individuals with many different skills as represented by the people taking part in this forum all have an important role in preserving, protecting and promoting traditional cultural expressions and intangible cultural heritage.

Article 7 of the *United Nations Educational, Scientific and Cultural Organization (UNESCO) Universal Declaration on Cultural Diversity* states that "[c]reation draws on the roots of cultural tradition, but flourishes in contact with other cultures." In this statement UNESCO highlights, I believe, the importance for all communities to preserve, protect and promote their cultural heritage, including their intangible cultural heritage, while at the same time recognizing that we are all enriched when we learn about the cultural traditions of other communities.

Intellectual property law, including copyright, may have a role in supporting traditional cultural expressions and intangible cultural heritage. But it will need to find that elusive balance between addressing the needs of authors and their respective communities, and addressing the needs of users and the broader public interest.

Thank you.

[18] For example, see Paul Gessell, "Resurrecting the Ghosts of the Past", *The Ottawa Citizen*, May 9, 2006, p. A7.