



COPYRIGHT LAW AND INDIGENOUS INTELLECTUAL PROPERTY RIGHTS FOR CANADIAN ARCHIVISTS AND RECORDS MANAGERS

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ABSTRACT

This paper highlights barriers within Canada's Copyright Act to respecting Indigenous notions of ownership and control over intellectual property in relation to records destined for or held in archives. It first provides an overview of developments regarding Indigenous knowledge and intellectual property rights in the archival sphere, before turning to the Canadian legal context to examine specific issues within the Copyright Act.

INTRODUCTION: CANADIAN COPYRIGHT CONTEXT

Copyright law, according to Jean Dryden, is a legal framework that "...attempts to balance a complex array of competing private and societal interests, including those of creators, rights holders, users, and institutions that preserve protected material in order to make it available for use" ("What Canadian Archivists Know," 78). Archivists and records managers, therefore, can be seen as important stakeholders in discussions concerning copyright, for as Dryden further argues, copyright is a part of all archival functions—from acquisition, description and preservation to access and dissemination. For example, the acquisition of a collection of records sometimes also means the transfer of copyright to the repository, and finding aids include copyright information (78-79). She also highlights the especially thorny issue of providing access to archival records

digitally. Dryden writes, "...copyright is widely perceived to be a problem in making cultural heritage materials available online due to difficulties in ascertaining whether or not the copyright has expired, identifying and locating rights holders in order to obtain appropriate permissions, and general uncertainty about the application of copyright in the digital environment" (79). It is clear, therefore, that copyright law is something that many archivists and records managers encounter in their work.

Canada's own Copyright Act was substantially updated in 2012. A statutory review of the legislations took place between February to December of 2018, and members of the Standing Committee on Industry, Science, and Technology met and heard from 209 witnesses from across the country. One of the many issues at play was whether and how the Canadian Copyright Act could be amended to respect Indigenous knowledge and intellectual property rights. The issue was overlooked by some experts of Canadian copyright at the time, including Michael Geist in his 2017 piece, "What's next, after the 2012 overhaul?". Others like Pascale Chapdelaine and Myra Tawfik of the University of Windsor's Faculty of Law argued in a Globe and Mail article that "consultation with Indigenous peoples" is one of five critical components of a modern copyright system. And that "Canada must initiate a long overdue process of consultation toward the recognition and protection of Indigenous traditional cultural expressions consistent with Canada's obligations under the United Nations Declaration on the Rights of Indigenous Peoples, specifically Article 31" (Chapdelaine and Tawfik para 5). Representatives from Canadian library and archival associations like Nancy Marelli for the Canadian Council of Archives (CCA), Camille Callison and Victoria Owen for the Canadian Federation of Library Associations (CFLA), and Naomi Andrew for the University of Manitoba and the National Centre for Truth and Reconciliation (NCTR) were among the witnesses who advocated for amendments to the Copyright Act to better respect Indigenous knowledge and intellectual property rights.

In June 2019, the Standing Committee chaired by Liberal MP Dan Ruimy produced its final report. It included, among its 36 recommendations, one recommendation related to the "protection of traditional arts and cultural expressions in the context of Reconciliation" (Recommendation 5, Canada 3-4), and a section titled 'Indigenous Matters' (26-31). In this section, the Committee acknowledges that "in many cases, the Act fails to meet the expectations of Indigenous peoples with respect to the protection, preservation, and dissemination of their cultural expressions" (30).

However, the report also admits that more concrete amendments to the Act would require "a more focused and extensive consultation process than this statutory review" and that future policy

formulations would need to “draw inspiration outside of copyright and intellectual property law and carefully consider how different legal traditions, including Indigenous legal traditions, interact with each other” (30).

In the wake of Canada’s Truth and Reconciliation Commission on the Indian Residential School System, future changes to Canada’s Copyright Act will no doubt have implications for Canadian archivists and records managers. This is especially true for those that deal with records pertaining to Indigenous peoples—whether as creators or subjects of those records. After all, archivists often work within cultural institutions that “lie at the tensed junction of various stakeholder’s needs and interests: on the one hand, creators, researchers, scholars and the broader public wish to access, study, share, re-use and re-create traditional cultural heritage held within the rich and varied collections of cultural institutions. On the other hand, indigenous peoples wish to prevent the misappropriation of their cultures” (Vezina 100). Likewise, potential changes to notions of ownership and control over intellectual property will require records managers to re-examine many aspects of their practice, including in the classification, retention, disposition, and access to records in their safekeeping that pertain to Indigenous peoples.

The aim of this paper, therefore, is to examine aspects of the Canadian Copyright Act that has been flagged as being problematic from the perspective of Indigenous stakeholders in relation to records destined for or already held in archival repositories. It will do so by first defining ‘Indigenous knowledge’ in the context of archives, then providing an overview of the developments in the archival sphere regarding Indigenous knowledge and intellectual property rights, before turning to the Canadian legal context to examine specific issues within the current Copyright Act.

INDIGENOUS KNOWLEDGE IN ARCHIVES AND OTHER CULTURAL HERITAGE INSTITUTIONS

Indigenous knowledge encompasses both traditional knowledge defined as “Indigenous cultural expressions and manifestations (TK) that are passed on by Indigenous ancestors through successive generations” as well as “contemporary Indigenous knowledge and knowledge developed from a combination of traditional and contemporary knowledge” (Younging 67). Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) outlines in more detail some categories of Indigenous knowledge when it states, “Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as manifestations of their sciences, technologies and

cultures, including human and genetic resources, seeds medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts” (UNDRIP, Article 31).

In a statement spearheaded by Indigenous librarian and archivist, Camille Callison, the CFLA's Position Statement on Indigenous Knowledge in Canada's Copyright Act defines Indigenous knowledge and cultural expressions as including "... tangible and intangible expressions including oral traditions, songs, dance, storytelling, anecdotes, place names, and hereditary names" (CFLA para 2). Livia Iacovino further breaks down Indigenous knowledge that is considered to be archival into the following four categories:

- (1) "oral memory and associated traditions"
- (2) "oral memory which has been captured using various Western technologies"
- (3) "records created by Indigenous people and organisations using the structures and forms of Western knowledge and communication systems"
- (4) "records created by non-Indigenous people and Indigenous people" (355-356)

Traditional Western archival theory has tended not to recognize Iacovino's first category, oral memory, as being an archival record, but this is beginning to change. For example, in addition to Iacovino, Canadian archivist Raymond Frogner urges public archives to explore ways that "unwritten Aboriginal culture and tradition" can be acquired in order to "safeguard a meaningful representation of the social constituencies of our constitutional democracy" (Frogner 126).

Similarly, Rachel Buchanan "argues that in order to decolonize...the definition of what qualifies as archival must be broadened" (cited in Luker 112). Iacovino's second category of Indigenous knowledge includes words, stories and songs that have been documented in some tangible form using Western technologies such as pen and paper, computers, tape recorders, etc. The third category refers to, for example, textual, audio and digital records created by Indigenous people living and creating now in a variety of forms like letters, novels, CDs, blogs, etc.

Lastly, it is especially important to note that Iacovino includes records created by non-Indigenous people as also being considered Indigenous knowledge, as this category makes up a bulk of the Indigenous knowledge contained in Canadian archival repositories—primarily government, church and university archives. Though she is writing in the American context, Jennifer O'Neal's description of how and why these records ended up in archives applies to Canada as well. O'Neal writes, "...the bulk of the historical documentation derives from anthropologists, ethnographers,

and historians, who often believed that Native American communities were disappearing. The resulting collections, which included items such as field notes, manuscripts, and recordings, were often donated to universities, local and state historical societies, museums, and religious organisations that were frequently far from the source community they originated from [...and...] most likely without the knowledge of the tribal community” (O’Neal 129-130). In the Canadian context Frogner explains, “[o]ur public archival memory is overflowing with the settler communities’ documentation of the Indigenous colonial experience: Indian agency reports, missionary records, trap-line records, land reserve commissions, and anthropological studies” (128). Library and Archives Canada alone holds close to 20 kilometres of textual records that document the Canadian settler-colonial state’s relationship with Indigenous peoples.

THE ARCHIVAL COMMUNITY’S RESPONSES TO INDIGENOUS KNOWLEDGE

The archives and records management profession in North America can be seen as being somewhat behind in addressing Indigenous peoples’ concerns regarding their culture and knowledge, but has been taking important steps forward more recently. In 1990, the Native American Graves Protection Act (NAGPRA) was passed in the United States, which required all institutions receiving federal funding to return any “cultural items” they held belonging to Native American tribes. However, according to Randall Jimerson, “[t]his significant change in museum practices set a precedent that archives have been slow to follow, despite scattered appeals to apply the concepts of NAGPRA to archival materials” (354). The Aboriginal and Torres Strait Islander Protocol for Libraries, Archives, and Information Services was produced not long after in 1995 in Australia (135), but it took more than a decade for a similar American document to be produced, and then another decade for it to be officially endorsed by the influential national archival association, the Society of American Archivists.

The First Archivist Circle drafted the Protocols for Native American Archival Materials (hereafter referred to as PNAAM or the Protocols) in 2006. This group of “19 archivists, librarians, museum professionals and scholars,” most of whom were Native American or First Nations, was convened in Arizona by Karen J. Underhill, then the head of Special Collections and Archives at the Northern Arizona University Cline Library (Agarwal para 2). Borrowing heavily from the Australian Protocols, the purpose of the PNAAM was to provide guidelines on best practices “for the

management and care of Native American archival materials held at non-tribal repositories” (para 2).

The First Archivist Circle approached a number of associations including the Society of American Archivists (SAA) to seek endorsement for the Protocols but failed in both 2008 and 2012 (Agarwal para 10). According to the authors of the report on the first failed attempt to get SAA endorsement, the Protocols’ stance on intellectual property and copyright was especially targeted for criticism by SAA members (Boles, et al. 10). The SAA’s working group on intellectual property was especially adamant about its opposition to two points relating to intellectual property rights, writing that “SAA should be wary of endorsing the creation of third party rights in archival materials where none currently exist” and “Western copyright is based on the idea of individual authorship, rather than cultural traditions” (cited in Boles, et al. 58). It was only in August 2018 that the SAA Council finally officially endorsed the document, making the following statement in its announcement: “Many of the original criticisms of the Protocols were based in the language of cultural insensitivity and white supremacy...

We regret and apologize that SAA did not take action to endorse the Protocols sooner and engage in more appropriate discussion” (SAA para 4-5).

In comparison to Australia and the United States, Canada was much slower in producing a collective set of guidelines for archivists and records managers working with Indigenous materials. Consideration for Indigenous intellectual property rights in archives was embedded within the Association of Canadian Archivist’s (ACA) Code of Ethics and Professional Conduct when it was revised in 2017. ‘Section 5: Sovereignty’ states, “Records and information relating to Indigenous Peoples is administered in a way that is consistent with guidance provided by and in consultation with Indigenous communities.” It cites a number of outside documents including the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services as documents they encourage archivists to consult (ACA 3-4). Section 3 does not explicitly mention Indigenous peoples, but the wording has been crafted to include considerations specifically relevant to Indigenous peoples. For example, Section 3a explains, “We respect the privacy of the individuals who created or are the subjects of records, especially persons and communities who had no voice in the creation, transmission, disposition, or preservation of the records” (5). The addition of the words “communities” as well as “creation, transmission, and preservation” in comparison to the old ACA Code of Ethics signifies that the drafters of the new revision recognized the colonial legacy of settler documentation and collection of records about Indigenous communities without consent

that fill settler archival repositories like national, provincial, and church archives (Frogner 127). However, it is important to note that this Code of Ethics does not provide the level of detailed or comprehensive guidance as provided in the American and Australian documents.

Most recently, the Steering Committee on Canada's Archives (SCCA), made up of representatives from the Association des archivistes du Québec (AAQ), Association of Canadian Archivists (ACA), Association of Records Managers and Administrators Canada Region (ARMA Canada), the Canadian Council of Archives (CCA), Council of Provincial and Territorial Archivists (CPTA), and Library and Archives Canada (LAC), formed a taskforce in 2016 to formulate a response to the Report of the Truth and Reconciliation Commission. According to its website, the SCCA's Response to the Report of the Truth and Reconciliation Commission Taskforce's mandate is to "... conduct a review of archival policies and best practices existent across the country and identify potential barriers to reconciliation efforts between the Canadian archival community and Indigenous record keepers" (SCCA para 1). In July 2020, this taskforce released a public draft of its "A Reconciliation Framework for Canadian Archives," the first of its kind specifically for the Canadian archives and records management community.

CHALLENGES WITHIN THE CURRENT CANADIAN COPYRIGHT ACT

Despite these positive developments within the archival community in Canada and beyond, there are still barriers that exist in the creation of an environment that truly respects Indigenous intellectual property rights in Canadian archives. For one, there are archivists and records managers that are opposed or indifferent to the ethical guidelines provided by the SAA and the ACA regarding Indigenous knowledge, and as ethical guidelines, they are unenforceable. Even for those who wish to adhere to the guidelines provide by frameworks such as that recently produced by the SCCA, legal barriers exist, including in the Copyright Act. The PNAAM goes as far as to say, "Western copyright laws are based on principles which are diametrically opposite to Indigenous legal approaches to knowledge" (First Archivists Circle¹⁴). Andrea Bear Nicholas, a Maliseet professor from the Tobique First Nation put it even more strongly when she wrote, "Canada's laws...have worked not only to ignore and/or specifically deny the rights of Indigenous peoples to practice and maintain their cultural and intellectual property but also to legalise the theft of Indigenous cultural and intellectual property through the Copyright Act" (para 4).

Three specific problematic areas of the Canadian Copyright Act in the realm of archives and

records management are

- its formulation of the owner of copyright as the individual that created the work (excluding the subject of the work or the 'third-party');
- its determination of the duration of copyright protection based on the understanding of individual copyright ownership (excluding communal, intergenerational ownership);
- and the Canada-specific section on Crown copyright for unpublished government records.

WHO OWNS THE COPYRIGHT?

Canada's Copyright Act stipulates that in general, "[t]he author of a work is the first owner of copyright....the general understanding is that the author is the person who created the work and expressed it in some form" (Dryden, *Demystifying*, 15). In the case of photographs taken on or after November 7, 2012, the author or owner of copyright is the photographer (18). In the case of an oral history interview or a sound recording, the owner of copyright is the interviewer and the "the person who made the arrangements for the first fixation of the sounds [...where...] the 'person' can be a human being or corporation" (18).

This formulation of copyright ownership poses two related but distinct problems for dealing with Indigenous knowledge. First is the issue of who ownership of copyright is conferred onto. As we can see from CFLA's position statement, from the Western perspective on which Canadian copyright law is based, copyright belongs to the person who first "fixed" a work. However, "Indigenous peoples would see the owners as the people from where the knowledge originated" (CFLA 1). In her statement before the parliamentary standing committee conducting the statutory review of the Copyright Act, Lynn Lavallée, then Vice-Provost, Indigenous Engagement at the University of Manitoba states, "The Copyright Act not only allows for the appropriation of Indigenous knowledge but... it also opens the door for the legalized theft of Indigenous knowledge, because copyright gives copyright to the person who has collected the information. Even though intellectual property is defined as "creations of

the mind," when a researcher speaks to Indigenous people, whether they're elders or traditional knowledge holders, the knowledge that is shared is ultimately the creation of the mind of the

person sharing the knowledge, yet copyright goes to the collector of the information” (Lavallée 16:15).

From the perspective of some Indigenous peoples, this aspect of Canadian copyright law can be considered problematic not only because it can come into conflict with Indigenous peoples’ understandings of knowledge ownership, but also in light of historical settler-Indigenous relations in Canada. As previously discussed in more detail, there is a longstanding “tradition” of colonial figures taking Indigenous knowledge without consent. According to the PNAAM, “... previous original collecting that may have been carried out with deception, duress, subterfuge, and other unethical or illicit means....Under any of these circumstances, issues of title, copyright, and authorship are suspect” (15). Thus, there are no doubt records in Canadian archival repositories where copyright has been transferred to the archives by entities which Indigenous peoples do not view as being the rightful owners.

WHO CAN EXERCISE CONTROL OVER COPYRIGHT PROTECTIONS?

Related to this issue of who ownership of copyright is conferred onto, is the issue of who has the authority to exercise control over these copyright protections and rights, including the right to transfer copyright to an archives or the right to give permission to an archives to make records available, either in physical or digital form, and/or the conditions under which these records may be accessed and used. At the heart of this problem is the division within Western thought as well as in archival theory between the records creator and record subject (often referred to as a third-party). Trish

Luker elucidates this problem when she writes, “This division between the primary record creator and the subsidiary role of record subject reflects the essentializing paradigm of Western intellectual thought in which subjects of knowledge are objectified” (113) and stripped of their power to manage their own records.

A concrete example where this has been an issue was provided by Naomi Andrew, Director and General Counsel of Fair Practice and Legal Affairs at the University of Manitoba during her presentation before the Standing Committee. In it, she stated:

“The NCTR is hosted at the University of Manitoba and is home to approximately five million documents relating to the history of Indian residential schools. As with most archives, we do not own the copyright of the majority of archival documents and images.”

“The Copyright Act” serves as a barrier when NCTR is contacted for permission to use archival images for purposes that clearly support reconciliation. Only the original creator of the photograph can permit its reuse if a copyright exemption does not apply. Because of the history of Indian residential schools, the requirement for an individual, such as a survivor, to have to contact a creator for permission is a very real barrier to truth and reconciliation” (Andrew 14:20).

WHAT IS THE DURATION OF COPYRIGHT PROTECTION?

Another problematic part of the Canadian Copyright Act is its way of determining duration of copyright protection based on individual or joint authorship before being released into the public domain. Generally speaking, the duration of copyright in Canada is the life of the author plus fifty years or in the case of joint

authorship, the life of the author who lives longest plus fifty (Dryden, Demystifying, 16 and 20). After this, the work is then released to the public domain and is free for anyone to use.

This formulation, however, does not take into account some Indigenous communities’ understanding of communal and intergenerational ownership. As Lavallée expressed, “Oftentimes, the knowledge is passed down through the generations” (Lavallée 2019). During her testimony before the standing committee reviewing the Copyright Act, Nancy Marelli made the following case for copyright reform in order to ensure stronger protection for Indigenous knowledge housed in Canadian archives: “The foundational principles of copyright legislation are that copyright is owned by an author for a term based on the author’s life. In the Indigenous approach, there is ongoing community ownership of creations. Archivists are committed to working with Indigenous communities to provide appropriate protection and access to the Indigenous knowledge in our holdings, while at the same time ensuring the traditional protocols, concerns, and wishes of Indigenous peoples are addressed. We urge the federal government to engage in a rigorous, respectful, and transparent collaboration with Canada’s Indigenous peoples to amend the Copyright Act to recognize a community-based approach” (16:00).

The current formulation of copyright protections as being of limited duration, is itself problematic as well. According to Canadian copyright law, claiming copyright protection over intellectual property ironically forces communities to then eventually relinquish their control over their knowledge into the public domain, even if descendants of this knowledge are still living. This is

especially problematic in cases of records that depict what the PNAAM formulates as “religious or sensitive

information” (First Archivists Circle 14). As Gregory Younging writes, the “precept that all intellectual property, including TK [traditional knowledge], is intended to eventually enter the public domain is a problem for indigenous peoples because customary law dictates that certain aspects of TK are not intended for external access and use in any form” (71). Younging further explains, “[arguments for a public domain of indigenous knowledge again reduce the capacity for indigenous peoples’ control and decision making over their knowledge...” (73). This in turn “may bring about risks of misuse or misappropriation....in view of the fact that traditional cultural expressions are not fully protected by existing intellectual property systems: they are allegedly in the public domain, free for anyone to use” (Vezina 95).

WHITHER CROWN COPYRIGHT?

Lastly, another particularly problematic section of the Canadian Copyright Act is section 12 on Crown copyright, which stipulates that the copyright term of unpublished Crown works –essentially any work created by a government department that is not published--never expires. Prior to 2013, permission to use Crown works was centralised in the Crown Copyright and Licensing Office, but as Dryden explains, the government decided to “devolve its responsibilities to individual departments” (Dryden, “Crown Copyright,” para 7), making it even more difficult to get permission to use these works. This is problematic for archives, for as Marelli explains, “Canadian archives hold millions of unpublished Crown works of historical interest, including correspondence, reports, studies, photographs, and surveys—all kinds of works” (15:55).

As mentioned in a previous section, a large portion of what is considered Indigenous knowledge held in archives are in fact Crown works. Unpublished records related to the day-to-day administration of Indian residential schools, are an example of unpublished Crown works. Perpetual Crown copyright poses problems especially for the NCTR, as well as other archives with mandates to educate the Canadian public and who wish to digitize their holdings. This section on Crown copyright—which essentially grants communal, intergenerational ownership of copyright of Crown works to the Canadian government—is also especially troubling in light of the

government's refusal to reform copyright legislation to recognize Indigenous communities' right to this same communal, intergenerational ownership of knowledge.

CONCLUSION: FUTURE IMPLICATIONS FOR CANADIAN ARCHIVISTS AND RECORDS MANAGERS

In light of these problems highlighted in the current formulation of Canada's Copyright Act, it is not enough for Canadian archivists and records and information managers to simply adhere to copyright legislation—it does not take into account many forms of Indigenous knowledge, and it does not provide adequate provisions for protecting Indigenous intellectual property rights. Until the Act has been amended to rectify the issues mentioned above, an ethical approach within Canadian archival repositories must look beyond the Copyright Act.

I would suggest two broad directions that Canadian archivists and records managers can take in order to promote and ensure the protection of Indigenous intellectual property rights within their own Canadian institutions. First, archives and records and information management professionals can take an active interest and role in the public discourse surrounding the adoption of UNDRIP by the Canadian federal government, which in turn will be key to pushing forward concrete legislative reforms to the Copyright Act. While the Canadian government has endorsed UNDRIP after its

initial refusal in 2007, it has stopped short of passing legislation that would commit it to implementing and integrating UNDRIP's guidelines into existing federal legal instruments like the Copyright Act (Gunn para 1). Key recommendations within UNDRIP related to Indigenous intellectual property include, for example, Article 11 which states that "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs" (Article 11).

Second, until the implementation UNDRIP and its principles within our Canadian copyright and intellectual property rights regimes, in-house policies and procedures can be amended so that they reflect not only federal and provincial legislation, but also other standards and guidelines. The aforementioned Australian Aboriginal and Torres Strait Islander Protocol for Libraries, Archives, and Information Services and the American Protocols for Native American Archival Materials are examples of documents that can help shape policies and practices within individual archival repositories that better protect Indigenous intellectual property rights. The First Nations Principles of OCAP® (Ownership, Control, Access and Possession) developed by the First Nations Information Governance Committee are also an important "set of standards that establish how

First Nations data should be collected, protected, used or shared” (FNIGC para 1). Although originally developed as standards for managing research data, its principles can be applied to a broad range information, including records of many types.

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