



**INTELLECTUAL PROPERTY AND INDIGENOUS
ARTS AND CULTURAL EXPRESSIONS**

VIRTUAL SEMINAR ON PROMOTING AND
PROTECTING THE ARTS AND CULTURAL
EXPRESSIONS OF INDIGENOUS PEOPLES:
PERSPECTIVES ON THE CANADIAN EXPERIENCE

ORGANIZED BY THE WORLD INTELLECTUAL
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Virtual Seminar on Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: The Canadian Experience

- Good Morning Everyone. It is an honour to be a presenter at this seminar.
- This presentation will provide the background for what I am sure will be a rich and diverse discourse on the protection of the arts and cultural expressions of Indigenous Peoples
- Such protection comprise many facets and take place on many levels
- Customary laws and community protocols of Indigenous Peoples may determine “who”, “when” and “how” their arts and cultural expressions may be used
- National laws may recognize the authority of Indigenous Peoples to control the use of their arts and cultural expressions
- International law, in some circumstances, can offer protection across national borders

Virtual Seminar on Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: The Canadian Experience

This presentation will include the following

- *Some preliminary comments about the use of the terms “Indigenous Peoples” and “Traditional Groups”; and “arts and cultural expressions of Indigenous Peoples” and “traditional cultural expressions”*
- *Overview and characteristics of Intellectual Property*
- *Some preliminary comments about the characteristics of the arts and cultural expressions or traditional cultural expressions of Indigenous Peoples*
- *Emerging protection in international law (the example of copyright law) from the 1970’s - initial copyright attempts at protection (Berne Convention, Tunis Model)*

Virtual Seminar on Promoting and Protecting the Arts and Cultural Expressions of Indigenous Peoples: The Canadian Experience

- *Challenges to utilizing copyright law to protect the cultural expressions of groups*
- *Ongoing attempts to protect those cultural expressions – laws inspired by copyright law (Model Provisions -1980s and the Draft Traditional Cultural Expressions (TCEs) Articles - 2000s produced by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore)*
- *Questions for policy makers and advocates for protection of the arts and cultural expressions/traditional cultural expressions of Indigenous Peoples*
- *Complementary laws and non- legislative activities*

Preliminary Comments – Use of Terms

- Indigenous Peoples - There is substantial discourse about the difference between “Indigenous Peoples” and “traditional groups” and therefore the arts and cultural expressions that emanate from those respective groups.
- This presentation will focus on the similarities between those groups and their cultural expressions, including the collective origination of those expressions, the connection between those expressions and the identity of the Peoples and groups from which they emanate. The terms “group/s” or “collective/s” will be used as a general term, unless stated otherwise, to encompass Indigenous Peoples and traditional and other cultural groups.
- Also, the terms “arts and cultural expressions of Indigenous Peoples”, “traditional cultural expressions” and “cultural expressions” will be used interchangeably, again focusing on the similarities between those terms.

Overview of Intellectual Property

Intellectual Property refers to creations of the mind, such as inventions; literary and artistic works; designs; as well as symbols, names and images used in commerce (see <https://www.wipo.int/about-ip/en/> accessed May 1st 2022)

Intellectual Property is protected in law by copyright, patents and trademarks, for example, and these laws allow persons to be recognized for their creations and inventions, as well as benefit financially from what they create or invent (see <https://www.wipo.int/about-ip/en/> accessed May 1st 2022)

Characteristics of Intellectual Property Laws

Intellectual property law generally

- *protects individual authors or inventors*
- *provides exclusive rights to exploit the work*
- *requires protected subject matter to be fixed in some material form*
- *requires subject matter to be original (copyright) or novel/new (patent)*
- *limits the duration of protection after which the subject matter falls within the public domain and can be freely used*
- *provides for exceptions to protection which allows limited use for research and educational purposes (among other activities)*

Characteristics of Intellectual Property Laws

In relation to copyright, the owner of the work has certain economic rights, namely, the right to

- *reproduce the work*
- *translate the work*
- *adapt the work*
- *first distribution of original work*
- *rental or public lending*
- *public display*
- *public performance*
- *broadcasting of the work*
- *communication to the public of the work*

Characteristics of Intellectual Property Laws

In relation to copyright, the author of the work has certain moral rights to the work, including

- The right to claim authorship of the work (the right of attribution)
- The right to object to any distortion or modification of the work which is prejudicial to the honour and reputation of the author (the integrity right)

In some jurisdictions moral rights include

- The right of the author to choose whether the work should be published or not
- The right to modify or withdraw the work
- The right to prevent false attribution of authorship

Preliminary Comments - Characteristics of the Arts and Cultural Expressions/Traditional Cultural Expressions of Indigenous Peoples

Some characteristics include the following:

- Origin of the arts and cultural expressions/traditional cultural expressions traced to a particular People, group or community described as “indigenous” or “traditional”
- Shared by more than one indigenous group or traditional group or held by the same group across geographical boundaries.
- A link between the “cultural expressions” and the identity of the Indigenous People or traditional group.

Preliminary Comments - Characteristics of the Arts and Cultural Expressions

- There are collective characteristics, recognising that there may be cultural expressions associated with groups within groups or individuals within a group.
- They are oral in nature and transmitted by oral means as well as documented in some instances.
- Passed or handed down from generation to generation.

Preliminary Comments - Characteristics of the Arts and Cultural Expressions

- Maintained in a “customary” or “traditional” context, according to custom or maintained by non-traditional means or through “conventional” educational institutions

Arts and Cultural Expressions/Traditional Cultural Expressions and Copyright Comparisons

Cultural expressions of groups assume many forms which mirror or are analogous to categories of works protected by copyright law namely

- Literary works
- Musical works
- Artistic works
- Dramatic works

Emerging Protection for the Cultural Expressions of Groups in International Law (1970s)

Initial copyright attempts at protection

Historically, the first attempt to utilize copyright law to protect the cultural expressions of groups was the Berne Convention for the Protection of Literary and Artistic Works (1886) (the Berne Convention) amended by the Paris Act in 1971 (Article (4) (a) which provided protection for “unpublished” works of “unknown authors” where a designated competent authority shall be entitled to protect and enforce those rights”.

Emerging Protection for the Cultural Expressions of Groups in International Law (1970s)

Initial copyright attempts at protection

Article 15(4)(a) provides as follows:

“In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall be entitled to protect and enforce his rights in the countries of the Union.”

Some Challenges to Utilizing Copyright Law to Protect the Cultural Expressions of Groups

- Copyright law generally protects individual and not collective or group rights
- Copyright law usually (though not exclusively) requires that protected subject matter must be fixed in some material form as a pre-condition for protection. Protection is not usually provided for oral works
- The arts and cultural expressions/traditional cultural expressions are usually **pre-existing**, passed from generation to generation, and may not satisfy the **originality criteria** in copyright law

Some Challenges to Utilizing Copyright Law to Protect the Cultural Expressions of Groups

- The durational limits for protection of copyright law are inconsistent with certain objectives of protecting the arts and cultural expressions/traditional cultural expressions of groups including Indigenous Peoples, which hinge on the protection of the cultural identity of those groups from which those expressions originate
- Exceptions to rights generally provided by copyright law may not be suitable in relation to some forms of sacred or secret arts and cultural expressions/traditional cultural expressions of Indigenous Peoples or other communities

Ongoing Protection for the Cultural Expressions of Groups in International Law – The Tunis Model (1970s)

Initial copyright attempts at overcoming some of the challenges posed by utilizing that law to protect the cultural expressions of groups.

Another development in the 1970s was “The Tunis Model Law on Copyright for Developing Countries (1976)” (The Tunis Model).

The Tunis Model Law was essentially “copyright legislation” amended to accommodate the peculiar characteristics of the cultural expressions of groups (referred to as “folklore” in that law) and overcome some challenges posed by using copyright legislation.

Folklore was not required to be fixed in material form nor was it required to be original. It is recognized as collective in origin and is protected for an indefinite period of time.

Ongoing Protection for the Cultural Expressions of Groups in International Law – Copyright inspired Model Laws (1980s)

- Another development in the attempt to provide protection for the cultural expressions of groups referred to as “expressions of folklore” (this time by model legislation inspired by copyright law) was the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1982) (1982 Model Provisions)
- These Model Provisions are based on copyright principles but deal with the protection of expressions of folklore as a separate issue and not as a category of copyrightable works in conventional or modified copyright legislation. Protection against specified uses without authorization is also provided without limitation in time.
- Some countries have adopted the Tunis Model Law while others have adopted or incorporated aspects of the 1982 Model Provisions in their copyright law.

Ongoing Protection for the Cultural Expressions of Groups in International Law – Copyright inspired draft laws (1999 onwards)

- Another significant development was the WIPO Fact Finding Missions conducted in 1998 and 1999 (as well as subsequent missions) to determine the intellectual property needs and expectations of holders of traditional knowledge
- Subsequently, there was the formulation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) in 2000 which produced draft provisions on traditional knowledge protection and the protection of traditional cultural expressions among other documents.

Protecting the Cultural Expressions of Groups – Key Policy Questions to Consider “What”- “Why”- “For Whom” – “How”

- Subject matter protected (“What”)
- Justifications/objectives for protection (“Why”)
- Beneficiaries (“For Whom”)
- Scope of protection (“How”)
- Sanctions and remedies (“How”)
- Management of rights (“How”)

“What”

Defining the Cultural Expressions of Groups

This can be defined descriptively and conceptually, and national laws have adopted both approaches

Descriptively

- *folksongs*
- *stories*
- *music*
- *dance*
- *drama*
- *festivals*
- *rituals*

This is not an exhaustive list.

The most recent Draft Traditional Cultural Expressions Articles produced by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) can provide some useful guidance

“What”

Defining the Cultural Expressions of Groups

Conceptually

As alluded to above, what is common to most, if not all, definitions of the cultural expressions of groups are

- the origin of the cultural expression traceable to a particular people, group or community
- the collective characteristics of the cultural expression
- the oral nature of cultural expressions and its oral transmission
- the intergenerational nature of the cultural expression

“What”

Defining the Cultural Expressions of Groups

- the importance of context in defining the cultural expression, for example, the social, cultural and performance contexts
- the linkage of the cultural expressions to the identity of the source group or community

“Why”

Justifications for Protecting the Cultural Expressions of Groups

- Preservation of cultural diversity/protection of cultural identity”
- Prevention of misappropriation of cultural expressions
- Equitable sharing of benefits from use of the cultural expressions
- Promotion of respect for the cultural expressions of groups and parity with literary, musical and artistic works typically protected by copyright law

“For Whom”

Beneficiaries of Protection for the Cultural Expressions of Groups

This could be defined in restricted terms or broad terms (as the context determines) and can include options for individual, community, country and regional beneficiaries, where appropriate

Possible beneficiaries may include:

- Indigenous Peoples
- traditional communities
- local communities
- religious communities
- individuals
- States

“For whom” Beneficiaries of Protection for the Cultural Expressions of Groups

Beneficiaries may be identified based on

- cultural affiliation with a relevant group or geographic location or origin
- their responsibility for maintaining and transmitting the cultural expressions of the group
- their designation as custodians of the cultural expressions of the group

Criteria may be prescribed in customary laws and/or national laws.

“How”

Scope of Protection for the Cultural Expressions of Groups

- Provision of a general right to prevent use of the cultural expression without authorization (that is, without the prior informed consent of the relevant group or source community)
- Right to equitable benefit-sharing (financial and non-financial benefits)
- Right to be identified as the source of the cultural expression
- Right to prevent the distortion of the cultural expression that may cause cultural harm or offence

“How”

Sanctions and Remedies for the Infringement of the Proposed Rights to the Cultural Expressions of Groups

This may include a range of

- civil and criminal remedies
- administrative sanctions such as fines
- public apology

Complementary laws

- Contract Law and Trust Law may be useful legal tools utilized by groups to protect their cultural expressions to complement protection provided by intellectual property law generally, and copyright specifically.
- However, groups face the challenge of recognition as a “legal entity” or usually lack “legal personality”
- Once a recognized competent authority or other legal entity is designated
 - *contracts can be entered into on behalf of the group or collective to negotiate rights, terms of use, and fair remuneration for access and use of the cultural expressions or*
 - *hold property on trust for and on behalf of the group or collective*

Non-legislative Activities that Support the Protection of the Cultural Expressions of Groups

There are other non-legislative interventions that support the legal protection of the cultural expressions of groups, for example

- continued engagement with Indigenous Peoples and traditional communities
- awareness-building about the value of the arts and cultural expressions of groups
- documentation of the cultural expressions with the necessary cultural and ownership safeguards

Non-legislative Activities that Support the Protection of the Cultural Expressions of Groups

- documentation of the unauthorized use of cultural expressions (commercial and otherwise)
- documentation of successful attempts at protection
- awareness-building exercises regarding the value and use of the copyright system and intellectual property laws in general
- an audit of legal and non-legal expertise and resources in copyright and the protection of the cultural expressions of groups
- development of a database of laws relating to intellectual property and cultural expressions of groups (enacted and proposed)

Thank you for your valuable time and attention

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