



**INTELLECTUAL PROPERTY
AND ABORIGINAL PEOPLE:
A WORKING PAPER**

Research & Analysis
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**INTELLECTUAL PROPERTY
AND ABORIGINAL PEOPLE:
A WORKING PAPER**

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**Research and Analysis Directorate,
Department of Indian Affairs and Northern Development**

**Intellectual Property Policy Directorate,
Industry Canada**

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Intellectual Property and Aboriginal People: A Working Paper

Preface

This paper outlines current Canadian intellectual property (IP) legislation as it relates to Aboriginal people in Canada, and provides a general review of the implications and limitations of this legislation for protecting the traditional knowledge of Aboriginal people.

A full review of these issues, which is outside the scope of this paper, would include an account of the activities currently underway in Aboriginal communities to protect traditional knowledge. Aboriginal reviewers of this paper have confirmed the existence of traditional practices or protocols in Aboriginal communities, designed to protect traditional knowledge and symbols. The Research and Analysis Directorate of the Department of Indian Affairs and Northern Development (DIAND) has commissioned a second study that will focus on the preservation and protection of traditional knowledge from the perspective of Aboriginal communities.

The material in this paper is presented as a guide for Aboriginal people and communities, and as a basis for discussion of issues relating to intellectual property, traditional knowledge and Aboriginal people. Anyone wishing to use the techniques and tools the paper outlines should seek the advice of a lawyer or IP expert.

This paper uses the words “indigenous” and “Aboriginal” interchangeably. The term “Aboriginal” is used in Canada to include Indians, Métis and Inuit according to the *Constitution Act* of 1982. The term “indigenous” is used in international treaties, such as the United Nations *Convention on Biological Diversity*, in the context of “indigenous and local communities” world-wide.

We wish to thank the contractors, Simon Brascoupé and Karin Endemann, who provided the first draft of this working paper to the Research and Analysis Directorate and the International Relations Directorate of DIAND. We also wish to thank Howard Mann and Gordon Christie, peer reviewers; the many

Aboriginal experts who provided comments and suggestions; and the federal government officials in DIAND, the federal departments of Industry, Justice, Canadian Heritage, Foreign Affairs and International Trade, the Canadian Intellectual Property Office and the Canadian Food Inspection Agency for their valued contributions.

As editors, our role has been to revise this document based on comments received from many sources. We hope that this paper will encourage a fuller discussion among Aboriginal people and in government on the protection of traditional knowledge, by increasing the understanding of IP rights in relation to Aboriginal concerns. Readers should be aware that the issues are rapidly evolving, and are now receiving attention on an international level. This paper should be viewed as the best effort possible at the time of publishing. Since this is an initial review of IP issues relating to Aboriginal people in Canada, suggestions for improvements are welcome.

The Aboriginal perspectives in this paper are based on written comments, published documents, and conversations with Aboriginal people. We hope that they are a fair reflection of what we have read and heard. The opinions expressed in the paper are those of the editors and contractors and do not necessarily reflect those of the federal government. We are, of course, responsible for any errors or omissions.

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Acronyms:

DIAND Department of Indian Affairs and
Northern Development (or Indian and
Northern Affairs Canada)

IP Intellectual Property

WIPO World Intellectual Property Organization

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Intellectual Property And Aboriginal People: A Working Paper

Introduction

For Aboriginal people, creation is a gift. All the elements of life are sacred and respected - water, land and sky; fish, animals, birds, people; trees and plants. Within this context, Aboriginal people, over many generations, have developed an extensive knowledge of ecology, plants, animals, medicines and spirituality. Since time immemorial, they have handed down songs, stories, designs and ways of doing things which reflected their history, culture, ethics and creativity, and are based on customary laws¹ and protocols. This body of knowledge, spirituality, and art forms is known as traditional knowledge. It is generally considered to belong to an Aboriginal community or people rather than to one or more specific individuals.

This study looks at only one of the many options to protect indigenous knowledge - the Canadian Intellectual Property regime. There are a host of other tools (e.g. contract law, customary laws) that merit further research and discussion on their potential influence, application and enforcement to protect Aboriginal knowledge. This research is a small part of a much larger discussion.

Many Aboriginal people in Canada are individual creators of artistic and literary works, developers of new technology and purveyors of knowledge. One of the common tools available to promote and protect this knowledge is the Canadian Intellectual Property regime. As with any legal or policy

instrument, Intellectual Property (IP) laws have their strengths and weaknesses in what they can and can not do. This study aims to explain some of the potentials and limitations of protecting indigenous knowledge as intellectual property. It also illustrates how Aboriginal people are currently using Intellectual Property laws as practical tools to protect and promote their cultural and intellectual property.

The term intellectual property (IP) designates precisely defined kinds of knowledge that can be protected by law. Generally, IP laws protect a creator's expression in artistic and literary works, the proprietary technology in inventions, the words and symbols used to identify products and services and the aesthetic aspects of product designs. However, it is important to note that not all information and knowledge is considered to be intellectual property under Canadian law, and not all intellectual property has significant commercial value.

While existing Canadian IP laws are not well-suited for protecting all types of traditional knowledge in all instances, they may be useful in some cases. The value of using existing IP regimes is that the law is established, and can be enforced throughout Canada. Lessons from the use of existing IP systems by Aboriginal people may help identify issues that need to be addressed, and help to ensure that benefits from using indigenous knowledge are shared with the Aboriginal custodians.

This paper is intended to raise awareness of issues related to protecting Aboriginal traditional knowledge and intellectual property from misappropriation and misuse. It is also intended to help Aboriginal people address issues of control and access related to their traditional knowledge and culture.

Aboriginal people and communities will ultimately need to decide how best to protect their knowledge. The IP strategies outlined here can be an important part of a comprehensive solution. Under today's laws, the best results are likely to

¹ Customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws (*Black's Law Dictionary*, 7th edition, 1999)

come from an approach that combines traditional knowledge systems, existing IP laws and alternative mechanisms such as access agreements and licensing.

This paper outlines:

- ! existing legal tools to protect the traditional knowledge and IP of Aboriginal people;
- ! alternative mechanisms that Aboriginal communities can use to protect their traditional knowledge;
- ! information related to licensing intellectual property; and
- ! sources of more information on IP and traditional or indigenous knowledge.

This paper provides an overview of issues relating to traditional knowledge, intellectual property and Aboriginal people. It is not intended as legal advice. Aboriginal communities seeking legally enforceable protection for traditional knowledge or new innovations through the use of IP law should consult a lawyer or IP expert.

Aboriginal Perspectives

The Aboriginal people of Canada have long been creators of knowledge in the forms of artwork, scientific and ecological knowledge, craftsmanship, songs and stories. Songs, designs and handcrafted products were traded widely throughout the Americas, long before European settlers began to arrive. Aboriginal people are custodians of this traditional knowledge and have passed it on from one generation to the next.

Significant differences exist between Aboriginal people's view of traditional knowledge and the principles underlying Western legal institutions, especially with regard to intellectual property rights.

The laws relating to intellectual property provide exclusive market rights for an innovation or artistic work for a period of time, in order to increase economic returns for the inventor or

creator. The purpose of these laws is to encourage individuals and corporations to create artistic works and to invest in new innovation.

In the case of traditional knowledge, the primary goal of Aboriginal people is usually preservation rather than innovation. Indigenous knowledge frequently has intangible and spiritual manifestations that relate to a community or nation rather than to an individual.

Aboriginal people could have customary laws or protocols governing their traditional knowledge. For the most part, both knowledge and property are shared within the community. In some cases, these customary laws govern creations that could also be protected under Canada's IP laws. For example, Inuit people have a practice, called "Ikeartaq" in Inuktitut, whereby they would not use anyone else's song without permission. In Canadian law, songs are protected under the Copyright Act.

Aboriginal people use many methods to protect and preserve their traditional knowledge and skills for the benefit of their people and culture; most often relying on oral culture as the means of transmission. Knowledge is passed on through apprenticeship to a shaman or by going out on the land with an elder. These methods have preserved traditional knowledge for the benefit of their people and culture. As an additional benefit, they have helped to maintain the diversity and health of the world's ecosystems.

However, there is growing concern around the world that traditional knowledge is being lost because it is not being passed on from elders to the next generation, or because indigenous peoples are being displaced from their traditional environments. Some traditional knowledge has already passed into the public domain, where it can be misappropriated by individuals or companies outside the Aboriginal community.

In today's world, companies and institutions are increasingly seeking out the traditional knowledge of indigenous communities to create new products

for the global marketplace. Consumers are increasing their demands for more natural and authentic products. The tourism and cultural industries are becoming increasingly aware of the value of the indigenous traditions, practices and ways of life and of the variety, beauty and novelty of Aboriginal symbols, designs and textiles.

The growing interest in indigenous knowledge and culture points to a need for Aboriginal people and communities to protect their traditional knowledge and prevent unwanted exploitation and misappropriation. If Aboriginal people can protect their traditional knowledge, they will be in a better position to enjoy and share benefits derived from that knowledge, and to contribute to their goals of self-reliance and self-government.

Traditional Knowledge and Intellectual Property

The Aboriginal legacy of traditional knowledge comes in two distinct forms. On one hand, an Aboriginal community is the custodian of a store of sacred knowledge, including ceremonies, symbols, and masks that is increasingly open to unauthorized commercial exploitation by individuals, companies or institutions. Some Aboriginal people contend it is not appropriate to use IP law to protect sacred traditional knowledge.

On the other hand, many products and services associated with traditional lifestyles of Aboriginal people may have commercial value that could help to support the continuation of these lifestyles and the Aboriginal goal of self-sufficiency. The limited Aboriginal use of Canada's current IP laws suggests that these laws may not be particularly well suited to protecting either of these forms of traditional knowledge.

A distinction must be made between traditional knowledge held by an Aboriginal community and the innovations or new creations of an individual or an Aboriginal company. New products and works

of art by Aboriginal inventors and artists qualify for protection under existing IP laws.

Music, songs, dance, stories, designs and symbols are passed on in many Aboriginal communities from memory and by word of mouth. Each community is both a conveyer and a user of traditional knowledge. This knowledge is dynamic and evolves with the culture, so it is the product of a continuing creative process. Many Aboriginal artists and artisans create works inspired by the traditional knowledge of their community, and use copyright law extensively. Issues that are not addressed widely are: how Aboriginal people relate to their community in the context of the traditional and dynamic aspects of traditional knowledge; and how traditional knowledge itself can be effectively protected.

Protecting Traditional Knowledge Within an Aboriginal Community

Few legal mechanisms exist to help indigenous communities protect and preserve traditional knowledge. It is urgent that such mechanisms be developed, because of the increasing pace at which control of traditional knowledge is being lost due to misappropriation and pressures from the non-indigenous world.

In the meantime, the use of existing legal tools can be part of a "web" of strategies to help Aboriginal communities better protect and control their traditional knowledge, and ensure benefits are shared in a way that meets community needs. These strategies could include:

- ! developing local mechanisms within communities to control and protect traditional knowledge;
- ! more effective use of contractual arrangements to recognize traditional customs and knowledge;
- ! developing guidelines to ensure that third parties secure proper and informed consent

before an Aboriginal community shares traditional knowledge; and
! using existing IP laws.

Many Aboriginal people have said that they need to consider how they share and protect traditional knowledge within their communities before deciding whether and how they will share this knowledge with others. Once a community identifies its traditional knowledge and adopts community-based measures governing the use of this knowledge, then the community will be more secure in its ownership and more effective in any negotiations to share its knowledge.

It is important that Aboriginal communities develop a strategy to protect traditional knowledge. This will help them avoid losing control over this knowledge to third parties seeking academic advancement or commercial gain. Public disclosure of traditional knowledge has the potential to jeopardize an Aboriginal community's ability to obtain protection under Canada's IP laws. This is because knowledge that is disclosed may no longer qualify for IP protection because it is in the public domain.

Aboriginal communities considering these issues should identify the scope and nature of traditional knowledge in their community. Part of this process is to identify what knowledge is most important to the community, and how the preservation of traditional knowledge and practices is at risk. Is traditional knowledge being lost because elders have been unable to pass their wisdom to the next generation? Is knowledge being lost because Aboriginal people are being displaced from their traditional environment or because they are influenced by outside media and culture? Has traditional knowledge been allowed into the public domain or been misappropriated by commercial or scientific interests from outside the Aboriginal community?

Some Aboriginal people have identified a need for dialogue about traditional ways of sharing and preserving traditional knowledge. What are the obligations of individuals to their community when

they use or share traditional knowledge? These issues are just beginning to be discussed within Aboriginal communities and First Nations, at the federal level in Canada, and internationally among indigenous peoples and within international organizations.

It is also important for Aboriginal communities to consider what traditional knowledge is sacred and what knowledge may be shared with others or used commercially. Only after a full dialogue will these communities be in a position to determine the best mechanisms to control access to their traditional knowledge, and what knowledge they want to share with others. A number of approaches will be needed to reflect the varied nature and use of the community's traditional knowledge.

One option may be for Aboriginal communities to develop guidelines to prevent unwanted disclosure, and to ensure that traditional knowledge remains within the community. The process of developing guidelines will help ensure that the entire community is consulted in decisions concerning the protection of traditional knowledge and control over its commercialization. These guidelines would need to be enforced by the community, since an Aboriginal community may not have any recourse to the courts if one of its members violates the guidelines.

Community guidelines might include policies on the publication of traditional knowledge, its use by others or the use of the community's symbols. Aboriginal communities may also want to ensure that sharing traditional knowledge within the community continues, and is not restricted more than it was traditionally.

Sharing Traditional Knowledge With Others

If an Aboriginal community decides that it wants to share some of its traditional knowledge with others, then the community will need to decide

what principles should govern access, control and use of its knowledge, innovations or traditional practices.

Article 8(j) of the *Convention on Biological Diversity* reflects some basic principles that are receiving increasing support internationally. It focuses on *in situ* (in its natural or original place) conservation of biological diversity and provides that:

- ! indigenous knowledge in this area should be respected, preserved and maintained since it is important for conservation and sustainable use of biological diversity;
- ! when indigenous knowledge related to biological diversity is used, it should be with the approval and involvement of the holders of that knowledge; and
- ! benefits arising from the use of traditional knowledge, innovations and practices relating to the *in situ* conservation of biological diversity should be shared equitably.

CONVENTION ON BIOLOGICAL DIVERSITY

Article 8: In situ Conservation - Each Contracting Party shall, as far as possible and as appropriate:

Article 8(j): Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

This section explores some techniques by which Aboriginal individuals and communities can retain control of their traditional knowledge and, if they wish, derive commercial benefit from it. Depending on the situation, these approaches may be used as alternatives to or in conjunction with the legal forms of IP protection outlined later in this guide.

Before sharing traditional knowledge with others, Aboriginal communities may wish to seek outside sources of information and help. These could be IP consultants, IP lawyers, trademark or patent agents, academics or government agencies. Another source of help is other Aboriginal communities and indigenous organizations. Some useful sources and websites are listed at the end of this paper, along with addresses for government agencies responsible for developing and administering Canada's intellectual property laws.

Even though the principles for sharing traditional knowledge with individuals, companies or organizations may be similar, the legal approach used may vary. Informal mechanisms such as guidelines and codes of conduct may be effective if they are supported by the community, but the ability to enforce these mechanisms in court is limited. Federal statutes are enforceable nation-wide. Legal agreements and contracts between parties are enforceable in civil courts, but do not extend to third parties (i.e., those that are not party to the contract).

Guidelines and Codes of Conduct

Aboriginal communities can develop **community guidelines** for scientists and businesses wanting access to traditional knowledge. One example is the guidelines drafted by the Inuit Circumpolar Conference (see *Information Sources*).

Guidelines should reflect how a community wishes to use and control its traditional knowledge. For example, guidelines might include policies for

obtaining informed consent from the Aboriginal community when traditional knowledge is shared with others, or when Aboriginal symbols or photographs of Aboriginal people are used in advertising. Guidelines may raise awareness and define the expectations of Aboriginal people with respect to the sharing of traditional knowledge. As guidelines are not enforceable in court however, they can only be enforced through sanctions within an Aboriginal community or be used as principles of conduct.

Another option for protecting traditional knowledge is to encourage firms and trade and professional associations to adopt **codes of conduct**. Codes of conduct would establish accepted standards of behaviour for employees and association members when accessing traditional knowledge. Like guidelines, however, codes of conduct are not legally binding.

Statutory Options

The *Scientists' Act* of the Northwest Territories (NWT) requires all scientists conducting research in the NWT to obtain a licence from the territorial government before beginning any research. In applying for a licence, the researcher must provide complete details about the scientific research, including its general goals, maintenance of confidentiality, intellectual property arrangements, use of data and how findings will be communicated back to the communities involved. This *Act* sets a precedent both in Canada and internationally; it has helped to establish the principle of prior informed consent in Canada for researchers seeking access to the traditional knowledge of Canada's Aboriginal people. This principle is now being adopted in land claims agreements and land use plans in the NWT and the new territory of Nunavut.

Legal Agreements and Contracts

Aboriginal people are increasing their use of legal agreements and contracts to allow others to access traditional knowledge while retaining control over its use. These contracts range from simple to complex, and can be legally enforced through civil action in the courts.

Agreements will differ depending on a community's needs. Any agreements should be prepared by an expert in contract and intellectual property law.

Issues that should be addressed in agreements concerning traditional knowledge or Aboriginal intellectual property include:

- ! the period of the agreement;
- ! the rights and responsibilities of the parties;
- ! involvement of the community and other parties;
- ! who owns the intellectual property;
- ! what the parties can do with the traditional knowledge or intellectual property; and
- ! the amount, form and method of compensation.

Any exchange of information, technology or resources with a third party should be designed as a fair exchange from which both parties will benefit. Any dealings by a contracting party should also respect this principle and guarantee the security and respect of the community's traditional knowledge.

Communities may seek compensation for access to traditional knowledge that has commercially valuable uses. This could be through up-front payments, training, infrastructure projects, employment guarantees, access to technology, royalties or non-monetary compensation.

Communities may also seek to control or limit how their knowledge will be used. A contract should stipulate whether the community or the outside party will own any intellectual property rights, such

as patents, created from the community's traditional knowledge.

Some common contractual arrangements used for intellectual property may be adapted for traditional knowledge. These include:

Prior Informed Consent

Before research begins, a community can insist the researchers sign a **Prior Informed Consent (PIC)** agreement as a condition for the community's co-operation. The purpose of a PIC agreement is to clearly define the reasons and methods, potential impacts, and expected outcomes of any scientific research activity that will affect Aboriginal people or their communities. PIC agreements may include arrangements for ownership and compensation if knowledge gained through the research is used commercially. As well, they ensure that the results of the research are shared with the community.

Confidentiality Agreements

Aboriginal communities may wish to share information involving traditional knowledge, such as information about traditional medicines, without giving up ownership or control. A community may want to disclose knowledge to a firm that is considering whether to license the knowledge, for example. Before proceeding, the community should protect its rights by having the other party sign a **confidentiality** or **non-disclosure agreement**. This type of agreement is designed to prevent the other party from using or disclosing the information for an agreed period of time, often three to five years.

It is also advisable to have other parties who may have access to a community's traditional knowledge - such as an employee, consultant, or contractor - sign a formal confidentiality or non-disclosure agreement. This can help ensure the knowledge is protected, since the community will lose control of the knowledge it holds if this knowledge is allowed to enter the public domain.

Confidentiality clauses can also be important elements of contracts with governments and business. For example, resource co-management agreements between governments and Aboriginal people increasingly include provisions to deal with the confidentiality and use of traditional knowledge.

Material Transfer Agreements

When biological resources are given, sold or licensed to an outside agency or organization, Aboriginal communities can use a **Material Transfer Agreement (MTA)** to outline the obligations of each party. These agreements often include compensation for the material, such as a lump sum payment or royalty. The agreement may also provide for further compensation if the other party successfully commercializes products based on the biological resources that were shared. Transfers of biological material by indigenous peoples often include confidential, traditional ethno-botanical knowledge.

IP Protection of Indigenous Knowledge

In recent years, globalization and advances in the creation of new information technology and biotechnology have resulted in new forms of intellectual property and the need to modernize existing Intellectual Property (IP) laws. The issue of protecting Aboriginal peoples' knowledge and innovations has received some preliminary discussion in domestic and international fora. However, policy development on these issues is still in an early stage, and Aboriginal perspectives on traditional knowledge are just beginning to be heard.

This section of the paper shows how current IP laws and mechanisms can be used to help protect that portion of traditional knowledge and new Aboriginal knowledge that can legally be defined as intellectual property.

As already noted, while the IP regime can not effectively protect all aspects of Indigenous knowledge, there are certain merits to using existing IP laws to protect some forms of traditional knowledge.

Because “intellectual property” is a legal term, it is used to designate a few precisely-defined activities or kinds of knowledge that can be protected by law. Generally, IP laws protect a creator’s expression in artistic and literary works, the proprietary technology in inventions, the words and symbols used to identify products and services and the aesthetic aspects of product designs. These laws exist to reward creators and innovators and to protect commercial investment in the arts, technology and industry. Their purpose is to protect owners while promoting creativity and the exchange of ideas. Ideas themselves cannot be protected through IP laws, only their expression or their embodiment in a process, an artistic creation or a manufactured product.

The *Copyright Act*, the *Patent Act*, the *Trade-marks Act* and the *Industrial Designs Act* are examples of Canadian IP statutes. Other forms of IP, such as trade secrets, also receive some protection through the courts.

Most IP law in Canada is administered by a federal agency, the *Canadian Intellectual Property Office* (CIPO). To understand the full nature of IP law, one needs to consult the various IP acts, CIPO regulations and guidelines and court decisions on specific cases. The websites and other information sources listed at the end of this paper provide a good starting point.

People occasionally confuse the different forms of intellectual property. Briefly, the types of IP and the areas that they protect are as follows:

! **copyrights** protect original literary, artistic, dramatic or musical works and computer software when they are expressed or fixed in a material form;

! **neighbouring rights** refer to the rights of performers and producers to be compensated when their performances and sound recordings are performed publicly or broadcast;

! **industrial designs** protect the shape, pattern or ornamentation applied to a manufactured product;

! **trade-marks** protect words, symbols or pictures used to distinguish goods or services of an individual or organization from those of others in the marketplace;

! **patents** protect new technological products and processes;

! **trade secrecy** law protects trade secrets and confidential information from public disclosure and unauthorized use;

! **plant breeders’ rights** protect new varieties of plants developed by plant breeders; and

! **integrated circuit topographies** protect the three-dimensional configuration of electronic circuits developed for integrated circuit products.

As this list shows, intellectual property laws protect different aspects of human creativity. For the traditional knowledge or innovations and new creations by Aboriginal people to be protected under existing Canadian law, they must fall into one of these categories.

Although these intellectual property rights differ in fundamental ways, some concepts and provisions are common to all, and have particular relevance in understanding IP from the perspective of the protection of traditional knowledge. These include:

Ownership

Intellectual property rights can be obtained by legal entities such as companies, as well as by individuals. The inventor(s) or author(s) need to be identified when IP is registered, even if the creation is being assigned to an employer or to another party.

An Aboriginal government or Aboriginal community organization that is entitled to sign contracts has the legal right to register IP. This can also be done through a special corporation acting as an agent to protect a community's traditional knowledge or IP.

Identifying a single source of traditional knowledge is not easy due to the collective ownership of this knowledge, and the fact that it has been passed on orally for many generations. One way around this problem may be to identify an elder or other member of the Aboriginal community who recorded the knowledge in fixed form as the creator, while assigning the IP right so it is registered in the name of the community.

However, some traditional knowledge may not be eligible for protection because it is held so widely that it is considered public knowledge. In other instances, several Aboriginal groups or communities may claim ownership of the same, or similar, knowledge and may differ as to how this knowledge should be protected or shared.

Nature of Rights

Through intellectual property rights, the government gives the inventor or creator the right to exclude others from making, using, copying or selling the holder's intellectual property for a fixed period of time. In addition to these economic rights, copyright law provides "moral rights" which prevent others from modifying or mutilating copyrighted works in a way which affects the creator's honour or reputation.

To protect the public interest, some innovations, such as new methods of medical treatment are excluded from IP protection. For the same reason, libraries receive a limited exemption from infringement of copyright. Special measures exist to counter abuses of intellectual property rights, such as the right of competitors to obtain compulsory licenses on patented technology from the Commissioner of Patents. Intellectual property rights are not absolute; they are an attempt by government to balance the rights of IP holders with those of consumers and other stakeholders.

Criteria for Protection

Intellectual property must be new, novel, original or distinctive. Novelty and originality can sometimes be tricky to determine, but the law clearly states that intellectual property protection cannot be obtained for someone else's creation. These concepts make it difficult for Aboriginal people to gain legal IP protection for traditional knowledge that has been handed down for generations and whose original creators are unknown.

The standard of originality required for IP protection in Canada varies with the category. To receive a patent, for example, inventors must meet the criteria of novelty, utility and inventive ingenuity. Creative works must be original to qualify for copyright protection, and must also be expressed or "fixed" in an enduring form such as a book, compact disc, sculpture, painting, film, or Internet website. To be valid, trade-marks must be distinctive, and used in the marketplace or intended for such use in the near future.

The practical commercial aspect of IP rights is reflected in the criteria that IP must have "utility", be "fixed" or be "used" to be protected. Other common criteria are that the IP be new and be the result of human creativity. Thus, patents are granted for novel and non-obvious inventions, copyrights are granted for new and original works

and trade-marks are granted for marks that are new and distinctive.

Scope of Protection

Because patents provide a broad scope of IP protection, they also go through a rigorous process of examination before being granted. Trade-marks and industrial designs are somewhat narrower in scope, but are subject to a registration process to prevent conflicts between registrants. The scope of copyright is narrower still; registration of copyright is not required, and most creators do not register their copyright, since there is little chance of conflicting claims to a work. The wide variation in subject matter and in scope of protection between different forms of IP helps to explain why the duration and nature of IP rights differ.

Duration

The length of IP protection varies with the type of IP involved. Industrial designs receive the shortest term of protection at 10 years. The longest term is for trade-marks, which can be held in perpetuity so long as they continue in use and are renewed every 15 years. Patents are granted to a maximum of 20 years from the date an application is filed, while copyrights generally last for the life of the author, plus 50 years.

Traditional knowledge in many Aboriginal communities dates back for generations or even to time immemorial. The acquisition of IP rights that may last for as little as 10 years is only a temporary form of protection for this kind of knowledge, since Aboriginal people and communities usually want to protect their traditional knowledge for generations to come.

Registration Costs

Some forms of IP are relatively inexpensive to register, while others are costly. A copyright can be registered directly with CIPO for only \$65. On the other hand, the cost of novelty searches, agent's fees and CIPO registration for trade-marks and industrial designs may cost up to several thousand dollars and the total cost of obtaining a patent may be as high as \$20,000. Further costs are involved to obtain IP rights in other countries.

Enforcement

Obtaining a Canadian patent or trademark with CIPO allows the holder to enforce IP rights in Canada, but not in foreign countries. Registering IP is no guarantee against infringement - the illegal use of someone else's IP - but it does establish title to intellectual property in cases where there are disputes with others.

The federal government is not responsible for preventing intellectual property rights from being infringed. Enforcement of IP rights is the IP holder's responsibility. This includes searching for infringing articles, trade-marks or products and launching legal action. The courts will decide whether the IP right is valid and whether it has been infringed by others.

Obtaining and enforcing IP rights can be expensive for organizations with limited resources, such as small businesses and Aboriginal communities. As a result, in some cases, Aboriginal IP holders may be at a disadvantage when negotiating appropriate arrangements and defending their IP rights.

International Protection

As intellectual property becomes a more important trade issue, it is becoming common for regional and multilateral trade agreements to include

chapters on IP that establish minimum standards and provisions for enforcement. In Canada, the *North American Free Trade Agreement* (NAFTA) and the World Trade Organization's *Trade-Related Aspects of Intellectual Property Rights Agreement* (TRIPs) are important because they include dispute mechanisms to enforce treaty obligations related to IP.

The IP treaties for which the World Intellectual Property Organization (WIPO) is responsible, such as the *Berne Convention* (on copyright) and *Paris Convention* (on patents, trade-marks, etc.) are also important in establishing minimum IP standards internationally. Protection for IP in most industrialized countries is effective because they have signed TRIPs and the major WIPO treaties, but current IP standards and enforcement in some developing countries may not be sufficient to protect an IP holder's interests.

The *Patent Cooperation Treaty* and the *Trade-mark Law Treaty* offer simplified methods of applying for protection in many countries simultaneously. These agreements establish a priority filing date after which an IP holder has one year to file patent and trademark applications in countries where IP protection is sought.

IP rights must usually be applied for in each country where protection is sought. The exception is for works protected by copyright, since work created or published in Canada receives automatic copyright protection in most foreign countries - specifically, those belonging to the *Berne Convention for the Protection of Literary and Artistic Works* or the *Universal Copyright Convention*. There is no such thing as an international patent or an international trade-mark.

The nature of future IP protection is somewhat uncertain, as national IP systems adapt to the challenges of new technologies, such as biotechnology and the Internet. The protection of traditional indigenous knowledge is another emerging issue, and it is now being reviewed by international organizations such as the *Convention on Biological Diversity* and WIPO.

While most countries have IP laws, the level of protection, registration procedures and court systems vary significantly. Professional advice is necessary in each country where IP protection is sought. Because of costs, most IP holders file in countries which are important markets, such as the U.S., U.K., Japan and France, or in countries that are likely to produce infringing products for sale in export markets.

IP Rules in an Aboriginal Context

The principal forms of IP protection available in Canada are outlined below in more detail, with special attention to their relevance for Aboriginal people and communities.

Copyright

In the simplest terms, copyright means the right to reproduce or distribute to the public any original literary, dramatic, musical or artistic work. Its purpose is to give copyright holders rights which they can sell, while promoting creativity and the orderly exchange of ideas.

Copyright law gives creators the exclusive right to control how their work is copied and made available to the public. It prohibits others from copying the work without permission. The *Copyright Act* extends to adaptations, to public display of most artistic works created since 1988 and to the broadcast of a fixed work, such as a record or tape, by radio, television or other electronic means.

Copyrighted works can be created through any form of technology from stone carving to computer art. While copyright law prevents copying, it does not prevent the independent creation of songs or other works that are similar to copyright works.

Copyright has been developed to give authors and artists an incentive to produce creative work and entrepreneurs an incentive to invest in it. Copyright law has become increasingly complex over the years as new technologies and means of communications have increased and become more complex.

Ownership: Only the owner of copyright, usually the creator or author of the work, is allowed to produce or reproduce the work in question or to permit anyone else to do so. Creators may legally transfer their rights to another person or to a corporation, in which case that party owns the copyright. If a work is created in the course of employment, the copyright generally belongs to the employer unless there is an agreement to the contrary.

While this is not required under Canadian law, copyrights can be registered with the Canadian Intellectual Property Office (see *Information Sources*). Registration makes it easier for a copyright holder to enforce their rights in the work should an infringement occur. Although registration is inexpensive, it is not used widely in Canada.

Criteria for Copyright Protection: Creative works must meet the criterion of originality and be “fixed” in an enduring material form, such as a book, magazine, musical score, cassette or video tape, film or photograph.

“Original” works need not be completely novel or reach some predetermined standard of aesthetic, artistic or literary quality, but should result from independent creation and effort. Originality lies in the expression of an idea and the effort used to express it. The work should originate from the creator and not be copied from another work. The low threshold of originality means that someone else can create a similar work provided the work is done independently. Many court cases revolve around the question of whether a work has been copied, even in part, from someone else’s work.

Scope of Protection: Copyright applies to original literary, dramatic, musical and artistic works and applies to a wide range of creations. Here are a few examples:

- ! **literary works:** books, pamphlets, poems and other works consisting of text, including computer programs;
- ! **dramatic works:** films, videos, plays, screenplays, scripts and choreographic works;
- ! **musical works:** musical compositions with or without words;
- ! **artistic works:** paintings, drawings, maps, photographs, sculptures and architectural designs; and
- ! **compilations** of creative work in any of these categories.

Duration: In Canada, copyright protection usually lasts for the life of the author, the remainder of the calendar year in which the author dies, and for the next 50 years. After this period, the work becomes part of the public domain and can be used without permission or payment. This general rule has a few exceptions and variations, including photographs, works created by the Crown, joint authorship, unknown authors, posthumous works and unpublished works whose creator died before 1999.

Nature of Rights: Rights under copyright are considered to be “distinct” and “exclusive”.

Distinct means that each right is separate and independent from any other right and can be sold separately by the copyright owner. The copyright owner must consent to each and every use of a work.

Exclusive means that the copyright owner has the sole right to produce or reproduce a work, or a substantial part of it, in any form. It also includes the right to perform or present the work in public. If the work is unpublished it includes the right to publish it, or to prevent others from doing so.

Copyright protection allows owners to authorize third parties to use the holder's rights, to perform or present the work in public or to make derivative works, such as a movie from a novel. More specifically, copyright owners have the sole rights to:

- ! make adaptations, including converting a dramatic work into a novel or other non-dramatic work, or converting a novel, a non-dramatic work or an artistic work into a dramatic work;
- ! make and show publicly a film or video adaptation of any copyrighted literary, dramatic, musical or artistic work;
- ! make a sound recording, film or other version of a literary, dramatic or musical work by which the work may be mechanically reproduced or performed;
- ! reproduce, adapt and publicly present a work by cinematograph (i.e., film or video);
- ! communicate the work to the public by telecommunication;
- ! produce, reproduce, perform or publish any translation of a copyrighted work;
- ! present an artistic work at a public exhibition, for a purpose other than sale or hire;
- ! rent sound recordings and computer programs in which the work is embodied; and
- ! authorize third parties to use the holder's rights.

Even if creators assign the "economic rights" under copyright to someone else by selling it or licensing it, they retain what are called "**moral rights**". This means that no one, including the copyright owner, is allowed to distort, mutilate or otherwise modify the work in any way that may tarnish the creator's honour or reputation (right of integrity). A creator also has the right to be associated with a work as its author by name or under a pseudonym, if reasonable in the circumstances (right of attribution). In addition, the work may not be used in association with a product, service, cause or institution in a way that is prejudicial to the creator's reputation without permission (right of association).

A creator cannot transfer or sell moral rights, but they can be waived when copyright is sold or transferred at a later date. Moral rights last for the same length of time as copyright, and they pass to the heirs of the creator, even if they do not inherit ownership of the copyright itself.

Not all reproductions of a work without permission is considered infringement. The *Copyright Act* provides that any "fair dealing" with a work for purposes of private research, or for criticism, review or newspaper summary, is not infringement. However, the user is generally required to cite the source and author's name. There are no guidelines that define the number of words or passages that can be used from an author's work without permission. Only the courts can rule whether fair dealing or infringement is involved. Private activities, such as a private performance of someone else's play or song in one's own home, are not considered to be infringement.

For reasons of public interest, the *Copyright Act* provides limited exceptions for certain types of users. These include groups such as libraries, museums, and people with perceptual disabilities. The Act also gives limited rights to non-profit educational institutions to present or reproduce a work at no cost.

Enforcement: When someone uses a copyrighted work without permission, infringement has occurred. A court order can be issued to stop the use and to seek damages (e.g. financial compensation). Significant effort may be required to monitor infringements on copyright in the case of works that are distributed widely. Before taking action against an infringement, the gains of possible damages should be weighed against potential legal costs.

Sometimes individuals find it inconvenient or difficult to administer the rights they hold through the copyright system. In such cases, copyright owners may choose to join a collective which collects royalties or tariffs on behalf of its members. There is a wide range of collectives

covering such areas as television and radio broadcasts, sound recordings, reprography (photocopying), performances, video recordings and visual arts. These licensing bodies grant permission to others to use works owned by their members, determine the conditions under which those works can be used, and also launch infringement suits on behalf of members. They also collect royalties or other fees for photocopying or broadcasting copyrighted works (see *Information Sources*).

Royalties are sums paid to copyright owners as commission for sales of their works or permission to use them. For example, a composer is entitled to a royalty every time a radio station plays his or her song or if someone is paid to sing it in a public performance.

Tariffs are set fees, similar to royalties, that must be paid for the use of copyright material. Cable companies pay tariffs for permission to transmit programs. The federal Copyright Board helps to regulate this complex and growing sector. It determines tariffs for different users, such as broadcasters, theatres and discothèques; sets tariffs for cable retransmission; and arbitrates disputes that involve outside parties and a licensing body.

International: Canada is a member of the *Berne Convention for the Protection of Literary and Artistic Works*. This means Canadian works are automatically protected under copyright in more than 130 countries which have signed the Convention. In return, Canada automatically grants copyright protection to all authors and creators who are citizens or subjects of a Commonwealth or *Berne Convention* country.

Copyright Use by Aboriginal People

Copyright is widely used by Aboriginal artists, composers, writers and filmmakers. For example, copyright protects: Norval Morrisseau's paintings; the sculpture *Spirit of Haida Gwaii* (1991) by Bill Reid outside the Canadian embassy in

Washington, D.C.; stone carvings by Inuit; the architectural drawings of Douglas Cardinal, architect for the Canadian Museum of Civilization; songs and sound recordings by Aboriginal artists Kashtin, Robbie Robertson and Susan Aglukark; wood carvings of Pacific Coast artists, including masks and totem poles; and the silver jewelry of Haida artists; the film *Christmas Time in Moose Factory* (1971) by Alanis Obomsawin; *The Manitous: The Spiritual World of the Ojibway*, a book by Basil Johnston; *House Made of Dawn*, a Pulitzer prize-winning novel by an Aboriginal American author, N. Scott and the film adaptation of his novel.

Aboriginal Perspectives on Copyright

Although copyright applies to the works of Aboriginal writers and artists, it does not meet all the needs of Aboriginal people, especially with respect to traditional knowledge. Copyright protection encourages the creation of new works, but Aboriginal communities may want to achieve other goals, such as preserving traditional culture and controlling the use or misappropriation of traditional knowledge.

As copyright protects the expressions of ideas and not the ideas themselves, it would be difficult to obtain protection for traditional knowledge or legends which are not "fixed" in writing, film or art but are passed down orally from generation to generation. Also, copyright can be used to control copying of a book or other created work, but does not prevent the reader or viewer from freely using the ideas that the work contains.

In many cases, Aboriginal communities want some control over the use of ideas appropriated from their culture. They are seeking a form of protection that is broader in scope than copyright.

Copyright law does not allow legends and stories belonging to a community to be protected in perpetuity. When traditional knowledge is recorded in writing or some other fixed form, its expression may be eligible for copyright

protection. An Aboriginal legend or song copyrighted in this way would be protected for a minimum of 50 years under existing copyright law, but could not be protected indefinitely.

Moreover, if non-Aboriginal people were the first to publish this material, they could claim copyright for their expression of Aboriginal stories and art that an Aboriginal community considers to be its own. If challenged, however, the non-Aboriginal person would have to satisfy the criterion of originality - that is, that the work involved independent creation. Many Aboriginal works were created generations ago and transmitted orally. Under current copyright law, they may be considered to be in the public domain and therefore open for use by outsiders without the Aboriginal community's consent.

Copyright is normally held by legal entities such as firms and individuals. In contrast, traditional knowledge is held by an Aboriginal community. As noted earlier, Aboriginal communities may be able to hold copyright or as an alternative, may assign copyright for works based on their communal traditional knowledge to a separate corporation or legal entity under community control.

Neighbouring Rights

Neighbouring rights is a term used to indicate rights of performers and producers to be compensated when their performances and sound recordings are performed publicly, broadcast, rented out or reproduced. Although similar to copyright and legislated under the *Copyright Act*, neighbouring rights are a distinct form of IP protection. In effect, the performance of a work creates a "neighbouring" work called a performer's performance. Royalties for broadcasting or public performances were once only provided to composers and lyricists under copyright law. Neighbouring rights provide compensation for performers and producers of sound recordings, whether or not the works themselves are copyrighted.

Under neighbouring rights, performers - including actors, singers, musicians and dancers - are protected under the *Copyright Act* against the unauthorized use of their performances. A performance, for the purpose of neighbouring rights, includes:

- ! a performance of an artistic, dramatic or musical work;
- ! a recitation or reading of a literary work; and
- ! an improvisation of a dramatic, musical or literary work.

Performers are entitled to several types of neighbouring rights, whether or not the performance is fixed or recorded. These include:

- ! the **right to fix**, under certain conditions, that is to make an audio recording of a performance that is live or broadcast;
- ! the **right to prevent unauthorized recordings** or bootleg copies of a performance, although the performer may also consent to such an unauthorized recording being reproduced;
- ! the **right to communicate** the performance to the public by radio or television at the time of the performer's performance;
- ! the **right to rent out** a sound recording of the performance; and
- ! the **right to authorize** any of the above rights.

Sound recording producers enjoy the right to authorize the first publication of their sound recordings. They also have the right to reproduce their sound recordings directly or indirectly and to rent them out. Finally, they are entitled to be paid equitably if their sound recordings are performed in public or broadcast.

Neighbouring rights for performers last for 50 years after a performance occurs and for sound recording producers, for 50 years after the performance is first fixed in a sound recording. After these terms expire, the fixed performance is part of the public domain and can be used without permission or payment.

Broadcasters and public establishments such as nightclubs, discothèques, and hotels pay for performers' and producers' neighbouring rights through collective organizations such as the Neighbouring Rights Collective of Canada and the Société de gestion des droits des artistes-musiciens. The neighbouring rights tariff for broadcasting in Canada is set by the federal Copyright Board. As neighbouring rights are new in Canada, their use and the creation of collectives to receive payment are still evolving.

Neighbouring rights have potential value for Aboriginal performers. Dancers and drummers at pow wows and musicians and singers performing traditional songs are just some of the Aboriginal performers entitled to neighbouring rights. However, many of the limitations of using copyright to protect traditional knowledge and culture also apply to neighbouring rights.

Use of neighbouring rights may help performers gain compensation for new performances of traditional songs or dances which can no longer be protected by copyright. Whether the performers are Aboriginal or non-Aboriginal, however, they would have no obligations under existing Canadian law to the Aboriginal community whose traditional dances or songs they perform.

Industrial Designs

The success of manufactured products in the marketplace depends not only on how well they work, but also on their aesthetic appeal. The *Industrial Design Act* protects creators from unlawful imitation of their designs in order to encourage creativity and investment in the aesthetic features of manufactured articles. It applies whether these articles are made by hand, tool or machine.

The protection of industrial designs applies to original shapes and patterns or to the ornamentation applied to a manufactured article. Registration is based on the aesthetic aspects of the article, which is usually in three dimensions

but may consist of two-dimensional patterns applied to surfaces of manufactured articles.

Ownership: Only the proprietor of a design may apply to have it registered for industrial design protection. There are three main types of design registrants:

- ! multi-national companies making products such as containers, tires, running shoes or toys;
- ! small- and medium-sized firms registering designs for factory-made goods such as furniture and clothing; and
- ! individual creators in cottage industries making goods such as jewelry, garden ornaments, fine art and clothing.

Criteria: The key conditions for registering an industrial design are that a design is original, that it has a fixed appearance and that it has visual appeal. A design cannot be the same or similar to a design already applied to a comparable article of manufacture. Examiners at the Industrial Design Office, part of CIPO, search previously registered Canadian and foreign designs to ensure that the new design is original. The design must have a fixed appearance. A beanbag chair with a shape that can be changed would not be eligible. The design must have features that appeal to the eye, but the federal Industrial Design Office will not judge the quality or merits of those features.

Scope of Protection: Industrial designs protect the features of shape, pattern or ornamentation applied to a manufactured article. Containers, such as bottles and packaging, and furnishings are the most popular articles that have registered designs. Other products often registered include tires, toys and dolls, footwear, clothing, jewelry, household goods such as cooking appliances and lamps, office equipment, musical instruments and fine arts. There is hardly a consumer good made for which some designs have not been registered.

The following can not be registered under the *Industrial Designs Act*:

- ! an idea;
- ! the useful function of the article;
- ! designs for components that are not clearly visible, such as parts used inside a car engine;
- ! materials used in the construction of the article; or
- ! a specific colour (although a pattern of contrasting colours could qualify).

Duration: Industrial design protection lasts for 10 years in Canada, if a maintenance fee is paid before the first five years have passed. Once this time period is over, anyone can make, use, rent or sell the design. If a design has never been published or made public, industrial design protection can be filed for at any time. If a design is made public, protection must be applied for within 12 months.

Don Yeomans is a renowned Northwest Coast artist. Born of a Masset Haida father and a Métis mother from Slave Lake, Alberta, Yeomans creates exquisite jewelry pieces in gold and silver. Works such as these can be protected using copyright or by being registered as an industrial design. In the case of fine gold and silver jewelry, the Precious Metals Markings Act may also apply.

Nature of Rights: A certificate of registration is evidence of the ownership and originality of a design. It gives the owner exclusive right to make, import or trade any article which incorporates the registered industrial design.

An owner may take legal action against anyone who infringes on the design in Canada. However, the owner must act within three years of the alleged infringement. The owner is responsible for enforcing the design rights, not the Industrial Design Office. If the design mark, [D], is used on your product, a court may award financial

compensation for infringement. Where there is no such mark, the court's powers are limited to providing an injunction forbidding the infringer from using the design in the future.

Industrial Design Use by Aboriginal People

A search of the federal Industrial Design Office records suggests that Aboriginal people tend not to register their designs. The one exception appears to be the West Baffin Eskimo Co-operative Ltd. which filed more than 50 industrial designs in the late 1960s. These covered fabrics using traditional images of animals and Inuit people.

A number of industrial design classifications may be of interest to Aboriginal businesses and designers making products associated with a traditional way of life. These classifications include snowshoes, canoes and kayaks, hunting and fishing equipment, axes, fabrics, sculpture, jewelry, musical instruments, containers and sporting equipment such as lacrosse sticks.

Incorporated companies have registered designs for some of the classifications mentioned above, usually when new materials such as plastics have been used. These include snowshoes, canoes and kayaks, and lacrosse sticks.

Aboriginal images are used in some classifications of registered designs such as dolls, toys and games. In this category, the only example found of an Aboriginal registration was the design of an Indian woman doll registered by the Conseil des Montagnais (du Lac St. Jean) in 1969. Of some 20 other designs registered for Indian dolls, only two figures in plastic are still protected.

Aboriginal Perspectives on Industrial Design

The short duration and limited scope of IP protection for industrial designs may be at odds with the goals of Aboriginal people wanting to protect their culture from misappropriation. Once

the 10-year period of protection for an Aboriginal design expires, non-Aboriginal producers would be able to market identical designs. Additionally, there is no restriction on non-Aboriginal producers or designers seeking to register industrial designs which mimic traditional Aboriginal designs.

It is also unclear whether traditional designs even qualify for industrial design protection, since they may be considered to be already public, and therefore not eligible by reason of their traditional use in Aboriginal communities. This is an issue specific to Aboriginal people that the courts have not yet considered.

Trade-marks

A trade-mark is one or more words, symbols or designs that are used alone or in combination to distinguish the wares or services of one person or organization from those of others in the marketplace.

Trade-marks exist to identify who made or offered the trade-marked products or services to potential customers. They help consumers distinguish trade-marked products or services from those offered by other firms and from fraudulent imitation copies.

Trade-marks allow firms to establish their reputation in the marketplace and benefit over time from the goodwill invested in the company name or brand-names. Trade-marks are also important to help advertisers establish imagery related to the company or brand. Thus, the law of trade-marks protects investment in these corporate and brand identities.

Ownership: Rights for a trade-mark are acquired through use or through an application to register a proposed mark. If someone creates a registrable mark but does not use it, they will not be allowed to retain ownership if another party adopts a similar mark and gives it wide exposure. Ownership of a trade-mark can be established

through common law simply through use if the mark is not registered.

Companies, individuals, partnerships, trade unions and organizations all have the right to register marks of identification for their wares or services. Trade-mark registration provides direct evidence of ownership and makes it easier to protect rights against a challenge, since the burden of proving ownership of a registered trade-mark falls on the challenger. When certification marks are used to indicate that goods or services meet a certain standard, the standard-setter owns the mark and provides licences to parties that meet the standard to use it.

Criteria: No application is needed to secure unregistered trade-mark rights, provided a few conditions are met. These are:

- ! no one else is using the trade-mark for a similar use;
- ! the trade-mark is not a descriptive phrase which people might use normally, such as "hot apple pie"; and
- ! the trade-mark is actually being used, for example on brochures, invoices and packaging.

Registered marks must be distinctive, or be capable of becoming distinctive, and be used as a trade-mark. A mark is a distinctive word, symbol or design which can be affixed to a product or service. If words, symbols, sounds and ideas are confusingly similar to a registered or pending trade-mark they will not be eligible for trade-mark protection. If a trade-mark is not used, the owner could lose the right to it in a court challenge.

In 1996, the Comox First Nation and an Aboriginal artist from another Aboriginal community went to court in British Columbia over use of the trade-mark “Queneesh” to describe the artist’s art business. For the Comox First Nation, “Queneesh” referred to a culturally significant legend and was also the name of its development corporation. The judge turned down the band’s effort to have its Aboriginal right to the term “Queneesh” reviewed as part of a trade-mark case because Aboriginal rights are outside the scope of trade-mark law.

A trade-mark must distinguish a firm’s products or services from those of other firms or be adapted to distinguish between products. Some marks are distinctive from the start, such as an invented word like Corel ®. Other marks become distinctive through extended use and advertising. A trade-mark that becomes a generic description for a type of product, such as “nylon” or “zipper”, may be used so widely that it is no longer considered distinct. Help from a trade-mark agent to register a trade-mark is normally required.

Scope of Protection: There are four main categories of trade-marks:

- ! **Ordinary marks:** these are words or symbols that distinguish the wares or services of a specific firm or individual;
- ! **Certification marks:** these marks identify wares or services that meet a defined standard;
- ! **Distinguishing guises:** this protects the unique shape or appearance of a product or its package, such as the packaging on President’s Choice ® foodstuffs; and
- ! **Official marks:** these are marks created for non-commercial use by governments and other public institutions.

Trade-mark law in Canada prohibits the registration of some words or symbols. These restrictions include:

- ! using a person’s name or surname as a trade-mark, although this rule does not apply if the word has come to mean more than a person’s name in the public mind - such as McDonald’s ® restaurants or McCain ® french fries - or if the person has given consent;
- ! using a word that clearly designates where the goods or services came from, or misleads the public about where they came from;
- ! using a descriptive word that refers to a common feature of the product or service, such as “sweet” for ice cream or “juicy” for apples, because this could be unfair to competitors selling similar products;
- ! using a word that could deceive or mislead consumers - such as describing candy that contains artificial sweetener instead of sugar as “sugar sweet”; and
- ! using a descriptive word that comes from another language, such as trying to trade-mark the word “anorak”, the Inuit word for parka, to market winter coats.

Some trade-marks are expressly prohibited. These prohibitions include:

- ! marks used without consent which resemble official symbols. Examples include: the Canadian flag; royal coats of arms; emblems and crests of the Red Cross and the United Nations; badges and crests of the armed forces; and symbols of provinces, municipalities and public institutions;
- ! any mark which falsely suggests a connection with a living individual or someone who has died within the last 30 years, unless they have given their consent;
- ! any scandalous, obscene or immoral word or device. This ban includes profane language, obscene pictures and racial slurs; and
- ! names of plant varieties designated under the *Plant Breeders’ Rights Act*.

Duration: Trade-marks are registered for 15 years in Canada. Registration can be maintained by paying a renewal fee every 15 years thereafter. Unlike other forms of intellectual property, there is

no limit on how long trade-marks can be protected. However, the rule is “use it or lose it.” If a trade-mark is not used for an extended period, registration may be cancelled.

Nature of Rights: Registration of a trade-mark gives the owner the exclusive right to use it throughout Canada for all the goods and services identified in the trade-mark application. Trade-mark law focuses on: the right to prevent others from engaging in unfair competition (passing off goods); preventing others from diluting the trade-mark by using confusing trade-marks or unfair associations, as in comparative advertising; and the right to transfer trade-marks.

Any person who sells, distributes or advertises wares or services while using a confusing trade-mark could be infringing on trade-mark rights. Trade-mark owners can take legal action against confusing trademarks and the unauthorized use of trade-marks to sell imitation products.

Owners of trade-marks are also protected from others using their trade-mark in a manner which may reduce the value of the goodwill invested in the trade-mark.

Enforcement: One function of the federal Trade-marks Office, a part of CIPO, is to prevent anyone from registering a mark that is the same as an existing mark or confusingly similar. However, the trade-mark owner is responsible for monitoring the marketplace for cases of infringement and for taking legal action. An owner may also need to police the use of a trade-mark to ensure that it does not lose its distinctiveness by becoming a generic term and falling into the public domain.

Trade-Mark Use by Aboriginal People

Trade-marks are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food

products, clothing, tourist services and enterprises run by a First Nation. The use of these marks can increase consumer recognition of authentic Aboriginal goods, services and works of art. This can help support fair selling prices, and protect Aboriginal businesses and artists from imitation by others.

Many Aboriginal businesses and organizations use registered trade-marks in Canada. Some examples are provided below. The number of unregistered trade-marks used by Aboriginal businesses and organizations is considerably greater than those that are registered.

The Cowichan Band Council of B.C is famous for its Cowichan sweaters which are hand-knit from ancient designs. The yarn is hand dyed, using traditional colours. To protect its designs and techniques the band registered a certification mark that is used on all Cowichan sweaters and clothing products. This mark helps consumers identify an authentic Cowichan product and protects the Cowichan products against imitation.

Certification marks are a form of trade-mark that can be used by Aboriginal people to identify their traditional crafts and artworks. Using these marks can increase consumer recognition of authentic Aboriginal works, help support appropriate pricing for authentic works and help safeguard them from imitation by others. The Cowichan Band Council has received a certification mark on the words and design for “*Genuine Cowichan Approved*” to protect articles of clothing such as sweaters. Certification marks may be the most effective types of marks available today for identifying and protecting the art and textiles of Aboriginal communities.

The community symbols and designs of band councils and Aboriginal governments created under self-government agreements may be protected under the official marks section of the *Trade-marks Act*. Official marks may be more

appropriate than trade-marks in some cases because they are non-commercial, have different rights and are subject to different criteria.

The Department of Indian Affairs and Northern Development's official mark, the "igloo design identifying Canada Eskimo art" is well known in the marketplace for identifying authentic Inuit sculptures. Some Aboriginal communities and organizations that have filed and advertised official marks under the *Trade-marks Act* include: the Osoyoos Indian Band Council for "Inkaneep"; the National Native Role Model Program; Kahnawake for a "Dream Catcher design"; the council of the Comox Band of Indians in B.C. for "Queneesh"; Campbell River Indian Band Development Corporation, also in B.C., for the "Discovery Harbour" mark and design; and the Peigan Band Administration of Alberta for a "Hide and Feathers design".

In addition to using trade-marks, Aboriginal businesses can register their trade name under federal or provincial laws relating to business registration and incorporation. While this provides some protection, the use of a registered name may be restricted if another business or organization registers the trade-mark for the same or similar name.

In other cases, marks are registered under other federal statutes. One example is the *Precious Metals Markings Act*, under which markings for gold and silver jewelry are registered.

Where non-Aboriginal businesses sell arts or crafts as "Aboriginal-made" (and in fact are proved not to be), there may be some recourse through the misleading advertising provisions of the *Competition Act*. Provincial commercial and consumer protection laws may also apply in some cases where non-Aboriginal people are fraudulently selling bogus Aboriginal arts or crafts.

Some Aboriginal Trademarks

Many Aboriginal businesses and organizations use registered trade-marks in Canada. Here are some examples:

- ! Chisasibi Band Council (Quebec) trademarked a design identifying activities of the band
- ! La Fédération des Cooperatives du Nouveau Quebec promotes its excursions as "Inuit Adventures ®"
- ! Modeste Indian Sweater & Crafts Ltd. of B.C. has a registered "Indian Head design" for clothing
- ! Chippewas of Sarnia Band (Ontario) trademarked a design for a recreational club
- ! Skidegate Development Corporation (B.C.) uses "Haida Gwaii Watchmen®" for fishing and wilderness tours
- ! West Baffin Co-operative Ltd. trademarked "Inuit designs" for drawings of Inuit art and books
- ! the Sawridge Indian Band of Alberta registered "Sawridge ®" for use on clothing and various retail businesses
- ! 489882 Ontario Inc. (Amik Wilderness) has a trade-mark "Indian Head Inside a Beaver design" for smoked trout, wild rice and other Aboriginal foods
- ! Ogotopogo Manufacturing Ltd. of B.C. has trademarked "Moose-Mocs Tsinstikepum Indian Band design" for clothes
- ! Service de Gestion Naskapi Inc. uses "Tuktu and design" for hunting and fishing guide services
- ! Cree of James Bay use their trade-marks for health, education, housing, and fund-raising
- ! Television Northern Canada Inc.'s "Aboriginal People's Television Network design" is used for television programming and sportswear
- ! Burnslake Specialty Wood Ltd. of B.C., an Aboriginal company, registered an "Indian Bear's Head and design" for lumber.

Aboriginal Perspectives on Trade-mark Protection

The requirement that trade-marks be used commercially means that trade-marks are not an appropriate mechanism for many Aboriginal communities that do not want their symbols, designs and words used in this way. Official marks could be an alternative, since the *Trade-marks Act* prohibits registering trade-marks of symbols related to the federal and provincial governments, international organizations, the RCMP and other government organizations. However, its prohibitions do not specifically include the symbols and designs of Aboriginal people.

It would be prohibitively expensive to register trade-marks for all existing words, symbols and designs in Canada that Aboriginal communities may want to protect from commercial use by others, or to allow commercial use by Aboriginal enterprises. Thus, most Aboriginal communities will probably need to rely primarily on common-law protection for their marks rather than seeking registration under the *Trade-Marks Act*. There may be merit, however, in Aboriginal communities preventing others from using their most important symbols and designs by seeking protection under this Act.

An appealing aspect of trade-mark protection for Aboriginal people is that trade-marks can be renewed perpetually. However, it should be noted that many trade-marks filed by Aboriginal organizations over the last two decades have been dropped from the federal Register of Trade-marks because they were not renewed or were abandoned after filing. One example of non-renewal is the "Chimo design" of the Inuit Tapirisat of Canada. Even if they are dropped from the register, however, trade-marks that remain in use retain their rights under common law.

Sometimes Aboriginal groups disagree as to whether a trade-mark should be granted. For example, the Baffin Regional Inuit Association opposed the Toonoonik Sahoonek's claim to the

trademark "Nunavut Our Land", used on clothing, and it has not been registered to date.

Many Aboriginal people view the appropriation and trade-marking of Aboriginal names, words, symbols and designs as unfair. Names of First Nations - Algonquin, Mohawk, Haida, Cherokee - as well as symbols such as Indian heads, tepees or tomahawks are used as trade-marks by many non-Aboriginal companies. Trade-marks on Indian head designs have been used by non-Aboriginal businesses to market everything from firearms and axes to tobacco, gasoline and cars.

Inuit names, words and symbols are often used in trade-marks to protect wares or services associated with the cold such as ice cream ("Eskimo Pie") or winter clothing. To date, the words "First Nations", "Inuit", "Dene" and "Metis" have been included only occasionally in the trade-marks of non-Aboriginal companies. Recently, the Assembly of First Nations opposed an application for the trade-mark "First Nation" filed by a Winnipeg clothing company.

So many existing trade-marks use Aboriginal names and designs that Aboriginal people and companies may have difficulty establishing distinct trade-marks of their own in the future. Any confusion created by these non-Aboriginal trade-marks is likely to affect potential licencing and endorsement opportunities for Aboriginal people. The imitation of West Coast Indian designs used in trade-marked logos, such as those of the Seattle Seahawks and Vancouver Canucks, are examples of cases that may make it difficult for the Haida or other B.C. First Nations to develop trade-marks to distinguish their wares and services in the future.

In some cases, trade-marks such as Indian Motorcycles® or Red Indian® or Eskimo Pies® may have the effect of reducing the value of existing and future Aboriginal marks. This could occur if Aboriginal people or their communities are associated with inferior goods or stereotyped products, such as alcohol, firearms or tobacco,

through the use of their names, symbols or designs.

Aboriginal businesses may also suffer from confusion and crowding out if non-Aboriginal firms sell competing products, such as crafts and clothing, using Aboriginal words or images. For example, a business from Taiwan recently filed for a trade-mark in Canada, Native Indian Trail®, and a “headdress design” and E. & J. Gallo Winery of California has filed a trade-mark on Anapamu®, the Chumash-Indian word for “rising place.”

If Aboriginal people seek to file trade-marks with distinctive Aboriginal designs, they might be successfully opposed by non-Aboriginal firms that have already trade-marked similar designs. Pro-Football Inc., owners of the Washington Redskins®, is currently opposing an Indian head design filed by a private company in Canada.

Aboriginal people in the United States have challenged the use of Aboriginal images by sports teams for logos and mascots on the grounds that they are demeaning. Their actions have included holding public demonstrations against the Atlanta Braves® and challenging the Washington Redskins® trade-mark in court.

Patents

Patents protect new technology, such as a machine, a process or a method of manufacture, as well as technological improvements. A patent gives the inventor the exclusive right to make, use or sell an invention for up to 20 years. This includes the right to exclude others from making, using or selling the invention. Any patented invention must also meet any applicable health and other regulatory standards.

Patents create incentives for research and development by giving inventors a monopoly on their inventions. In exchange, inventors provide a full description of the invention. Through this exchange, the patent system encourages inventors to publicly disclose their technology

rather than keep it secret. The information in the patent specification helps scientific researchers, academics and innovative firms keep up with developments in their fields, and enables other manufacturers to use the invention when the patent expires.

Ownership: Patents are granted to the first inventor to file an application in Canada. This means that even if a scientist or engineer can prove that they were the first to conceive the invention, the patent would go to a competing inventor who filed first. Therefore, a patent application should be filed as soon as possible when a new product or invention is developed.

The rights to a patent can be assigned in whole or in part. The patents for employee inventions are usually assigned to the employer. In cases where the Patent Office, another branch of CIPO, refuses to grant a patent, or the validity of the patent is challenged by competitors, the courts will ultimately rule on the validity of the patent claims.

Criteria: Patents are not granted just because they are filed for. Patent applications are examined by the Patent Office to ensure they meet the law’s requirements. To be patentable, an invention must be new, useful and show inventive ingenuity.

Novelty means that the invention must be original. It cannot have been patented or commercialized by others anywhere in the world prior to the filing date. If an invention is made public, however, it can still be patented if an application is submitted within one year of the public disclosure by the inventor.

Utility means that an invention is functional or operative. A patent cannot be obtained for something that does not work, such as a perpetual motion machine, or that has no useful function.

Inventive ingenuity means that an invention must be a development or improvement that would not

be obvious to others skilled in the industry to which the patent applies.

A patent application has two parts. The patent claims describe the breadth of the patent (i.e., the scope of the monopoly), while the patent specification or description provides detailed information about the invention that others may use. As part of the required disclosure, patent illustrations and deposits of biological material may be required. The patent claims must be consistent with the invention disclosed. If an invention is not fully disclosed, a patent will not be issued on any claims that are not disclosed.

Scope of Protection: A patent is granted only for the physical embodiment of an idea, or for a process that produces something saleable or tangible. A scientific principle, an abstract theorem, an idea or a method of doing business cannot be patented. Products of nature and processes that are essentially biological are not patentable.

Patents are commonly used to protect mechanical, electrical, chemical, pharmaceutical and biotechnological inventions. Patents are also issued for an improvement of something that already exists. However, if the improvement applies to an existing patented invention, it could be an infringement to manufacture and market the invention. This situation is often resolved by the patentees granting licences to each other.

There are a number of areas where court decisions and Patent Office practices are used to determine the patentability of subject matter. Methods of medical treatment, such as surgical procedures, are not patentable. However, pharmaceuticals and diagnostic devices have been ruled to be patentable.

If someone isolates or purifies a substance from nature, such as an active chemical in a plant, a patent may be granted for the isolated or purified product. To date, the Commissioner of Patents has granted patents for genes and micro-

organisms such as bacteria, yeast and cell lines, but not for whole plants or animals.

Duration: Patent protection lasts for up to 20 years from the date of application. Fees must be paid to maintain patent protection over the 20-year term. If they are not paid, the patent holder's rights lapse and the invention falls into the public domain.

Nature of Rights: Patents give the patent holder the exclusive right to make, use or sell the invention and the right to assign the patent rights or licence the use of the patented technology. However, limits apply to the exercise of patent rights to protect the public interest. These include:

- ! under certain conditions, the federal government or the provinces may apply to use the patented invention for a fee set by the Commissioner of Patents;
- ! prices of patented medicines are reviewed by Canada's Patented Medicine Prices Review Board;
- ! common law in some cases allows researchers to use patented inventions for scientific work of a non-commercial nature;
- ! compulsory licences may be obtained, beginning three years after a patent is granted, to remedy "abuse of patent rights". This term covers practices such as failing to meet demand or hindering trade in Canada by refusing to grant a licence.

Enforcement: Infringement cases are often settled out of court. However, if someone has made, used or sold a patented invention without permission, the patent holder may sue for damages in the appropriate court.

Canadian patent rights are only upheld in Canada. To protect an invention elsewhere, a patent must be obtained in each country where protection is

sought. Canada is party to the World Intellectual Property Organization's *Patent Co-operation Treaty (PCT)* which makes this process easier.

Patent Use by Aboriginal People

Patents are an established means for protecting inventions around the world, but, to date have been little used by Aboriginal people or communities in Canada.

Indigenous peoples around the world have increasingly been sharing their knowledge of medicinal plants with scientists and pharmaceutical companies. Based on this information, a firm will isolate and purify chemical compounds in the plant, and undertake preliminary tests on the chemical for efficacy and safety. If the chemical shows promise as a drug, the company will file a patent and begin the costly process of obtaining regulatory approval from health authorities, such as the Health Protection Branch of Health Canada. The sharing of benefits from patented medicines usually depends on the specific terms of contractual agreements signed between drug companies and Indigenous peoples.

Métis entrepreneur Arnold Ashram, owner of Ashram Curling Supplies in Manitoba, has turned his love of curling into a profitable business. A champion curler, he has developed and sold curling supplies and accessories since 1978. His continuous research has netted him several patents, one of which is a curling broom.

Aboriginal Perspectives on Patents

The benefit of patent rights is that they are recognized and enforceable, but the cost of obtaining and maintaining them is high. As a consequence, many small Canadian firms prefer to use trade secrecy rather than patents to protect their inventions. This may also be the preferred

choice of many Aboriginal inventors. In other countries, some Indigenous people have formed partnerships with companies that have the financial resources and expertise to patent and commercialize chemical substances and drugs that originate from traditional knowledge of plants.

There is considerable uncertainty as to how patent law applies to Aboriginal traditional knowledge. If an Aboriginal community files a patent for an invention derived from traditional knowledge, questions may arise as to whether the criteria of novelty, inventive ingenuity and utility can be met. Questions relating to public disclosure may also be raised when traditional knowledge has been previously shared widely within an Aboriginal community, but not with outsiders.

Similarly, indigenous knowledge may not be commonly used by national patent offices as a measure of novelty and inventive ingenuity when examining patent applications by non-Aboriginals. Examiners primarily use electronic databases, such as *Chemical Abstracts*, to search for novelty. Indigenous knowledge is not normally searched because it is less readily accessible. If a patent is sought for an invention based on traditional knowledge, which is widely known among Aboriginal people, the users of this knowledge may need to alert the Patent Office that the patented technology is not novel.

Another concern raised by indigenous people is that applicants for patents are not required to publicly identify the source of traditional knowledge or of genetic resources used in inventions. Some indigenous people have suggested that patent applicants be required to show that prior informed consent was obtained if a patent application is based on indigenous knowledge.

Trade Secrets

Trade secrets consist of secret information that gives an individual or company an advantage over competitors, such as technical or financial data,

formulas, programs, techniques, customer lists, manufacturing processes or patterns for a machine. One well-known example of a trade secret is the recipe for Coca-Cola®.

The legal protection of trade secrets and confidential information from disclosure and unauthorized use is based on court rulings under common law and the Quebec Civil Code. These rulings govern contracts, fiduciary relationships and equity issues such as breach of confidence and unjust enrichment. Protection is limited to information that is kept secret.

The protection of confidential information or ideas in Canada falls under provincial jurisdiction. No province has enacted any specific legislation governing trade secrets to date. The treatment of trade secrets is not uniform across Canada because Quebec uses civil law and other provinces use common law. The application of the law relating to civil liability in commercial matters also varies between provinces.

Criminal law has a limited role in protecting trade secrets. Some actions involved in gaining knowledge of a trade secret are offenses under the Criminal Code, such as breaking into a factory to steal a competitor's prototype. The application of criminal law to offenses related to theft or unauthorized use of information *per se* is still evolving.

Ownership: Disputes over trade secrets are arbitrated in civil courts. The owner of trade secrets must document their creation and use, as well as the measures taken to keep them confidential.

Criteria for Trade Secrecy Protection: While practice varies between provinces, courts outside Quebec have generally adopted the requirements for trade secrecy protection used in English case law. The practice and customs of an industry are also relevant. Criteria applied by the courts include the following:

- ! information in the public domain cannot usually be protected;
- ! information that is partly public has been protected in Canada where further knowledge is needed to make practical use of that information;

- ! the extent and precision of the information and how much has been given to others are relevant factors;
- ! an idea that is quite simple can be protected if it is sufficiently concrete and original; and
- ! information received in confidence should have some degree of originality to be protected;

Scope of Protection: The same type of information can be protected as trade secrets in Quebec as in other provinces. There are four categories of trade secrets:

- ! *Specific product secrets.* Examples include: formulas for beverages, recipes for fast food and the composition of the metals in the highest quality orchestra cymbals. This knowledge is usually handed down through a tightly controlled hierarchy of persons, and often only by word of mouth. Although a business today may not know the secret of a competitor's product, it may be able to produce an identical product through the process known as "reverse engineering".
- ! *Technological secrets.* A firm's success in acquiring and exploiting new technology is often the key to lowering costs and raising its productivity. If competitors acquire this "know-how", the firm's market advantage will be reduced.
- ! *Strategic business information.* Secret insider information about a particular trade or industry, such as marketing studies, customer lists, and industry forecasts, is important because strategic marketing and financing decisions are based on this information.
- ! *Information as a product.* Individual bits of information may have little value in themselves, but they can be valuable if sold like a commodity or assembled into useful packages. Secrecy exists because no one else has the equipment or knowledge to assemble the information, or has invested the time and resources required to do so.

Duration: Unlike statutory forms of IP protection, there is no fixed term for trade secrecy protection. Holders of trade secrets will continue to enjoy a competitive advantage until the knowledge

becomes public, is outdated or is reverse engineered by competitors. Thus, the length of trade secret protection can be long in some cases, and short in others.

Nature of the Rights: Owners of trade secrets may seek redress through the courts in certain circumstances if their secrets are disclosed or misused. The grounds for redress include breach of confidence and fiduciary duty under common law, and forms of delictual and contractual liability under the Quebec Civil Code.

Breach of confidence is one of the most used actions under common law. In order to apply, the information that is disclosed must pass a test of confidentiality, have been communicated in circumstances giving rise to an obligation of confidence, and have been misused or used in an unauthorized fashion. The value of the information, the work and time required to produce it, and how much was known by other employees have also been considered as relevant under case law.

Confidential information, including any trade secret, held by solicitors, agents and key employees is protected by *fiduciary duties*. Fiduciary duties include an obligation not to disclose or profit from the business relationship. The fiduciary must also act in the best interests of the beneficiary and must refrain from profiting from his or her position, including taking advantage of any business opportunities.

Actions under the Quebec Civil Code are usually based on what is known as *delictual* and *quasi-delictual* liability or on *quasi-contractual liability*. The Quebec code allows compensation to be awarded for unfair use of a secret or of confidential information, provided there is proof of direct injury. The law of quasi-contract liability through unjust enrichment can also be used to protect trade secrets. Quebec courts have also relied on the principle of fiduciary duty and related common law decisions, even though these are not specified as part of Quebec civil law. The result is that conditions under which ideas and trade secrets are protected in Quebec are similar to those existing under common law.

Enforcement: Trade secrecy is usually enforced through civil court action; it requires the help of a

lawyer. The nature of the action taken may affect the remedies available and what kinds of damages the court can award.

International: There is increasing recognition and uniformity in the treatment of trade secrets around the world. Trade secrecy, or the protection of undisclosed information, is recognized both by the *North American Free Trade Agreement* and by the World Trade Organization's TRIPS Agreement.

Trade Secrecy Use by Aboriginal People

Internationally, indigenous people are probably using confidentiality agreements with non-Aboriginal firms more than any other legal instrument to protect their traditional knowledge of plants and medicines. Through contracts between indigenous people and non-Aboriginal institutions and firms, the world is beginning to accept that an "indigenous community" can be recognized as a single legal entity with collective knowledge comparable to a trade secret.

The Unaaq Fisheries, owned by the Inuit people of Northern Quebec and Baffin Island, is involved in fisheries management. The company regularly transfers proprietary technologies to other communities using its own experience in the commercial fishing industry as a model. The techniques it develops are protected as trade secrets. When sharing its information with others, Unaaq protects its trade secrets by using secrecy or access agreements.

When an Aboriginal community restricts access to traditional knowledge to members of that community, its action may be compared to that of a company or non-Aboriginal body that maintains a trade secret, even though the secret is known to a number of partners or employees. It is increasingly common for Aboriginal communities in Canada to sign confidentiality agreements with governments and non-Aboriginal businesses when sharing their traditional knowledge. Business partners and legal advisors are bound by these agreements not to disclose traditional knowledge or unjustly gain from their access to it. Contracts

can also be used to control the use of Aboriginal traditional knowledge in data bases and access to this data.

If an Aboriginal community wants to maintain its traditional knowledge as a secret, it will have to make serious efforts to protect this knowledge from disclosure to others. As a general rule, it takes less effort and resources to protect traditional knowledge from being disclosed than to take legal action against breaches of confidentiality through the courts. A community system for protecting traditional knowledge should be consistent with the legal principles relating to trade secrecy if the community wants the option of seeking redress through the courts. The most effective means of protecting traditional knowledge and complying with the requirements of trade secret law may be to use Aboriginal custom enforced by the community.

Aboriginal Perspectives on Trade Secrets

While it is possible that traditional Aboriginal knowledge can be protected in the same way as trade secrets, this protection likely applies only to secrets that have commercial value. It may be harder to use trade secrecy laws and practices to protect sacred traditional knowledge from being misappropriated.

Another consideration is that trade secrecy does not apply to information in the public domain. Thus, traditional knowledge that has been disclosed to others would not qualify for protection. There is also some uncertainty as to what is considered private and public when it comes to Aboriginal people and traditional knowledge. How many Aboriginal communities or people in a community can have access to traditional knowledge before it is considered public?

The duration of effective trade secret protection may be short in some cases. Traditional knowledge exploited by Aboriginal communities for commercial gain (e.g. herbal remedies) may soon face competition from similar products created by reverse-engineering or simply by copying.

Trade secrecy rights can also be limited. Owning a trade secret does not prevent someone else from independently inventing the same “idea”. For example, a firm may independently discover the medicinal properties of a plant used by Aboriginal people and may commercialize products without any obligation to the Aboriginal people. The firm could even file for a patent that might restrict the ability of an Aboriginal community to commercialize similar products based on its traditional knowledge. It is highly unlikely, however, that patents filed by others could prevent Aboriginal people from continuing to use their traditional knowledge.

Trade secrecy law is complex. The level of protection and of remedies it provides in different provinces is uncertain. It is also unclear how Canadian courts will view customary practices governing traditional knowledge in Aboriginal communities when cases based on trade secrecy laws are involved, because there have been few court rulings anywhere in the world related to this issue.

There are generally few legal grounds to prevent a third party from using a trade secret. Since redress normally focuses on the person who disclosed the confidential information, Aboriginal communities may find it difficult to gain fair redress. The use of traditional knowledge by third parties may also be difficult to stop through trade secrecy law if the knowledge is exploited outside Canada. Some foreign countries may have weak protection for trade secrets, or may not extend this protection to traditional knowledge at all.

Plant Breeders’ Rights (PBR)

The *Plant Breeders’ Rights Act* provides plant breeders the exclusive right to produce and sell new plant varieties which they have developed.

Canadian PBR regulations cover all plant species and include all grain, fruit, trees, vegetable and flower varieties. A new plant variety will have to meet several criteria in order to qualify for protection granted by the Plant Breeders’ Rights Office of the Canadian Food Inspection Agency.

A plant variety must be:

- ! **new:** not previously sold;
- ! **different:** from all other varieties;
- ! **uniform:** all plants in the variety are the same; and
- ! **stable:** each generation of the plant is the same.

A forest plant gathered for medicinal purposes would not meet the criteria for protection under the *Plant Breeders' Rights Act*. An Aboriginal community could apply for plant breeders' rights, however, if the community had developed the plant further to both ensure that the variety is new, distinct, uniform and stable, and also to demonstrate ownership of the particular variety.

If a claim for a new plant variety is granted, the breeder will be able to control the multiplication and sale of the seeds or propagating material for up to 18 years. The protected variety may be used to produce other varieties of plants, and may be licensed to others for the same purpose. These rights are limited, however, as others may use your plant variety to develop a new variety, or save seed for personal use, without seeking your permission.

The Indian Agricultural Program of Ontario (IAPO) is owned by Status Indian farmers in Ontario. This company has been researching White Indian Flint corn, a traditional corn renowned for its flour and high protein content, which has been grown and used by First Nations for many generations. IAPO's goals are to develop new varieties of corn that can be registered under the Plant Breeders' Rights Act of Canada and similar legislation in other countries, and to market these new varieties in North America and Europe.

Registration of plant breeders' rights protects a new plant variety in Canada only. A breeder must register a new variety separately in each country in which protection is sought. The International Union for the Protection of New Varieties of Plants (UPOV), of which Canada is a member, allows citizens of the member countries to receive

protection for new plant varieties in UPOV member countries.

Integrated Circuit Topographies

Canada provides IP protection for innovative integrated circuit (IC) topographies, the three-dimensional configurations of electronic circuits embodied in IC products or layout designs. These integrated circuits are at the heart of modern information and computer technology.

The *Integrated Circuit Topographies Act* protects the original design of a topography provided it was developed through intellectual effort and is registered under the act. The *Act* protects against the copying of registered IC topographies for up to 10 years from the date of filing for registration, but it does not prevent others from developing IC products which use different topographies to perform the same electronic function.

Licensing Intellectual Property

Holders of IP will often seek to license their proprietary intellectual property to third parties that may have the financial resources or production and marketing ability to successfully commercialize the product in domestic or foreign markets.

Intellectual property, including copyright, trade-marks, patents, trade secrets and plant breeders' rights, are commonly licensed in contracts between the IP-holder and licensees. Licensing is a legally binding method to let someone else use, make or sell your intellectual property for a defined period of time, in return for fees, royalties, or other consideration. When IP is licensed, the holder still retains ownership. The licence sets out the purpose and conditions for the licensee to use the proprietary innovation or creation. The licensor may take its rights back, however, if the licensee breaks the agreement.

Before IP is licensed, the owner must decide exactly what is being licensed to whom. This means assessing the market potential of the IP and evaluating potential licensees. It is important to remember that licences are long term business

relationships, so care must be taken in choosing a partner.

There are three basic types of licences: exclusive, sole, and non-exclusive. In **exclusive licences**, the licensor gives certain rights to only one licensee. The licensor also agrees not to exercise the licensed rights. These rights could include the right to make, use or sell the product in a particular field of use, such as pharmaceuticals, or in a designated geographic location, such as North America. In the case of a **sole licence**, the licensor agrees to give certain rights to only one licensee, but retains the right to exercise the licensed rights. **Non-exclusive licences** are issued to several different licensees for the same IP in the same geographic area or field of use.

Typical elements of a licence agreement:

- **definitions**
 - **exclusive or non-exclusive**
 - **litigation**
 - **sub-licensing**
 - **duration**
 - **trade-mark use**
 - **infringement**
 - **termination**
 - **assignments**
 - **cross-licencing**
 - **improvements**
 - **trade-mark quality control**
 - **field of interest rights**
 - **geographic rights**
 - **financial issues**
 - **reporting obligations**
 - **applicable jurisdiction**
 - **terms of payment**
 - **technical assistance**
 - **international rights**
-

An Aboriginal community should negotiate the amount and form of compensation the licensee will pay to use the traditional knowledge or Aboriginal Intellectual Property. Compensation may take the form of a royalty for each unit of the product sold, a percentage of sales, a lump sum paid in advance, or a fixed payment for each year of the agreement. There are no set rules for the type of compensation one can seek. Licensing contracts are flexible in their range of terms and conditions. Indigenous peoples world-wide are sharing their licensing experiences with other Aboriginal communities. However, in negotiating a licence agreement, legal advice is recommended.

Conclusion

For Aboriginal communities, traditional knowledge consists of more than the inventions and creative works commonly covered by existing intellectual property law. Traditional knowledge is the expression of the human soul in all its aspects, as well as the foundation for economic, social and spiritual growth.

The Aboriginal People of Canada have been custodians of a wealth of information, knowledge and resources. Only recently has the value of this knowledge begun to be recognized. To ensure that traditional Aboriginal knowledge continues to be preserved, it is important that Aboriginal people and communities work with each other and with governments to determine the best use of current Intellectual Property systems and to develop new techniques and laws that are more appropriate for protecting Aboriginal traditional knowledge.

This working paper has provided an initial review of current issues relating to intellectual property, traditional knowledge and Aboriginal people. Further research is needed in this area, looking at other ways to protect traditional knowledge, and highlighting the perspectives of Aboriginal communities.

The most challenging part of this future research will be to explore how Aboriginal approaches to protecting knowledge can be combined with IP laws. This exploration may identify the need for additional legislation or other approaches, such as educating non-Aboriginal individuals and organizations to increase respect and understanding for Aboriginal traditional knowledge.

Support for protecting indigenous knowledge is growing internationally. The potential for using existing IP statutes and alternative forms of protection for indigenous knowledge is being explored in a number of countries, as well as in international fora such as the *Convention on Biological Diversity* and the World Intellectual Property Organization.

New solutions to this complex problem are still a long way off, however. Until they are found, Aboriginal people in Canada will need to use

existing IP laws and other techniques currently available to secure their knowledge, to share it among themselves, and - where they wish - reap economic, social or cultural benefits by sharing it with the non-Aboriginal world.

INFORMATION SOURCES:

I: Internet

Federal IP Resources	
Canadian Intellectual Property Office	http://cipo.gc.ca/
Intellectual Property Policy Directorate (IPPD), Industry Canada (includes links to IP legislation and treaties)	http://strategis.ic.gc.ca/SSG/ip00001e.html
Copyright Policy Directorate, Canadian Heritage	http://pch.gc.ca/culture/cult_ind/copyri_e.html http://pch.gc.ca/culture/cult_ind/copyri_f.html
Plant Breeders' Rights Office, Canadian Food Inspection Agency	http://cfia-acia.agr.ca/english/plant/pbr/home-e.html
Biodiversity Convention Office, Environment Canada	http://www.doe.ca/biodiv_e.html
Canadian Federal Links and Law Resources	http://www.droit.umontreal.ca/doc/biblio/en/index.html
Intellectus (Industry Canada IP software package)	http://strategis.ic.gc.ca/sc_mrksv/cipo/learn/intellectus/intell-e.html
Aboriginal Business Canada, Industry Canada	http://strategis.ic.gc.ca/sc_mangb/abc/engdoc/homepage.html
International Sites	
Secretariat: Convention on Biological Diversity	http://www.biodiv.org/
World Intellectual Property Organization	http://www.wipo.org/eng/newindex/index.htm
General IP Sites	
Patent Searches - Canada	http://strategis.ic.gc.ca/sc_innov/patent/engdoc/cover.html
Trade-mark Searches - Canada	http://strategis.ic.gc.ca/sc_cons/trade-marks/engdoc/cover.html
Canadian Lawyer Listing	http://www.cusimano.com/dir/law/
Intellectual Property Institute of Canada (formerly Patent and Trademark Institute of Canada)	http://www.ipic.ca
Aboriginal Sites	
Indigenous Peoples Biodiversity Information Network (IBIN)	http://www.ibin.org/
Inuit Circumpolar Conference - Traditional Ecological Knowledge	http://www.inusiaat.com/tek.htm
Bill's Aboriginal Links	http://www.bloorstreet.com/300block/aborl.htm

II: Organizations:

Canadian Intellectual Property Office (CIPO)

(Copyright, Industrial Designs, Trade-marks,
Patents, Integrated Circuit Topographies)
Place du Portage I
50 Victoria Street, 2nd Floor
Hull, Quebec K1A 0C9
E-mail: cipo.contact@ic.gc.ca
Enquiries: (819) 997-1936
Fax: (819) 953-7620

Intellectual Property Policy Directorate

(Copyright, Industrial Designs, Trade-marks,
Patents)
Industry Canada
235 Queen Street, 5th Floor West
Ottawa, Ontario K1A 0H5
Phone: (613) 952-2527
Fax: (613) 952-1980

Plant Breeders' Rights Office

Canadian Food Inspection Agency
59 Camelot Drive
Nepean, Ontario K1A 0Y9
Phone: (613) 952-8000
Fax: (613) 992-5219

Copyright Policy Directorate

Canadian Heritage,
15 rue Eddy, 4th Floor
Hull, Quebec K1A 0M5
Tel: (819) 997-5990
Fax: (819) 997-5709

Copyright Board of Canada

56 Sparks Street, Suite 800
Ottawa, Ontario K1A 0C9
Tel: (613) 952-8621
Fax: (613) 952-8630

Biodiversity Convention Office

Environment Canada
351 St. Joseph Blvd., 9th Floor
Place Vincent Massey
Hull, Quebec K1A 0H3
Tel: (819) 953-4374
Fax: (819) 953-1765
E-mail: bco@ec.gc.ca

Some Canadian Collectives

CANCOPY

(Authors' rights, English)
Suite 900, 6 Adelaide Street East
Toronto, ON, M5C 1H6
Tel: (416) 868-1629
Fax: (416) 868-1621
Internet: <http://cancopy.com>

L'Union des écrivaines et écrivains quebécoise (L'UNEQ)

(Authors' rights, French)
3492, avenue Laval,
Montreal, PQ, H2X 3C8
Tel: (514) 849-8540
Fax: (514) 949-6239
Internet: <http://www.uneq.gc.ca>

Performing Rights Societies

SOCAN

Society of Composers, Authors and Music
Publishers of Canada
41 Valleybrook Drive
Don Mills, Ontario, M5B 2S6
Tel: (416) 445-8700
Fax: (416) 445-7108
Internet: www.socan.ca

Neighbouring Rights Collective of Canada (NRCC)

#203, 540 Mt. Pleasant Road
Toronto M4S 2M6
Tel: (416) 485-4035
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Société de gestion des droits des artistes-musiciens (SOGEDAM)

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III: Bibliography

Canadian Sources on IPRs:

Vaver, David (1997): *The Essentials of Canadian Law: Intellectual Property*. Toronto: Irwin Law.

Mackaay, Ejan and Gendreau, Ysolde (1998): *Canadian Legislation on Intellectual Property 1999*. Toronto: Carswell

Harris, Leslie (1995): *Canadian Copyright Law* (2nd edition). Toronto: McGraw Hill Ryerson.

Canadian Intellectual Property Office (1994): *A Guide to Copyrights*. Ottawa: CIPO.

Canadian Intellectual Property Office (1994): *A Guide to Patents*. Ottawa: CIPO.

Canadian Intellectual Property Office (1994): *A Guide to Trade-marks*. Ottawa: CIPO.

Canadian Intellectual Property Office (1994): *A Guide to Industrial Designs*. Ottawa: CIPO.

Canadian Intellectual Property Office (1994): *A Guide to Integrated Circuit Topographies*. Ottawa: CIPO.

(The five CIPO guides are also available on the CIPO website at www.cipo.gc.ca)

Canadian and International Sources on Indigenous Knowledge and IP:

Augustine, Stephen J. (1997): *Traditional Aboriginal Knowledge and Science vs. Occidental Science*. Ottawa: Biodiversity Convention Office, Environment Canada.

Brush, Stephen B. and Stabinsky, Doreen, editors (1996): *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*. Washington, D.C.: Island Press.

Convention on Biological Diversity (1997): *Report of the Workshop on Traditional Knowledge and Biological Diversity*. Geneva: The Convention.

Ford, Violet (1998): *Traditional Knowledge and Article 8 (j) of the Convention on Biological Diversity: An Inuit Perspective*. Ottawa: Biodiversity Convention Office, Environment Canada.

Greaves, Tom, ed. (1994): *Intellectual Property Rights for Indigenous Peoples: A Sourcebook*. Oklahoma City: Society for Applied Anthropology.

Inuit Circumpolar Conference (1996): *Recommendations on the Integration of Two Ways of Knowing: Traditional Indigenous Knowledge and Scientific Knowledge*. Report from a Seminar on Indigenous Knowledge. Ottawa: ICC. (ICC website).

Kagedan, Barbara (1996): *The Biodiversity Convention, Intellectual Property Rights, and Ownership of Genetic Resources: International Developments*. Ottawa: Industry Canada. (IPPD website).

Johnson, Martha (n.d.): *Dene Traditional Knowledge*. Ottawa: Canadian Arctic Resources Committee (published at www.carc.org/pubs/v201no1/dene.htm).

Mann, Howard (1996): *Intellectual Property Rights, Biotechnology and the Protection of Biodiversity: Literature Review*. Ottawa: Industry Canada. (IPPD website).

Mann, Howard (1997): *Indigenous Peoples and the Use of Intellectual Property Rights in Canada: Case Studies Relating to IP Rights and the Protection of Biodiversity*. Ottawa: Intellectual Property Policy Directorate, Industry Canada. (IPPD website).

Posey, Darrell and Dutfield, Graham (1996): *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*. Ottawa: International Development Research Centre.