Intellectual Property Rights: A Reference Paper for Protecting Language and Culture in the Digital Age

This paper was prepared for the Indigenous Language Institute
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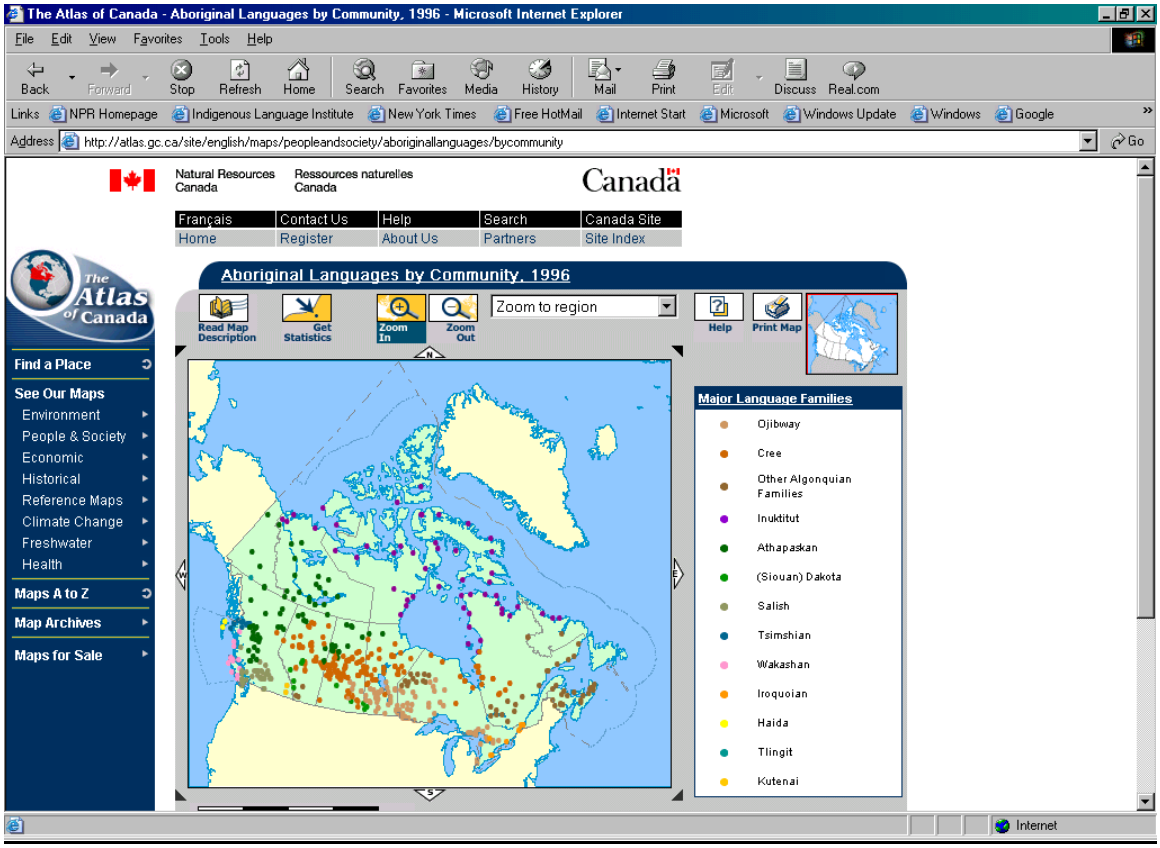

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U. S. Geological Survey/photo by W.R. Hansen

Purpose of Paper

The purpose of this paper is to provide a starting place for further research and study of intellectual property rights as they relate to indigenous peoples, their languages, and cultures. As many commentators on the application of intellectual property rights to indigenous knowledge have noted, the current legal models are insufficient to protect indigenous cultural, artistic, and heritage rights.

International indigenous peoples' forums have called for development of a *sui generis* legal system (one that is new and specific to its subject matter) to address the inherently unique values of indigenous peoples' knowledge and its applications. In the meantime, however, new technologies have encouraged the rapid development and broad dissemination of cultural materials. The ease with which one can copy printed and digital works raises concerns of exploitation and manipulation of indigenous peoples' knowledge and cultural materials.

For those who would like to participate in the formulation of national and international protections for indigenous peoples' culture and heritage, the section below entitled *Broad Protections for Indigenous Peoples' Knowledge and Culture* provides a brief discussion of this topic and resources for further research. For those who would like to know how to protect their works under current law, a brief outline of current legal protections and some specific topics about copyright law are discussed below.

The subject matter of intellectual property rights and law is vast and complex. For each of the subjects mentioned below there are multiple legal layers that must be explored to fully understand the items discussed. Readers are encouraged to review the resources cited for further information on each topic.

Broad Protections for Indigenous Peoples' Knowledge and Culture

Questions raised in the international arena on how to protect indigenous peoples' knowledge and culture recognize that the concept of "intellectual property" and its formulation do not protect systems of thought that view natural resources, knowledge, and technology as inextricably related concepts that cannot be compartmentalized and assigned individual economic value. The term intellectual property implies that knowledge is tangible and subject to ownership. This contradicts a more traditional view of the world that cultural knowledge encompasses both the tangible and intangible and cannot be owned or traded, but is a gift arising from the group and the surrounding environment.

Current intellectual property laws require the identification of a specific original author. Prohibitions on reproduction and use by others provided under these laws are limited in scope and duration. If an individual chooses to publish a traditional tribal story, copyright protection on that publication will only last for that individual's lifetime

plus seventy years. Current laws do not recognize a "property right" to that publication in the individual's community or tribe.

Therefore, many indigenous peoples and organizations are striving to develop new policies and laws that will recognize "communal title" or "communal property rights" to cultural knowledge. In this way, perhaps, a tribe or community can protect cultural knowledge forever. There are some existing legal models that may help in the formulation of new policies and laws. The Native American Graves and Repatriation Act recognizes the communal right to perpetual ownership of "cultural patrimony"—defined as "[O]bjects having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe." (25 United States Code Section 3001 (3)(d).) However, NAGPRA does not protect against "derivative" works based on those objects of cultural patrimony. (*See* Jordan, p. 104, below.)

Discussions of indigenous peoples' knowledge and intellectual property rights have covered a broad range of topics including the commercialization of traditional "folkart", use of indigenous peoples' symbols or art as trademarks, patenting of indigenous peoples' ethnobotanical knowledge and traditional resources, and protection of linguistic diversity. As discussion of these topics proceed, indigenous peoples will have to decide how their knowledge will be used and discover methods to retain the benefits of that knowledge while protecting it from exploitation and misappropriation. New national legislation must be developed that respects and protects the economic and moral rights of indigenous peoples. To learn more about these discussions, see:

- The World Intellectual Property Organization, Roundtable on Intellectual Property and Indigenous Peoples (Geneva, 1998) http://www.wipo.org/eng/meetings/1998/indip/index.htm.
- The Tribal Law Intellectual Property Home Page at http://world.std.com/~iipc/.
- Cultural Survival Quarterly, *Intellectual Property Rights: Culture as Commodity*, Winter 2001 (can be ordered from Cultural Survival at www.cs.org or 1-617-441-5400).
- David B. Jordan, *Square Pegs and Round Holes: Why Native American Economic and Cultural Policies and United States' Intellectual Property Law Don't Fit*, 25 AM. INDIAN LAW REVIEW 93-117 (2000-2001, University of Oklahoma College of Law). In this article, Jordan suggests a framework for new laws that would protect both communal intellectual property rights vesting in tribes and perpetual intellectual property protections for individual Native artists.
- S. James Anaya, *Indigenous Peoples in International Law*, (Oxford Press University Press, 1996).

Current Legal Protections for Intellectual Property

USGS photo by Marcia Semenoff-Irving

If an individual creates an interactive storybook on the internet, using digital recordings of traditional songs, audio pronunciation of text, and original illustrations, how can that person's work be protected from reproduction by others?

First, the digital storybook in its entirety would be protected by copyright laws. Copyright protects music, art, movies, writings, and computer programs. It also protects webpages and sound recordings. What if this individual used illustrations created by

another person? The first author would have to receive permission to use that illustration from the original artist. Therefore, in developing digital works, authors must be concerned not only with protecting their own creations but also with not infringing on someone else's protected work.

What are copyrights and how do they work?

Intellectual property has been defined as the transformation of ideas into tangible property. (*See* Stim, p. 2, below.) Copyright protection laws in the United States generate from Article 1, section 8 of the U.S. Constitution, which authorizes the federal government to establish laws and regulations to implement copyright protections. The primary laws governing copyright in the United States are:

- **U.S. Copyright Act of 1976**—which provides for protection of an original work once it is fixed in a tangible form and does not require that the copyright be renewed.
- **The Berne Convention Implementation Act**—provides that works published after March, 1989 do not have to include a copyright notice.
- **The Sonny Bono Copyright Extension Act**—provides an extension to the term of a copyright from the life of the author plus 50 years to the life of the author plus 70 years (for works created after January, 1978). It should be noted that the U.S. Supreme Court is currently reviewing a case challenging this law; holders of copyrights to Disney movies and related items are concerned they will lose substantial financial interests once those items enter the public domain.
- **The Digital Millennium Copyright Act**—prohibits circumvention of technology security devices and provides exemptions for certain uses of copyright protected material on the internet. (See the Attachments to this paper.)
- **Title 37 of the U.S. Code of Federal Regulations**—governs how copyrights are registered and applied.

Copyrights provide several protections for an author's work: the exclusive right to publish, distribute, and perform a work (the author can also transfer these rights in writing to another person or publisher for a period of time), the exclusive right to reproduce the work, and the exclusive right to create new works based on the original ("derivative" works). Although it is illegal for anyone to violate the author's rights, several exceptions and limitations apply to these rights such as "fair use" and "first sale". (See discussion below in "*How to Get Permission to Use Copyright Protected Works*.")

A work need not be published to be protected by copyright. Additionally, authors can transfer ownership of their copyright to others during their lifetime or through a will. Authors can also prevent others from copying or distributing their work through legal action. The "author" of a work may be one person or a group of people. Different rules apply to joint authorship and co-ownership of copyrights. Also, works created by employees generally belong to an employer. Works made for hire are protected for 95 years from first publication or 120 years from creation, whichever is shorter.

Copyrights are administered by the U.S. Library of Congress Copyright Office (http://www.copyright.gov). Although, works need not be registered with this Office to receive copyright protection, there are several advantages to registration. Registration allows for a lawsuit under federal statute if a copyright is infringed. The statutes provide for monetary damages, as well as attorneys' fees. Registration also provides a *prima*

facie case that a work is protected. Otherwise, an individual must prove that he or she is the author and that the work is original.

U.S. Bureau of Land Management

Other protections provided under intellectual property laws

Patents protect inventions, discoveries, product designs, and plants (e.g.—tulips, roses, tomatoes). Generally, an invention or discovery must be new, useful, and original to be eligible for patent protection. Unlike copyrights, which do not need to be registered to be effective, patents must be filed with the U.S. Patent and Trademark Office (http://www.uspto.gov).

Trade secrets are considered confidential business information and can be protected from reproduction and distribution. Trademark protection can include words, symbols, designs, and slogans, among other items, and applies to the first person who sells a product using the mark. As with copyrights, trademarks do not need to be registered, but there are advantages to doing so.

Finally, there are rights of publicity that allow individuals to control the commercial exploitation of their name, image, or persona.

If the creative digital storybook author mentioned above invented a new computer program to produce this digital wonder, that program would be protected under copyright, it may also be eligible for patent protection. However, certain elements of the program may not be protected, such as icons and menus. All of the elements in the storybook will also be protected, but only for a short period of time. After the copyright expires, the author's illustrations, audio files, and text enter the public domain and can be used, changed, or reproduced by anyone. Also the author must realize that there are certain exemptions from copyright protections that allow educational institutions, non-profit organizations, libraries, and others to use portions of a copyright protected work for non-commercial purposes.

It is important to understand that once a work is produced in a digital form, it is very difficult to ensure its complete protection from copying or use by others. In addition, despite laws prohibiting the circumvention of digital security technology protocols, there will always be those who find ways to violate that security. The anonymity of the internet allows for easy access to any item on the world wide web, including emails, and it is extremely difficult to control that access. Therefore, always remember that there is no such thing as total security on the internet. Authors should be cautious about what they choose to share in a digital environment.

For further information see:

- Richard Stim, *Copyright Law*, (West Legal Studies, 2000). (Includes detailed discussions of computer and internet issues).
- Gretchen McCord Hoffmann, *Copyright in Cyberspace: Questions and Answers for Librarians*, (Neal-Shuman Publishers, Inc. 2001)
- Stephen Fishman, *The Copyright Handbook: How to Protect & Use Written Works*, (Nolo, 5th ed., 2001). (Also see www.nolo.com, Phone: 510-549-1976.) Includes instructions on registering, protecting, and profiting from a copyright protected works, as well as copies of all the copyright registration forms (both domestic and international).
- Library of Congress, U.S. Copyright Office website, http://www.copyright.gov.
- Library of Congress, U.S. Copyright Office Circular 66, *Copyright Registration for Online Works*, http://lcweb.loc.gov/copyright/circs/circ66.pdf.
- Franklin Pierce Law Center, Thomas G. Field Jr., *Copyright on the Internet*, http://www.fplc.edu/tfield/copynet.htm.
- For general legal information on intellectual property, www.findlaw.com and www.abanet.org/intelprop/ (website of the American Bar Association that contains articles about intellectual property issues, including copyright.
- Mayer, Brown, & Platt, *Corporate Primer for Intellectual Property*, copyright 1997— Mayer, Brown, & Platt. (On website, www.mayerbrown.com)

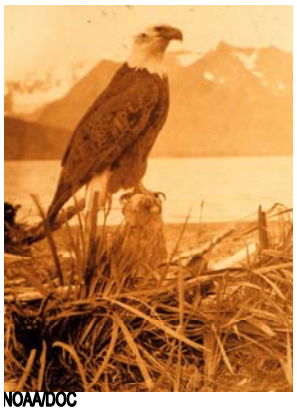
Are Online "Distance Education" Courses Included under Copyright Protections?

If you are interested in hosting "distance education" courses over the internet, be sure to look at http://www.groton.k12.ct.us/mts/pt2a13.htm. On this comprehensive copyright issues website (hosted by the Groton, Connecticut Public Schools) you will find information about ***The Debate Over Copyright Protection in the Digital Age*** and ***New Directions in Copyright Law***. The U.S. Copyright Office has recommended updating several sections of the Copyright Act that currently do not cover the technological advances in digital transmission that allow for online courses. As discussed above in other areas of copyright, "distance education" courses must be concerned not only with protecting their own content but also with complying with copyright laws that may protect materials these courses contain. (For example— copyright protected audio & visual recordings, texts, and illustrations).

The Copyright Office has recommended that "distance education" online courses be included in exemptions that allow for classroom reproduction of copyright protected works and would provide some liability protection for network content providers. This recommendation has been incorporated in the Technology, Education, and Copyright Harmonization Act of 2001, also known as the TEACH Act. (Senate Bill 487: http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN00487: **Title:** A bill to amend chapter 1 of title 17, United States Code, relating to the exemption of certain performances or displays for educational uses from copyright infringement provisions, to provide that the making of copies or phonorecords of such performances or displays is not an infringement under certain circumstances, and for other purposes.) Until "distance education" courses are specifically exempted by law, however, be sure to check on the copyright status of any materials you may want to include on your site.

For further information see:

- Groton Public Schools website, *Copyright Resources on the Internet*, http://www.groton.k12.ct.us/mts/pt2a.htm.


NOAA/DOC

How to Get Permission to Use a Copyright Protected Work

The Copyright Act of 1976 provides for the "Fair use" of copyright protected works (including reproduction for the purpose of criticism, education, scholarship, research, and reporting). Although use permission is not required, credit must be given to the original author.

Sec. 107. - Limitations on exclusive rights: Fair use. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2)
the nature of the copyrighted work;
(3)
the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4)
the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

If the uses contemplated do not fall under "fair use", obtaining permission depends on the type of work you would like to use (written works, art, music, movies, cartoons). Universities are often at the forefront of seeking use of copyright protected works and have compiled helpful resources for gaining permission. Following are excellent websites containing recommendations for gaining permission to use copyright protected works:

- http://www.utsystem.edu/ogc/intellectualproperty/permissn.htm (University of Texas)
- http://www.k-state.edu/academicservices/intprop/howto.htm (Kansas State University)
- See also the list of copyright licensing organizations from the U.S. Copyright Office website attached to this paper. (http://www.copyright.gov/resces.html)
- Franklin Pierce Law Center, http://www.fplc.edu/tfield/copynet.htm.

First Sale Doctrine—a copyright owner's exclusive right to distribute their work expires once the copy of the work is sold. The owner of the copy does not own a copyright to the work but is free to transfer or sell the copy without consent of the author. To maintain control over copies, authors can license or lease a work for a limited period of time.

USGS, photo by Steven Amstrup

Are Webpages Copyright Protected?

Yes. However, to ensure that a website receives full legal protections, be sure to register it with the U.S. Copyright Office.

Circular 66 "*Copyright Registration for Online Works*" (http://lcweb.loc.gov/copyright/circs/circ66.pdf) explains what types of online works can be registered (works accessed via network—World Wide Web sites, homepages, FTP sites, and GOPHER sites—and files or documents transmitted and/or downloaded via network.) This publication also explains that "[f]or works transmitted online, the copyrightable authorship may consist of text, artwork, music, audiovisual material (including any sounds), soundrecordings, etc. Copyright does NOT protect ideas, procedures, systems, or methods of operation."

The Circular describes how to register websites that contains periodic revisions and updates, serial newsletters, databases, and other content that changes frequently. Different registration forms must be used depending on what website content you want to register (for example Form TX is for literary materials, Form PA for audiovisual materials, and Form VA for pictorial and graphic works).

Although there is no requirement of formal notification of copyright for websites, it is a good idea to include some form of notice on a website and on any webpage whose content you want to protect. Such notice can be detailed and formal (see examples from the Rockefeller Foundation and the Industry Canada websites attached to this paper) or it can simply state Copyright followed by the name of the copyright holder and the statement, "All rights reserved." (Example—"Copyright XYZ Organization. All rights reserved.") The first year of publication or registration may also be included after the word "Copyright".

The symbol © is used only for "visually perceptible copies" of works. For example, it can be applied to reproductions of texts, however it would not cover sounds in audio recordings. Therefore, webpages containing protected materials should note a copyright on the webpage itself and copyright to all materials contained therein.
For more information about copyright protection for websites and emails, see:

- Franklin Pierce University, http://www.fplc.edu/tfield/copynet.htm
- University of Texas, http://www.utsystem.edu/ogc/IntellectualProperty/offsite.htm
- ABA, http://www.abanet/org/intelprop/comm106/106copy.html.

What about typefaces (fonts) and Electronic Publishing?

According to Stim, typefaces are excluded from copyright protection. "The appearance of the computer-created typeface will not be protected. However, protection will be granted for the underlying computer program that creates the typeface." (*See above*, Stim, p. 38.) Therefore, individuals who want to develop digital works in their native language, must be aware that the typefaces they create to write their language will not be protected by copyright laws.

Electronic publishing can include two format types. The first produces print-based media such as books, magazines, and encyclopedias in a computer readable format. The other creates written works specifically for electronic publication. Electronic digital materials that include audio, graphics, video, and other digital items are considered to be multi-media productions. (See above, *The Copyright Handbook*, Nolo, p. 14/27)

Generally, the original author owns the "electronic rights" to their work. When an author sells or transfers their work to a publisher, the question arises as to who holds the electronic rights once a work is sold. Many publishers include acquisition of electronic rights in their publishing contract, however authors should remember that they may retain these rights. Publishers, website administrators, and non-profit organizations who distribute an author's works should also remember that they must obtain the author's permission in writing before distributing those works over the internet or by other means.

For multimedia productions (for example—a CD-Rom program that includes historical photos, newspaper articles, graphics, and software applications to produce sound and animation), authors and publishers must obtain permission to use the materials they plan to incorporate in the work.

Conclusion

The world of intellectual property law is complex and often convoluted. However, authors should not be discouraged from producing digital works of their culture and language. The key is to decide before setting anything down in writing or on a computer, what material can be shared freely and what material should be protected. If an individual wants to share digital material with a limited audience, there are means to do so (such as password protections on websites). Authors should recall that the work they create and distribute has only limited protections under current intellectual property laws. Publishers must take care to obtain written permission before using works for any purpose.

The road to greater, more comprehensive protections for cultural knowledge and language is long and challenging. However, it contains many opportunities for creative, innovative solutions that will provide perpetual protections for indigenous peoples' knowledge, heritage, and traditions. Individuals, tribes, and organizations who choose to put cultural knowledge in a digital format will not only pass on cultural values to future generations, but also the knowledge of how to protect those values in a digital age.