



National Centre *for* Truth *and* Reconciliation

UNIVERSITY OF MANITOBA

Centre national *pour* la vérité *et* la réconciliation

UNIVERSITÉ DU MANITOBA

Submission to the Standing Committee on Industry, Science and Technology for the Statutory Review of the *Copyright Act*

About: The National Centre for Truth and Reconciliation (NCTR) was created in 2007 by the *Indian Residential Schools Settlement Agreement* between representatives of former school students, the Government of Canada, Churches, the Assembly of First Nations, and the Inuit Tapiriit Kanatami. The NCTR fulfills the mandate of the Truth and Reconciliation Commission of Canada (TRC) as a permanent archive for all of the statements, documents and other materials collected by the TRC. The NCTR operates at the University of Manitoba pursuant to the *Trust Deed and Administrative Agreement*, which are overseen with the support of the Governing Circle and Survivor's Circle. Going forward, the NCTR will be home to other Indigenous collections, and continue to encourage dialogue about issues that stand in the way of Reconciliation.

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Copyright at the NCTR

As the archival home of the documents collected by the TRC, the NCTR encounters a common situation where archival operations are complicated by the current Canadian *Copyright Act* regime. This problematic situation is amplified by the special nature and mandate of the NCTR. The current Canadian *Copyright Act* legislative framework serves as a barrier to the ***Calls to Action*** that the NCTR is intended to help address.

Consider a scenario:

Judy works for a small non-profit organization. Inspired by the Truth and Reconciliation Commission's (TRC's) 94 ***Calls to Action***, Judy convinces her organization to prepare information about the legacy of Indian Residential Schools that can be included in some upcoming publications. She finds an undated photo of the Fort Albany Residential School on the NCTR website that she thinks would be a great graphic illustration. There are no people in the photograph, so she feels confident that using this photograph won't violate anyone's privacy. Judy doesn't think there will be any problems, but decides to contact the NCTR to make sure she can use the photograph. She knows that her organization will be hesitant to use the photograph without first securing permission.

The NCTR tells Judy it does not own copyright in the photograph, and does not have authority to licence use of the photograph. All the NCTR can do is direct Judy to the originating archive for more information. Judy is on a tight deadline and it takes a while for her to reach someone at the originating archive. When Judy is finally able to speak with someone she finds out the archive does not own copyright in the photo either. They give her the name of the photographer, but Judy can't locate them to ask for a licence. Judy becomes frustrated and calls the NCTR back to say she will not be using the photograph at all because the whole process to secure copyright permission was too time consuming and difficult to navigate. Her organization would rather not use the photo than risk copyright infringement.

This scenario plays out frequently at the NCTR. Under the Indian Residential Schools Settlement Agreement, the Administrative Agreement, and the Trust Deed, the University and its partner institutions can provide access to an extensive collection of materials related to the history of residential schools. However, except in limited situations where copyright has been transferred to the University, the University cannot licence the use of materials contained in the NCTR archives. This is frustrating for NCTR archive users, staff, and to the mandate of the NCTR to make accessible and widely disseminate documents regarding the legacy of Indian Residential Schools.

Copyright law provides creators with the right to compensation for their creations and the right to authorize additional uses of their works. The copyright protected works maintained by the NCTR are documents and images produced primarily for historical or record keeping purposes, and without motive of financial gain on the part of the creators. Excessive copyright protection in the historical holdings of the NCTR does not help grow the creative economy, but instead restricts

engagement with a period of Canadian history and the potential for new creative works based on these historical records.

Fair dealing and reconciliation

Digital copies of historic archival works have been transferred to the NCTR specifically for public dissemination, yet, while the NCTR can allow access to the images, they cannot licence individuals and organizations to use these images for the very reason they are being made available: to promote education, truth, and reconciliation. Contacting copyright owners can be a barrier for NCTR archive users:

- Survivors and their families may feel disempowered or re-victimised having to engage with the creator of a document or photograph taken at an Indian Residential School.
- Copyright owners (which in some cases may be heirs of the original creator) may be difficult or impossible to locate. When the owner is unlocatable, this forces archive users to engage with the time consuming and cumbersome orphaned works regime.

In many areas, to redress the wrongs of the past and to promote reconciliation in Canada, legislative change is required. The NCTR proposes an amendment to s. 29 of the *Copyright Act* which specifically permits fair dealing for reconciliation purposes. This would address and remedy the concerns outlined above.

The NCTR suggests the following wording could be adopted:

“Reconciliation

29.3(1) Fair dealing reproduction of all of a literary, artistic or cinematographic work or sound recording for the purpose of reconciliation does not infringe copyright if the following are mentioned:

- (a) the source of the work;
- (b) if given in the source, the name of the
 - (i) author, in the case of a work, or
 - (ii) maker, in the case of a sound recording.

Limitation

(2) Subsection (1) only applies when:

- (a) the source of the work or sound recording is an archive or museum;

(b) a subject of the work or sound recording, or the work or sound recording's author or maker has not requested that the archive or museum restrict the reproduction of the work or sound recording; and

(c) no applicable Indigenous cultural protocols are violated by the reproduction of the work or sound recording.

Restrictions on reproduction

(3) Unless the subject, author or maker who requested the restriction on the reproduction of the work or sound recording notifies the archive or museum that the restriction may be lifted, restrictions on reproduction shall last for a period of 20 years from the date of the request.”

This limited exception would mean greater access to and dissemination of the materials in the NCTR archive, and expand public knowledge of the legacy of Indian Residential Schools to help further the process of reconciliation. The proposed exemption is tailored to include only historical records in the possession of an archive or museum, such as the NCTR, in recognition that commercially available works about reconciliation continue to be produced. The proposed exemption would also assist Indigenous communities with rediscovering and engaging with their lost histories.

Although placing restrictions on fair dealing at the request of a creator or the subject of a work would be novel in Canadian law, in the context of reconciliation this restriction would help place greater control over intellectual property about First Nations, Inuit, and Métis people into the hands of Indigenous Peoples. This would be a step towards engaging more constructively with the First Nations Information Governance Centre Principles of OCAP® (Ownership, Control, Access, and Possession),¹ and other similar information governance principles used by Canada's Indigenous peoples.

Copyright Protection for Traditional Cultural Expressions and Traditional Knowledge

Traditional Cultural expressions (TCE) and Traditional Knowledge (TK) or Indigenous Knowledge (IK) are separate but overlapping concepts. TCEs include the tangible and intangible forms in which Indigenous culture is expressed, while TK/IK includes the skills and practices developed in Indigenous communities.² These two concepts intersect where skills developed in a particular community are used to create a cultural expression (e.g. traditional pottery techniques being used to create a bowl).

In the current intellectual property legal framework copyright would be the natural mechanism to protect TCEs as artistic, literary, dramatic or musical expressions, however, frequently TCEs originated at an unknown time, or have unidentifiable creators. Copyright law centres on the protection of new and original works in a way that excludes most TCEs from protection. Likewise, ownership of TK/IK or TCEs is typically understood as the communal right of a society or group,

¹ OCAP® is a registered trademark of the First Nations Information Governance Centre (FNIGC). Refer to <https://fnigc.ca/ocapr.html> for further context and information.

² World Intellectual Property Organization (WIPO) (2017) *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*. WIPO: Geneva, p. 9.

or may be subject to protocols which determine when TK/IK or a TCE can be shared or its use can be authorized. Communal ownership and protocols do not fit harmoniously with the current intellectual property system focused on individualised ownership and public registration.

The NCTR supports changes to Canadian intellectual property legislation, including the *Copyright Act*, to provide protection for TK/IK and TCEs. The NCTR stresses that legislative reform needs to be undertaken in consultation with Canada's First Nations, Inuit and Metis peoples. Consultation would demonstrate an acknowledgement of Indigenous constitutional rights in TK/IK and TCEs, and show good faith towards Canada's duty to consult with Indigenous Peoples. Although the ultimate outcome of consultation may be that *sui generis* legislation beyond amending the *Copyright Act* is required, there are steps, such as acknowledging the existence of extant Indigenous rights in TCEs, which could be taken now during this first *Copyright Act* review.

Any legislative changes should forward Canada's implementation of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, including:

- Article 13 requiring "effective measures" to ensure that Indigenous Peoples have the right to "revitalize, use, develop, and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures".
- Article 31 providing that "Indigenous peoples have the right to maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional cultural expressions."; and
- Article 3, confirming that Indigenous peoples have the right to self-determination in their economic and cultural development.³

The NCTR also encourages Canada to meaningfully participate in ongoing World Intellectual Property Organization discussions respecting TK/IK and TCE. This participation should be informed by consultation and participation from Canada's Indigenous Peoples, and be reflective of Indigenous perspectives and rights.

Recommendations

1. Include "reconciliation" as a fair dealing purposes, subject to appropriate restrictions to safeguard the privacy of creators and subjects of works related to the history of Indian Residential Schools.
2. Consult with Canada's First Nations, Inuit and Metis peoples respecting TK/IK and TCEs to create legislation that is reflective of aboriginal constitutional rights and practices.
3. Consider *sui generis* concepts and methods to recognize, preserve and share Indigenous Traditional Cultural Expressions such as an Indigenous cultural commons.

³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 18 September 2018]

Conclusion

Canada has an opportunity to lead the world by example, both in creating a copyright regime that is responsive to the current constraints placed on archives with sensitive, but historically and culturally significant documents that require wide distribution for education and reconciliation, and by addressing areas where the intersection between Indigenous intellectual property rights and the current legal system conflict.

A reconciliation exemption and meaningful consultation with Canada's Indigenous Peoples would be preliminary steps towards meeting Canada's obligations to uphold the intellectual property rights of Indigenous Peoples under the *UNDRIP*, and towards a legal system that fosters true reconciliation with Canada's Indigenous Peoples, their legal traditions, and values.