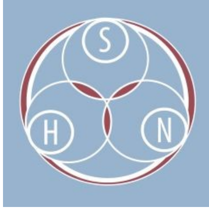

Key Terms on Intellectual Property and Copyright Law

What is Intellectual Property?

Intellectual property is an umbrella term used to cover specific laws that are loosely united in their efforts to manage the relationships between an idea and the tangible expression of that idea (a book, a photograph, an artwork, a sound-recording, a design on fabric, an invention). There is no specific intellectual property law named as such. Rather, the independent legislation for copyright, patents, designs, trademarks, trade-secrets, and confidential information together constitute the 'laws of intellectual property.' They are grouped under this term 'intellectual property' because they are seen to share some dimension of the problematic of determining legally recognized and justifiable rights in the expression of ideas and treating this expression as some kind of 'property.'

Copyright, patents, and designs are specific laws that evolved slowly and haphazardly from the late seventeenth century. This slow evolution was in response to cultural, political, social, technological and economic shifts that occurred throughout this period. There are early references to the phrase 'intellectual property' in French courts in the 1820s and in a specific case in the US in the 1840s, but 'intellectual property' was certainly not a widely cited or utilized description. It is really only in the 1970s that the phrase begins its movement into popular usage. This was initiated, in part, through the terms' further institutionalization as the international agency The World Intellectual Property Organization in 1970. Prior to this, copyright or patents or designs were the terms used in popular discourse and were not necessarily understood as connected because they functioned differently and had different foci. While they evolved separately they do share important historical moments that helped constitute their development in legislation. These were in response to specific problems about what exactly the property was, how it could be identified, how it could be measured, how loss could be recognized and compensated, what labor the individual exerted to 'make' a work and generally, how a right to something that was intangible could be justified.

What is Copyright?

The term "copyright" (or sometimes "author's rights") refers to rights in relation to original artistic and literary works such as novels, writing, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. It protects the particular form of expressing an idea: it does not protect the idea or cultural expression itself. This distinction between the idea and the protected tangible expression is often problematic for Indigenous, traditional and local communities because it provides protection for the document and documented form, not the oral expression from which the documented form captures.

Copyright protection comes into existence automatically upon the creation by the 'author' of an original work -- the author is not required to register his or her copyright. The author of a work, the initial copyright owner, has a bundle of "exclusive rights" to do certain restricted acts in relation to his work. These may include: copying the work; publishing, issuing, or selling copies of the work to the public; performing the work in public; playing the work in public; showing the work in public; broadcasting the work or including the work in a cable program service or digital media; making an adaptation of the work or doing any of the above activities in relation to an adaptation; and authorizing any other person to do any of the restricted activities listed above.

In the United States (title 17, U.S.Code) copyright is offered to the authors of "original works of authorship," including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the 1976 Copyright Act generally gives the owner of copyright the exclusive right to do and to authorize others to do the following:

- reproduce the work in copies or phono-records;
- prepare derivative works based upon the work;
- distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- display the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work;
- perform the work publicly (in the case of sound recordings) by means of a digital audio transmission.

What Does Copyright Protect and What Does it Not?

The list of protectable material can vary from jurisdiction to jurisdiction. This is important precisely because some of the questions regarding protection for Traditional Cultural Expressions (TCEs) are specifically tied to what copyrightable subject matter is.

Generally, copyright protection extends to original literary (novels, poems, plays, newspapers, computer programs), scientific and artistic works (paintings, drawings, photographs, sculpture, architecture, advertisements), in any form of expression. Copyright laws may thus cover a range of works including, but not limited to, films, musical compositions, choreography, maps, etc.

Generally, copyright protection does not extend to functional aspects, formulaic or other non-original elements of works, such as colors, and techniques used to create a work, or what is sometimes referred to a work as work's "style." Copyright permits the imitation of the non-original elements or underlying ideas and concepts of works, allowing futher cumulative creativity and innovation.

What is a Copyright Holder?

A copyright holder is the person who holds the legal rights to the copyrighted work. This person can make decisions and exert control over how the work is used, reproduced and circulated by other people. In most jurisdictions copyright is automatic and the copyright holder is most often the person who physically made the photo, sound recording, or film; wrote down the stories, language or oral histories; who physically performed a work; or collected material and created a digital database. In some circumstances the copyright holder can also be the organization that funded the research that resulted in the production of the films or photographs or other copyright material. Sometimes, legal ownership can be very difficult to determine, especially with older
material.

How Long Does Copyright Last?

Unfortunately there is no simple answer to this question. It depends on the work itself as well as in which country it was created. This is because different kinds of works, like photographs or sound recordings or manuscripts, can have different durations for copyright protection and different countries can have different time-periods for protection. For instance, in the US and Australia the time period for protection is generally the life of the author plus 70 years, but in Canada and New Zealand it is the life of the author plus 50 years.

United States:

- For works created on or after January 1, 1978 are automatically protected from the moment it is created and is ordinarily protected for the author's life plus another 70 years. In the case of joint-works made by two authors but not made for hire, the duration of copyright is 70 years from the death of the last surviving author. For works made for hire (and for anonymous works), the duration of copyright will be 95 years from publication or 120 years from creation – whichever is shorter.
- For works created before 1 January 1978 and not published or registered, copyright in these works is similar to the above – that is, life of the author plus 70 years, or 95/120 years if made for hire.
- For works created before 1 January 1978 that were published or registered, the original period for protection used to be 28 years with an option for renewal. In 1976 the renewal period was extended from 28 years to 47 years, making works eligible for a total term of protection for 75 years. In 1998, a further extension for these works still in copyright at this time was made – adding another 20 years, giving a total term of protection of 95 years.
- Sound recordings are present a special set of problems for understanding the terms of their protection. A sound recording is the "fixation of a series of musical, spoken, or other sounds." A sound recording can embody another work (referred to as the "underlying work"), such as a musical composition, a play, or a literary work such as a novel. February 15, 1972, is a key date for sound recordings: sound recordings first "fixed," or recorded, on that date or thereafter are protected by federal copyright law. U.S. sound recordings fixed prior to that date are protected only by state law.
- Since pre-1972 sound recordings were not eligible for Federal copyright protection, the 1976 Copyright Act allowed states to continue to protect them until 2047. That date has since been extended to 2067 and upon that date all pre-1972 sound recordings will enter the public domain.
- For sound recordings made post-1972, the term of protection is life of the author plus another 70 years. For unpublished anonymous and pseudonymous works and works made for hire (corporate authorship), the duration is 120 years from the date of fixation. This means for any recordings made by Siebert post 1972, protection of these would extend until 2068.

What is Public Domain?

The public domain refers to material that was once protected by copyright law but that now can be used and exploited by anyone and everyone without authorization, and without the obligation to pay fees or enter into license agreements for use. Public domain material is no longer protected by copyright due to the expiry of the term of protection, or if the conditions of protection are no longer fulfilled. The nature of the public domain is under active discussion. The role of the public domain is critical to Indigenous, traditional and local communities because

particular expressions are either not protected by current copyright laws, or have been ‘authored’ by non-Indigenous people and due to the time-period have fallen into the public domain. To the extent that Native, First Nations, Aboriginal and Indigenous knowledge is in the public domain, this means that it may be freely used by artists, writers, researchers, industry and/or any other user. Native peoples and communities contest the conditions that allow their cultural expressions, knowledge systems and cultural heritage to be in the public domain.

What is “In Perpetuity”?

In perpetuity basically means indefinitely. The term is normally used in the context of intellectual property to qualify a period of protection that lasts indefinitely. Copyright protection subsists in a creative work for a finite period of time. The Berne Convention requires that this period of time be no less than the life of the author plus 50 years beyond his death. National laws are free to provide for a longer period of time, but perpetual protection does not currently exist in national copyright laws. Many Indigenous peoples and traditional communities are of the view that protection for traditional cultural expressions should be perpetual, as this corresponds best to their needs and to the customary laws and values relating to these materials.

What is a Protocol?

Protocols are guidelines, rules and forms of governance that emanate from local contexts. They function as a means for changing people’s understanding of an issue — for instance, how a ceremony or a song should be heard and used — and how people should act in relation to it. In the context of the sharing, usage and storage of Indigenous knowledge, protocols are being utilized as a strategic way of increasing reflective behavior around Indigenous rights in cultural knowledge and resource use.

One clear advantage of protocols is that they can be flexible and adaptable to specific contexts and local interests. This makes them ideal tools for guidance on appropriate and/or ethical behavior and practice. In the absence of formal legal intellectual property mechanisms for recognizing and protecting rights in Indigenous cultural knowledge, and in ever increasing contexts where relationships with Indigenous peoples are sought, or where Indigenous knowledge is used, protocols are providing a productive tool for negotiating new kinds of equitable relationships. In our contemporary moment, protocols can be broadly understood as context driven policy. They can be designed to provide guidance and instruction when dealing with issues that are sensitive, and are especially helpful when the parties have differing expectations and value systems. In some instances, protocols can resemble memorandums of understanding, but can be much more expansive in addressing specific issues regarding consent, benefit sharing, relevant laws, community practice and therefore facilitate the development of future equitable relationships.

What is a Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA)?

A Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU), is a document that describes the terms of a cooperative agreement between two or more parties, as well as the goals of the cooperation. A MOA typically marks the beginning of a collaborative project, and is an opportunity for stakeholders to outline their visions, conduct debates, and resolve issues. A MOA is normally not considered to be a legal contract. The main difference is that a contract is an agreement where something of value is exchanged (for example goods or labor). A MOA is an agreement for parties to work together to meet an objective, without necessarily exchanging anything.

Resources used to create this document:

- www.localcontexts.org
- http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf