

Indigenous knowledge and copyright

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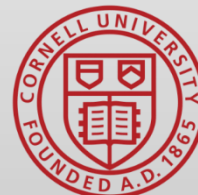
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Overview

- Introduction
- Indigenous knowledge (IK)
- IK measures
- Copyright
- Copyright and IK
- South Africa
- Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (**IKA**)
- Canada
- IK under Canadian Law
- Future collaboration

Introduction [1]

- Examples of indigenous people:
 - South Africa: Khoe-San/Khoisan including Khwe, Koranna, and Griqua
 - Canada and USA regional overlap of Indigenous nations
 - Canada: 634 First Nations plus Métis and Inuit including Algonquin, Cree, Ojibway
 - USA: 566 recognized sovereign Indigenous nations including Seneca, Sioux in the northeast and north central and Swinomish and Kootenai
 - New Zealand: Māori
- Information available in *The Indigenous World 2019* ([PDF](#))

Indigenous knowledge (IK)

- Defining IK
- IKA defines IK as “knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes—
 - (a) knowledge of a functional nature;
 - (b) knowledge of natural resources; and
 - (c) indigenous cultural expressions”
- Indigenous cultural expression **includes verbal and action tangible expressions** - language?

IK measures

- Treaty of Waitangi (1840)
- ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007
- Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019
- ... and a lot more

Copyright

- Copyright is a Western concept
- Derives from Statute of Anne, 1710

"An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Copies, during the Times therein mentioned"



Copyright and IK

- List of worldwide copyright legislation available on WIPO's [website](#)
- In South Africa, the IP Act was amended in 2013 to include IK
- Are copyright and IK reconcilable?
- Is western copyright and its protection something different from the concept IK and its protection

South Africa

- “African indigenous San and Khoi-Khoi peoples are not formally recognised in terms of national legislation as a customary/indigenous community; however, this is shifting with the pending Traditional and Khoisan Leadership Bill of 2015.” – Jansen (2019) at <https://www.iwgia.org/en/south-africa/3508-iw2019-south-africa>
- Traditional and indigenous people being recognised more often
 - As of April 2019 Khoekhoegowab is a subject at UCT in South Africa

Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 [1]

- Published in the Government Gazette on 13 August 2019, process of around two years
- 9 chapters, 34 sections:
 - chapter 1 (§ 1) = definitions
 - chapter 2 (§ 2-3) = applications and objectives
 - chapter 3 (§ 4-8) = NIKSO (National Indigenous Knowledge Systems Office)
 - chapter 4 (§ 9-13) = protection invoking § 25 of the Constitution of South Africa
 - chapter 5 (§ 14-16) = recognition of prior learning
 - chapter 6 (§ 17-24) = registration
 - chapter 7 (§ 25-26) = commercial utilization
 - chapter 8 (§ 27-28) = enforcement of rights
 - chapter 3 (§ 29-34) = general provisions

Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 [2]

- § 11 sets out ground for eligibility of IK
 - passed down generations
 - developed in IC
 - IK associated with social and cultural identity
- § 13 describes the rights of an IC to their IK and the commercial use application of IK
- § 26(4) specifies academic/non-commercial use as exempt from application procedure.
- § 28 enables positive protection of IK through a fine
- Download the IKA-statute [here](#)
- Download the Traditional and Khoi-San Leadership Bill [here](#)

Canada [1]

- Statutory copyright law and judicial interpretation
- In context of constitutional obligations and laws of Indigenous peoples
- IK under Canadian law:
 - Canada's first copyright legislation enacted in 1921
 - Indigenous inhabitants of lands of Canada created knowledge well before Canadian law existed
 - Colonials recognized application of systems of laws

Canada [2]

- Constitutional supremacy; constitutional obligations



A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Canada [3]

- Constitution protects specified Indigenous rights and affirms treaty and other rights

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. ⁽⁹⁴⁾

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. ⁽⁹⁶⁾

- Supreme Court of Canada jurisprudence affirms obligations
- UNDRIP adopted 2016

IK *under* Canadian law

Should we reconcile IK ownership and use notions and *Copyright Act* perspectives:

- tangible and intangible expressions
 - fixed and oral traditions, use of place names
 - conceptualizations of authorship, work, duration of rights, protocols for reproduction or distribution of knowledge
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- Colonial approach
 - UNDRIP Act, Bill C-262; Act Re Indigenous Languages, C-91; Indigenous Languages, C-443; Indigenous Human Remains and Cultural Property Repatriation Act, Bill C-391 (none of them passed)

IK *and* Canadian law: a conflict of legal systems

- Theory: a conflict of laws
 - Inappropriate to absorb Indigenous knowledge protections directly into *Copyright Act*
 - Inappropriate to apply *Copyright Act* directly to Indigenous peoples' knowledge, which may be governed by different notions of copyright law

IK *and* Canadian law

- Recommended approach:
 - Canadian law requires a *duty to consult* in dealings with Indigenous lands
 - Apply this approach to dealings with Indigenous peoples' knowledge or intellectual property

Future collaboration

- Abstract submission to KULA
- Submitted a forum proposal for DH2020 in Ottawa, Canada