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ISSUES AND INTERSECTIONS OF INDIGENOUS KNOWLEDGE PROTECTION AND COPYRIGHT FOR DIGITAL HUMANITIES

Kim Paula Nayyer

Introduction

We can celebrate the extent to which research and explorations in digital humanities centre the cultural heritage and living works of Indigenous peoples. Researchers can surface, investigate, and share deep and nuanced elements of ideas, objects, and other creations of Indigenous peoples. Societies have also reached a point at which it is uncontroversial to recognize that these works of Indigenous peoples are fairly characterized as constituting or holding Indigenous knowledge. This chapter examines legal issues and principles touching on access to and control of Indigenous knowledge, and specifically the intersections of Indigenous peoples' knowledge protection regimes with domestic enacted copyright laws, jurisprudence, and treaties.

Indigenous knowledge and governance are both local and global: Individual communities may create and hold knowledge, as may individual members of those communities, and the conceptualizations of rights and permissions will be specific to each community. At the same time, communities of people are Indigenous to lands worldwide, within many domestic legal jurisdictions which also may govern. This chapter also explores how the intersections, and even tensions, between Indigenous knowledge protection regimes globally and the laws of those domestic legal jurisdictions can be evaluated through a lens of the legal principles of conflicts of laws.

What is Indigenous knowledge?

An exploration of issues and solutions regarding access to and control of Indigenous knowledge in digital humanities work requires clarity about what is meant by "Indigenous knowledge". In turn, one must exercise caution when

writing about Indigenous matters from a perspective that is not that of a person Indigenous to the lands on which one is writing, or outside a clear and specific context. This is true for specific elements of Indigenous matters, whether Indigenous laws, characterization of heritage, terminologies, ontologies or, here, Indigenous knowledge. What an outsider to a particular Indigenous community conceives of as "knowledge" and what a member of that community thinks may not be the same. This simple qualification applies as well to members of different Indigenous communities in respect of the knowledges of other communities.[1] And within a given community, different perspectives will exist—for example, among an elder, an elected chief, and an Indigenous person raised off the home lands. Different opinions may exist among persons whose viewpoints derive directly from oral histories, those whose thoughts reflect a study of written record or physical objects, and those who consider a combination of these (Rimmer 2015b). For many researchers, therefore, ethical use of Indigenous knowledge in their work requires consultation, as does interpretation of Indigenous principles.[2]

At the heart of indigeneity is place, a connection to a locality. And locality is nevertheless global. Indigeneity and Indigenous communities exist throughout the world; Indigenous knowledge likewise flourishes globally. Whether characterized as cultural property, traditional knowledge, Indigenous artistic expression, Indigenous intellectual property, or other similar terminology, Indigenous knowledge connects to the place and the community who created the knowledge or from which it grew (Unaipon 2001).

This chapter prefers "Indigenous knowledge" for a few reasons. Terms like "traditional" or "customary" property or knowledge arguably connote fixed or historical elements. "Cultural property" and even "Indigenous intellectual property" use colonial legal terms of art that may represent principles antithetical to the community's conceptualization of law: the later discussion about communal and individual authorship, for example, is illustrative. "Indigenous knowledge", on the other hand, recognizes that a living, evolving people or community create works, which works themselves may not be fixed. This term thus is meant to convey and reflect a deeper and more fluid meaning.

To determine what kinds of works or activities will constitute Indigenous knowledge, a good place to begin is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), by which countries agree to affirm and protect several enunciated forms or elements of Indigenous knowledge.[3] It should be noted that UNDRIP is a declaration, not a treaty between peoples. Even countries that have adopted UNDRIP are not bound by its Articles in their relations with the populations Indigenous to their lands. Indeed, the framing of UNDRIP by even some adopting countries has received criticism: "A key example of this is the Australian government statement of so-called support for the Declaration, which noted that it is 'non-binding and does not affect existing Australian law . . . '" (Larkin & Butler 2018, p. 94). Nevertheless, UNDRIP offers valuable guidance both for the identification of what can be considered to

be Indigenous knowledge, and for expressing the specific rights and obligations of access and control that can attach to this knowledge.

First, a few of UNDRIP's Articles illustrate the parallels between, on the one hand, the kinds of Indigenous knowledge that are protectable, and, on the other, works that attract copyright protection under colonial law. For example, Article 11 declares the right of Indigenous people to *maintain, protect, and develop* cultural manifestations such as *artefacts, designs, ceremonies, visual and performing arts, and literature*. Article 12 recognizes *spiritual and religious traditions, customs, and ceremonies* as subject to these rights, and Article 13 discusses *histories, languages, oral traditions, writing systems and literatures*, along with *place, person, and community names*.

Second, as to the nature or content of the rights, Article 11 takes some definitive and concrete steps. It affirms the right of Indigenous peoples to *practice and to revitalize* their cultural traditions and customs relating to described knowledge. It goes further, too, to characterize this knowledge as cultural, intellectual, religious, and spiritual *property*. And Article 31 goes on to activate these rights, by stating a right of Indigenous people not only to maintain, protect, and develop but also "to *control*" their cultural heritage, traditional knowledge, and traditional cultural expressions (TCE), along with oral traditions, literatures, designs, sports and traditional games, and visual and performing arts.[4]

Indigenous knowledge protection: Indigenous laws

UNDRIP clearly enunciates the kinds of things that can constitute or contain Indigenous knowledge, and it declares rights to maintain, protect, develop, and even control this knowledge and its use. But UNDRIP takes another step that is a category beyond these statements: It recognizes the existence and validity of Indigenous peoples' own laws, and that the laws can govern matters addressing Indigenous knowledge. Article 11 explicitly requires countries to ensure mechanisms of redress and restitution for a knowledge appropriation that is nonconsensual or that violates those laws, traditions, or customs. Other Articles also recognize the existence, validity, and evolving nature of Indigenous laws, some in subtle or even matter-of-fact ways. Rights of self-determination alongside state citizenship are declaratively expressed in Article 33, and identity and membership determinations are made according to the customs and traditions of the Indigenous community. Finally, Article 40, which addresses dispute resolution and remedies for infringement, mandates considerations of not only the customs and traditions of Indigenous peoples, but also their rules and legal systems.

Indigenous laws on knowledge protection: global and local

Indigenous legal principles, often termed customary law or Indigenous legal traditions in legal literature, are thus valid legal rules that should further assertions of and respect for the knowledge rights expressed in UNDRIP.[5] Indigenous

laws, like colonial or other state systems of law, can establish principles that govern knowledge protection, or access to and control of knowledge. However—and even setting aside the non-binding nature of UNDRIP—a challenge to advancement of mechanisms of access to and control of Indigenous knowledge is the absence of a catalogue of global Indigenous laws. Although their existence, validity, application, and living nature are not disputed, Indigenous laws are expressed in varying states of formality in communities throughout the world. It may be that a given community's custom or tradition permits written or even oral capture of a legal principle only in defined circumstances or settings, or in accordance with the directions of appropriate representatives.[6] In some communities, researchers are working with communities and elders to surface and express laws from customs and traditions that may exist in oral form alone (Friedland & Napoleon 2015). In general, though, Indigenous law is not always straightforwardly accessible and understood beyond the community, and those outside the community must consult with members of the community to understand laws they may need to work with.

Independent of the extent of formality, the key point to understand is that Indigenous law refers to the systems of rights, responsibilities, and dispute resolution mechanisms the Indigenous community itself developed and maintains (Webber 2009). This is distinct from domestic laws of the country in which the Indigenous community is located, even if those domestic laws might govern aspects of relations with or the lives of the Indigenous peoples located there.[7] A comprehensive review of global Indigenous laws about knowledge protection, or customary rules or traditions seen as elevated to the position of laws on the topic, or the literature that discusses them, is beyond the scope of this chapter.[8]

Nevertheless, it is well-accepted that legal principles within an Indigenous community that address the knowledge of that community do exist alongside domestic laws about access to and control of knowledge. Further, they exist within Indigenous communities globally, and some common elements do appear in the literature (Rimmer 2015a). Indigenous legal systems may consider some knowledge to reside in the community itself (Aoki 1998), or the creator of a particular knowledge may not be a human individual, such that the knowledge and its appurtenants cannot rest in a single owner and there can be no term limit connected with an author's life. Relatedly, it may be antithetical to the laws of the Indigenous community to consider that any rights appurtenant to the knowledge can exist otherwise than in perpetuity. It might be that a particular knowledge can be communicated only orally, and not in a fixed and tangible form. The applicable Indigenous laws may see such knowledge not as property at all, but something else, and some rights to which reside in the community as a whole, others in specific members, and yet others only in ancestors. Some knowledge may be associated with rights exercisable only in accordance with specific customary laws (Napoleon et al. 2013).

Domestic copyright laws

In contrast, researchers are often relatively comfortable with, or have access to guidance about, mechanisms of copyright access and control that derive from the domestic legal system they work within. Nevertheless, a brief explanation of commonly invoked copyright law systems will assist in the discussion of intersections with Indigenous knowledge protection. The attention that is directed to copyright in modern digital humanities research is interesting, given the origins of the concept in western or colonial systems. In Canada, as in other systems deriving largely from colonial law, modern copyright rules are generally accepted to be creatures of statute.[9] In Canada, the *Copyright Act* governs what kinds of expressions of knowledge are protected by copyright.[10] The *Act* has its origin in a 1710 English statute known as the Statute of Anne.[11] Before that statute, some notion of a natural right of copyright was understood, and limited reproductions were managed by licensing regimes or by the power of the Crown through a Royal prerogative. It seems the motivation for the Statute of Anne was a commercial one, to ensure limited terms of protection.[12] It was a short statute developed in an era where control of the making and distribution of print material was held by a few.

But over time, that short statute evolved into complex systems of statute and regulatory law, supplemented with successive decisions of courts and tribunals, thus refining interpretations and applications of this law to resolve specific disputes. Even international instruments such as treaties and multinational or bilateral trade agreements are important elements of the global web of domestic copyright laws.

But the heart of the copyright that is common to many colonial or post-colonial legal systems is the sole right to reproduce a work. This right is qualified by a number of competing rights of use, meant to balance the realm of knowledge between creators and users.[13] Similarly, copyright laws set a term or period of time during which the author or owner has a monopoly on decisions relating to the work, after which the property in the work effectively disappears and the work is available to others to use.[14] These systems of copyright law reflect an evolution of efforts to balance incentives for creativity and production with the availability of a public domain of resources upon which future authors or creators can draw (Nayyer 2002).

In essence, in these colonial or post-colonial legal systems, copyright is an intellectual property right of an identifiable author or owner of a work. The rights it accords vary among different jurisdictions; generally, though, they include a time-limited right to prevent others from reproducing the work, or from making other uses such as alteration, without permission. In jurisdictions that follow this copyright law legacy, an author holds this right by virtue of being identified as having created, or coming to legally own, the work.

Conflicts of Indigenous knowledge protection laws and domestic copyright regimes

Copyright in western legal systems thus is understood to be a mechanism of qualified protection and limited rights of reproduction of works. Although disputes invariably arise, the elements of this mechanism are widely and well expressed in available laws and legal literature. However, as explained, copyright described as such is not the only mechanism by which knowledge protection and rights of access and control can be described. UNDRIP affirms that Indigenous peoples have been creating knowledge for countless ages, well before the Statute of Anne and its successors defined mechanisms of rights of access and control. As has been explained, systems of Indigenous law or customary law specific to local communities are well-recognized globally. Researchers increasingly understand that Indigenous peoples have established conceptualizations of laws and legal systems, that these systems are of long standing in the respective Indigenous community, and that they continue to evolve, just as common law and enacted and codified laws do (Rimmer 2015a, p. 6). Customary laws or legal principles of different Indigenous communities may be in varying states of elucidation and formal expression outside the local community itself, but the reality of Indigenous or customary law is well accepted.[15]

It follows that, where countries may hold established colonial or post-colonial populations alongside the peoples Indigenous to the lands of those countries, the colonial or post-colonial copyright system derived from the Statute of Anne is but one of the sources of law that may govern populations within the locality.[16] Whether or not expressed in the laws or constitution of a country, recognition of Indigenous peoples' own laws may result in those countries having trans-systemic legal structures.[17] Taking the analysis a step further, the existence of the multiple legal systems may suggest a kind of conflict of laws situation. This is legal analysis that applies when the facts of a matter implicate multiple jurisdictions, and the choice must be made about which jurisdiction's laws will govern the matter. It may also be tangentially useful in this regard to consider the Berne Convention, an early international copyright instrument which is signed by most countries.[18] One of its key elements is the principle of national treatment: signatories agree to accord the same copyright protection to works of authors of other signatory states as they do to their own nationals (Nayyer 2002). Extensive law and jurisprudence exist globally on the complex legal subject of conflicts of laws, and a full analysis of conflicts of laws in copyright law or the application of national treatment is beyond the scope of this chapter. Nevertheless, the parallels are intriguing, and this subject may offer a useful frame through which to understand, if not resolve, the issues that can arise when we think in the intersection of Indigenous knowledge protection and copyright law.

This view of the relationship between domestic copyright law and Indigenous knowledge protection laws highlights an essential question for every digital

humanist who works with the kinds of knowledge described in this chapter. Whether in oral stories, written ones, art, objects, or other works, representations of Indigenous knowledge are repurposed, adapted, remixed, and reproduced in numerous ways. If the researcher proceeds only on understandings of domestic copyright law, a violation of Indigenous knowledge laws and expectations may occur, even if inadvertently. For example, the researcher might determine that a reproduction of a few lines of a story or a digital image of a physical object, perhaps with an attribution, is fair under the rules of the domestic legal system. The reality may be, though, that the Indigenous peoples from whom the knowledge originated are not properly acknowledged under their legal system.[19]

For another example, perhaps a story is so old that it seems to the researcher that any copyright will have expired, and excerpts can be freely taken, or the story can be presented in a digital format and adapted or altered. Or perhaps the story was never written or recorded anywhere so the researcher assumed it was never subject to any copyright at all, not being fixed in any tangible form. Perhaps an object or design has no identifiable name of an author or creator attached to it, so again copyright is assumed not to subsist, and images can be reproduced or adapted without more. But in these same instances, an Indigenous legal system might govern the place of the use or the creation of the knowledge, and its laws may hold an Indigenous knowledge and its appurtenant rights to reside in certain members of the community, ancestral members of the community, or the community itself (Rimmer 2015a). The use might be seen as a use without permission or compensation, according to the Indigenous laws. Or it may even violate a sacred obligation deriving from the customary legal system (Napoleon et al. 2013). An Indigenous community might view such disregard or misuse of the Indigenous interest in the knowledge, even if inadvertent, as an appropriation, or a taking of the property of, the traditional knowledge. In domestic copyright law terms, this would be equivalent to an infringement of intellectual property rights.

Thus, a tension arises: under the domestic law, the correct interpretation may be that these uses and appropriations are not unauthorized reproductions or uses. This tension—this conflict of laws—exposes fundamental legal differences. It shows not only differences of legal principle, but also differences between conceptions of knowledge, the nature of interests that may subsist in that knowledge, and who—if anyone—is considered to own any such interests. Under the domestic law, the determination of who holds legal copyright to an expression of Indigenous traditional knowledge likely depends on the application of well-established and available rules. As discussed, these include who created the expression, how long ago, and whether it was transferred to anyone and under what terms. And the decision of whether copyright even subsists at all in the expression depends on whether it meets a legal definition of a copyright-protected work, including whether it was fixed in a tangible form. The conclusions one would draw by analysis of a copyright statute, along with related jurisprudence of courts and tribunals, might be quite different from those one would draw through analysis of

principles of the community's Indigenous knowledge protection laws, including what constitutes Indigenous knowledge and its appurtenant rights and in whom, if anyone, they reside. And any global community—a nation, a tribe, a people Indigenous to a local place—would have its own established and evolving principles that govern these same questions.

Resolution of conflicts of laws

It can be tempting to attempt reconciliation of tensions between domestic and Indigenous knowledge protection laws by urging the amendment of a country's domestic, or colonial, copyright law systems. This approach even seems implicit in UNDRIP. However, resolution of the tensions by this approach would be deeply complicated. It would require reconciliation of legal systems that proceed from such different fundamentals that any resultant attempts to respect the systems could only be inherently inconsistent. Copyright systems that derive from the Statute of Anne—those that rest on an identifiable author and a fixed tangible creation—are at odds with systems that contemplate oral traditions and communal rights. The concept of "ownership" rights may be incongruous and "fundamentally dissonant" (Tsosie 1997, p. 9).

When such tensions arise between conceptualizations of law and rights—that is, when conflicts of law arise—researchers and institutions operating under domestic copyright systems instead must develop strategies that not only would respect and protect Indigenous knowledge, but also would abide by the governing Indigenous legal principles. Ethical digital humanities work requires these obligations irrespective of both the resolution of domestic copyright questions and the state of elucidation of the local Indigenous community's systems of laws. An appealing feature of the conflicts of laws analysis is that it affirms both perspectives of laws, and it thus foresees the need to work in a consultative and informed way which respects the sets of legal systems. This approach is reflected in such ethical and pragmatic strategies already being undertaken in digital humanities and cultural and heritage work. Creative and effective strategies are increasingly explored, and tools such as protocols and agreed attribution through labels for traditional knowledge are being implemented. A discussion of these is beyond the scope of this chapter. However, they are available for illustration, exploration, and use and present forward-looking models for reconciliation of these conflicts of legal principles.[20]

Conclusions

The existence of Indigenous knowledge in many forms is well accepted, and international instruments contribute to furthering its recognition. Likewise, Indigenous legal systems are now widely understood to exist alongside domestic legal systems. The voice thus given to Indigenous peoples and the respect thus accorded to their knowledge can be applauded. Discovery and understanding of

Indigenous laws may still be a challenge for digital humanists and others who would want to work respectfully with Indigenous knowledge.

Researchers must attend to this issue: stark contrasts likely exist between principles of domestic copyright law systems they regularly work within and the Indigenous laws of communities whose knowledge they wish to work with. Though silent, this tension underlies many expressions of Indigenous knowledge and their use in research and in the creation of new knowledge. An expression of Indigenous knowledge may be seen to attract no protection at all under a country's domestic copyright law, whereas it may be sacred or subject to strict protocols under the Indigenous community's law. When Indigenous laws coexist alongside a domestic law, issues can arise when work is done at the intersection of the systems.

Rather than asserting efforts to merge the legal systems, an ethical approach calls for the situation to be framed in a way that recognizes equally valid legal systems that conflict. The use of forward-looking and respectful strategies can bridge and reconcile the conflicts and enable research and use of knowledge in lawful and respectful ways.

Notes

1 I write from the perspective of someone indigenous neither to lands on which I was raised nor those where I now live; whose family had emigrated from lands to which they were indigenous and were colonized by other peoples; and who has learned my heritage through written and oral histories, arts, foods, customs, and more. I discuss Indigenous knowledge from the intersection of these perspectives and from research and study of different writings and discussions about knowledge of Indigenous communities globally. In writing comparatively about mechanisms of knowledge protection, I write primarily from the perspective of a lawyer qualified to practise law in two Canadian jurisdictions, who works with but does not advise on copyright laws of the United States, and peripherally of a few other jurisdictions.

2 Bohaker et al., in ch. 10 of this volume, give a case-based treatment of the requisite of initial and ongoing consultation.

3 United Nations General Assembly (2007). UNDRIP is varyingly adopted among UN member countries.

4 These declared rights also extend to knowledges that are in the nature of other intellectual property elements akin to patentable knowledge, including technologies of their cultures, seeds, and medicines.

5 Short (2014). For an extensive discussion that uses this term, see Tobin (2015).

6 As illustrated in the case study in Napoleon et al. (2013).

7 Discussions of the distinction between what is often characterized as "aboriginal law" and the legal orders that form "Indigenous laws" are discussed in recent literature on the subject, particularly in legal literature. See, for example, Napoleon & Friedland (2016), and in particular the discussion at pp. 729–732.

8 For deeper exploration of these legal systems see Nayyer (2002). For an expansive examination of Indigenous laws and legal mechanisms of controls of and access to Indigenous knowledge, see Rimmer (2015a).

9 Judge (2005). Judge notes that the Supreme Court of Canada has confirmed repeatedly that no such natural right exists at Canadian law.

10 *Copyright Act*, RSC 1985, c C-42, available from: http://canlii.ca/t/53p5c

11 1709 (UK), 8 Anne, c 19.

12 *Statute of Anne*, Preamble.
13 In Canada, a leading case explaining this balance is *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339, par. 12, available from: http://canlii.ca/t/1glp0#par12. Analogous interpretations exist in analogous copyright systems.
14 The duration of the right varies among jurisdictions depending on what is set by domestic legislation. Such domestic legislation generally is influenced by multilateral copyright agreements, however. See Nayyer (2002).
15 For a description of one example of such a process of elucidation, see Friedland & Napoleon (2015).
16 For an illustration of the idea that the applicable law is attached to the land, see the case study in Napoleon et al. (2013).
17 For example, in Canada, the recognition of existing aboriginal rights is entrenched in the constitution: *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s 35; available from: http://canlii.ca/t/ldsx#sec35.
18 WIPO (1979), and summary: www.wipo.int/treaties/en/ip/berne/summary_berne.html
19 See, for example, Coombe (1993) and see discussion in the Preface to Borrows (2018).
20 Examples of strategies and protocols include the *Mukurtu* platform, Local Contexts system, Traditional Knowledge Labels. For an interesting explanation of the use of protocols to address matters of appropriation and to govern terms of use proactively, see Janke (2015). See also the case study examined by Bohaker et al. in ch. 10 of this volume.

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