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ABORIGINAL PEOPLES AND INTELLECTUAL PROPERTY RIGHTS

1. Definition: What are Intellectual Property Rights (IPRs)?

Legal rights that restrict the use of cultural works, knowledge, or information.

2. Types of IPRs:

There are **three** "traditional" groups of intellectual property rights: **Patents, Trademarks, and Copyright**.

A **fourth** type of intellectual property right, known as "**Geographical Indications**," is also widely recognized. There is some theoretical debate among IP lawyers about whether GIs are a separate type of IP right, or a special branch of trademark law.

A **fifth** type of right, known as "**neighboring" rights** or "related" rights, applies to performances, and to other types of activities "related" to copyright works, such as sound recording and broadcasting. Performers were historically placed in this group because they were considered to "disseminate" the works of composers, rather than creating new works in their own right. There is now a movement in the international community to augment performers' rights, so that they may enjoy similar protection to authors. This involves improving their rights over those of others traditionally protected by neighboring rights, and for this reason, it is becoming more common to refer to performers' rights separately.

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Traditionally, each type of right applies to a certain area of human creation, as follows:

- **Copyright governs literary and artistic works**
- Examples: books, paintings, sculptures, musical compositions

- **Patents protect scientific inventions or innovations**
- Examples: medications

- **Trademarks protect the use of a word or design in association with a particular product or company**
- Examples: the word Sony in relation to consumer electronics

- **GIs protect the use of a geographical term used to label a traditional product**
- Examples: Champagne used to identify sparkling wine from the Champagne region of France; Parma ham used to identify specially prepared ham from Parma, Italy (except in Canada, where Canadian producers enjoy the right to this label over Italian producers)

3. Operation of IPRs:

a. In the case of **copyright**:

These rights may be held by the **author** of a work, its creator, or by the **owner** of the copyright, who acquires rights from the author. **The first copyright always belongs to the author. It is acquired automatically by the simple act of creating the work, and subsists from the first moment of its creation.**

No formalities whatsoever are required for the author to hold copyright in a work. In particular, **registration is not required.** It is possible to register a copyright in Canada, but this only serves the limited evidentiary purpose of helping someone to prove that he or she is the owner of copyright in the work.

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When the copyright is transferred to an **owner**, this must be done through a contract between the author and owner, or through the operation of the employment rule, a specialized rule in s 13 (3) of the Canadian *Copyright Act* governing the relationship.

The transfer of copyright ownership through the employment rule is governed by tests set out in the provision itself. The work must be created "in the course of employment," and not subject to other arrangements made through contract. There is practically no other situation in which a copyright may be automatically transferred from the author to another person.

The rights can also apply to a group of people as **joint authors**, who are each given all of the rights in the work of joint authorship. For example, each of two co-authors of a book is treated as the author, and the consent of all is required for any copyright transactions.

b. In the case of **patent**:

The inventor holds the patent, but he must apply to the Patent Office to register a patent. The application is subject to a rigorous process of review, and rights are limited to 20 years from the date of filing for the patent.

c. In the case of **trademark:**

These rights may be held by an individual or company in association with a product or service.
The trademark must be registered, and lasts for 7 years from the date of registration. It may be renewed indefinitely.
If the person registering the mark fails to use it in association with the product within 3 years, the registration is cancelled, and anyone may then use the mark.
Famous marks can be held without registration, but this depends on the difficult proof of very long and widespread recognition of the mark.

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d. In the case of a **geographical indication:**

These rights are held by a group of producers, whether business, individuals, or both, associated with the production of traditional goods in a particular country or region of the world.

Unlike other IPRs, geographical indications are protected without any limitation in time.

4. Traditional Purposes:

- To promote creation or innovation by granting the creator rights in his or her work.
- To provide a livelihood to creators.
- To promote the dissemination of knowledge by encouraging its commercialization.
- To provide recognition and reputation to the creators of works of value.

5. New Purposes:

- To prevent misappropriation of knowledge.
- To prevent the destruction of knowledge through misattribution or damage to cultural heritage, in both its material and intangible forms.

6. Relevance to Aboriginal Peoples:

Aboriginal cultures represent a wealth of traditions that are increasingly valuable in the modern world. Aboriginal traditional knowledge includes knowledge about the environment and climate, the uses of plants, traditional music, traditional design, and stories, to name only a few elements.

Any or all of this knowledge may be converted into “intellectual property” by a person or company who takes Aboriginal traditional knowledge and uses it to create a “work” or a scientific invention that is recognized by intellectual property law. Typically, traditional knowledge may become the subject of a copyright work, such as a book,

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song, or sound recording, or the basis of a patent, such as the use of traditional knowledge about plants to apply for patented medications or cosmetics as has happened in the case of the neem and turmeric plants from India.

For example, an Aboriginal symbol or word may be incorporated into a design for clothing, a banknote, or carpets, and the person who does so will then acquire a right to use it in this way. Because Aboriginal traditional knowledge may not fit within the accepted terms of intellectual property rights – individual and identifiable creators, a limited duration of protection, a work that meets the required criteria for protection such as "originality" or fixation – it may not be difficult to recognize through intellectual property rights.

At the same time, Aboriginal peoples may want to make use of certain elements of their cultural knowledge and heritage to promote Aboriginal culture and to enrich Aboriginal society. It is possible that Aboriginal knowledge can be communicated by Aboriginal peoples in a form that allows it to be protected by intellectual property laws. In this case, Aboriginal peoples could not only prevent misappropriation of their knowledge, but, wherever they deem appropriate, they could also make use of their traditional knowledge for modern benefits.

7. What problems do we confront when we try to protect traditional knowledge through the existing system for the protection of intellectual property?

a. The concept of property

Traditional knowledge is often not considered to be "owned" by anyone by the group involved, not even by the group responsible for its creation or development. By bringing in the concept of "ownership," are we changing very nature of this knowledge?

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b. The concept of authorship

IPRs usually deal with individual, or at best, joint authorship. They do not usually deal with situations of communal authorship. This leads to practical issues, such as:

- Who benefits from the right?
- Who is going to be responsible for asserting the right?

Amendments to the law could make it easier for groups and communities to claim IPRs, notably, TMs and GIs.

c. Time limits

Traditional knowledge is very ancient, and the time-limited nature of IPRs is not appropriate. However, TMs and GIs do not have the same time limitations as other IPRs, which may imply that these types of protection are better suited to traditional knowledge.

d. Fixation

Traditional knowledge is often oral and not "fixed" – or recorded in a tangible medium. The Canadian Copyright Act seems to have some potential flexibility in this area, because, in contrast to other copyright laws, the Act does not state that fixation is a requirement. However, at the international level, TRIPs has a fixation requirement in Article 9.2.

e. The "interdisciplinary" nature of traditional knowledge

Is traditional knowledge art? Is it science? Is it both? Is it neither?
What form of intellectual property protection is appropriate? Can we offer more than one form of IP protection to the same work? Can the same knowledge be both a copyright work and a trademark? Can it be subject to both copyright and patent restrictions (software)?

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Interestingly, this raises a general problem in IP law, which is the breakdown of the traditional distinctions between science, art, and commerce. For example, copyright law is the accepted protection for computer programs, because they are written down, and therefore considered “analogous” to literary works. This trend may ultimately work in favour of intellectual property protection for Aboriginal culture.

8. Conclusion

Intellectual property rights are increasingly powerful in the world. In order to safeguard their culture and preserve it for future generations, Aboriginal peoples should attempt to develop independent and informed policies on how they would like to approach intellectual property rights in their traditional culture and knowledge.

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