Recognizing Indigenous Legal Values in Modern Copyright Law

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Recognizing Indigenous Legal Values in Modern Copyright Law

Abstract
Canada was founded on three legal traditions: common law, civil law, and Indigenous law. Despite this multijuridical founding, Indigenous legal traditions (ILTs) have been largely ignored in many areas of Canadian law. This lack of inclusion is harmful to Canadian society in several ways. Notably, it ignores Canada’s treaty obligations, disregards the social integration of contemporary Canadian society, and wastes an excellent opportunity to aid in the reconciliation of Canada’s colonial past. It is not as though Canada is without opportunities to integrate ILTs into its legal systems. For example, in the recent Supreme Court of Canada decision, *CCH v LSUC*, the Court outlined a shift in Canadian copyright law, moving toward a model of “fair use” and “social good” in the copyright space. In so doing, the Court did not rely on any Indigenous legal or cultural justifications for its decision; however, copyright law is an ideal space for the inclusion of ILTs. Not only are many of the new elements outlined by the Supreme Court similar to many Indigenous nations’ views on property, but Canadian copyright law also has a history of integration, having already merged the British and Francophone traditions. This paper argues that such an inclusion would be beneficial for all Canadians and would represent a positive step in Canada’s relations with its Indigenous nations. A broad view of ILTs is taken in this paper so as to allow the argument to stand without distracting criticism of the substance of any nation’s distinct tradition. Indeed, the paper takes an overarching view on a broad topic and asks the salient questions about whether integration is possible and whether it can be achieved. The answer, to both, is in the affirmative.

Keywords
copyright, Indigenous, Aboriginal, Intellectual Property
RECOGNIZING INDIGENOUS LEGAL VALUES IN MODERN COPYRIGHT LAW

DENISE BRUNSDON*

INTRODUCTION

Canada is a multijuridical state with common, civil, and Indigenous laws as its founding legal traditions; however, the Canadian judiciary is dominated by non-Indigenous justices who fail to incorporate Indigenous legal traditions (ILT) into its decisions. In the rare instances when ILTs are considered, Canadian courts tend to implement them only in relation to Indigenous peoples. This occurs despite the fact that such legal traditions could be equally relevant in situations involving non-Indigenous peoples. This paper outlines how ILTs are part of Canada’s multijuridical makeup. To that end, it demonstrates how a Canadian legal system that more broadly complies with the underlying treaty commitments of cooperation, shared jurisdiction, and mutual benefit would result in a more inclusive and respectful legal system, and one that remains true to its legal history. With that in mind, this paper argues for the further blending of ILTs into the country’s current legal framework. In particular, this paper suggests that contemporary Canadian copyright law could be used as a case study in effective multijuridicalism, also known as legal pluralism.¹

Indeed, ILTs must be more actively incorporated into Canada’s legal system and placed on equal footing with the common law. To accomplish this goal, copyright law may be a helpful, albeit retrospective, roadmap for its inclusion. For example, in the recent Supreme Court of Canada (Supreme Court) decision, CCH v LSUC, the Court could have better articulated its shift within contemporary copyright law. In that case, the Court moved to improve fair use and social good in copyright but could have used ILTs in doing so. As is detailed below, copyright law proves that Indigenous laws and

¹ There are many other areas in Canadian law where a blending of legal traditions could take place, but this paper focuses on the possibility within the copyright context. For example, in Tsilhqot’in Nation v BC [2004] SCC 44, in which the Supreme Court of Canada balanced traditional common law concepts with Indigenous values in reaching a decision that recognized the Tsilhqot’in’s aboriginal title to the 1,750 square kilometer region that they have historically occupied in British Columbia’s interior.
the common law can co-operate.\(^2\) To actively recognize and voice this co-operation would better respect Canada’s founding traditions. Moreover, to increase this co-operation will benefit all Canadians because it will move Canada closer to the post-colonial reconciliation that the country needs in order to rectify the past.\(^3\)

ILTs are referred to en masse for most of this paper, with a few explicitly mentioned in regard to copyright. This bulking disservices their rich, diverse tapestry; however, generalizing allows the core argument to be delivered without putting pressure on any one nation’s tradition to serve as the example. When specific traditions are explained as relevant to copyright law, the traditions are shared across many nations—enough that some may say the traditions are closer to values than legal rules. This paper counters that the same could be said of common and civil laws. Using broader, more widespread ILTs allows the argument to stand without distracting criticism of the substance of any nation’s distinct tradition. This particular branch of copyright law is also used to demonstrate how natural multijuridical blending because enough years have passed to let any controversies fade and jurisprudential debates to settle through fine-tuning in subsequent application.

I. INDIGENOUS LEGAL TRADITIONS ARE PART OF CANADA’S MULTIJURIDICAL MAKEUP

Canada’s colonial history underpins current race and political (i.e., nation-to-nation) relations inside and outside of the law in Canada today. White European colonizers came to Canada with the express intent of subjugating the Indigenous peoples already populating the country. At that time, Indigenous peoples—also called Aboriginals—including First Nations, Inuit, and early Métis peoples; they lived in every region of what we now call Canada and self-identified as members of unique, distinct nations such as the Mohawk, Cree, Oneida, Salish, and many more.\(^4\) The destruction and oppression of these nations following first contact was a catalyst for the institutional and social racism that continues to manifest itself in Canadian political society.

This colonialism included such endeavours as indigenous resource exploitation, land expropriation, rights extinguishment, racism, and wardship.\(^5\) Historically, it also

\(^2\) This paper refers specifically to the common law as utilized by Canadian Courts. Although the common law is used in many jurisdictions around the world, and many of the claims espoused in this paper could apply elsewhere, the analysis is restricted to the Canadian context.


included the residential school system, a major tool of oppression. Residential schools aimed to separate Aboriginal children from their families and communities in order to destroy Indigenous culture and language.\(^6\) This familial and cultural destruction was endorsed by the most powerful politicians of the day, including Canada’s first Prime Minister, Sir John A. MacDonald.\(^7\)

Colonial racism has deeply embedded itself in the colonizer’s preferred justice system, particularly in the field of criminal law. As Dara Culhane and Renee Taylor explain:

> In the arena of criminal justice, numerous well-publicized cases and inquiries have established beyond the doubt of any reasonable person two facts: (1) that Aboriginal people are discriminated against on the basis of their racial(ized) identity at all levels of the Canadian criminal justice system; and (2) that Aboriginal people are disproportionately disadvantaged according to all commonly accepted indicators of sociocultural vulnerability to conflict with the law: economic marginalization, unemployment, poverty, poor education, stigmatized identity, high rates of alcohol and drug abuse, and personal histories punctuated by abuse, dislocation, and family conflict.\(^8\)

Indeed, colonial-era imperialists pushed Indigenous communities to assimilate with Eurocentric social, economic, cultural, and linguistic traditions, which included assimilation to the colonizer’s legal systems and dominant legal traditions.\(^9\)

Despite historical revisionism and other attempts at erasure, such as perpetuation of the stereotype of the primitive, lawless savage, the many Indigenous nations of what is now Canada had well-established systems of law and justice, collectively referred to as ILTs.\(^10\) There are numerous documented examples of ILTs in many of the Indigenous nations. For example, the Constitution of the Nisga’a Nation includes government structure, legal principles, and laws that extend to every aspect of life.\(^11\) These ILTs

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\(^6\) Truth and Reconciliation Commission, *supra* note 3 at v.
form a legitimate part of Canada’s history, and as a result, these traditions should continue to play a role in law and courts today. Indeed, this is more than a value statement: it is a statement of historical fact.

As noted above, Canadian political society is multijuridical, with common, civil, and Indigenous legal systems composing its founding legal traditions. As affirmed by the Supreme Court there is much proof that European colonizers never conquered Canada’s Indigenous peoples. On the contrary, treaties between the colonizers and different Indigenous groups were common, and do not suggest any acts of “conquering.” This method of colonization by treaty binds the colonizers to their treaty commitments. Many colonizer–band treaties were designed to benefit both Indigenous peoples and the new immigrant colonizers, and included sections affirming either the shared or the supreme authority of ILTs. In Recovering Canada: The Resurgence of Indigenous Law, ILT scholar John Borrows stated the following about the importance of preserving Indigenous law:

Given that First Nations law continue to give meaning and content to Aboriginal rights and form a part of the ‘laws of Canada,’ reference to these laws in Canadian law recognizes a foundational and unifying principle in Aboriginal rights jurisprudence.

It must be noted that forced assimilation is not cultural Darwinism (i.e., the strongest culture survives). Such arguments involving cultural superiority are at direct odds with many treaties signed between white settlers and Indigenous peoples. Moreover, any theory of cultural superiority is at odds with the Canadian Charter of Rights and Freedoms (the Charter). On this topic, Borrows wrote:

Imperialism wanes when the Constitution Acts are seen as consistent with the preservation of Indigenous legal traditions and the creation of inter-societal norms in their relationship with the common law and civil law.

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12 John Borrows, Canada's Indigenous Constitution (Toronto: University of Toronto Press, 2010) at 17 [Borrows, Indigenous Constitution]: “[i]t is factually apparent that at Canada’s formation there was no first discovery on the part of the Crown that would justify displacing Indigenous law.”
13 Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511 at para 25: “[p]ut simply, Canada’s Aboriginal people were here when Europeans came, and were never conquered.”
14 See e.g. Reference re Manitoba Language Rights, [1985] 1 SCR 721 at para 66, aff’d [1992] 1 SCR 212: “in the process of Constitutional adjudication, the Court may have regard for unwritten postulates which form the very foundation of the Constitution of Canada.”
Therefore, it is not only important to preserve and incorporate ILTs from a historical standpoint, but it is also consistent with Charter values.

Fortunately, many ILTs continue on- and off-reserve in Canadian society today. For example, some traditions are partially integrated within the colonial common law court system via Métis or Cree courts. These courts operate within the stare decisis system of colonizers yet make use of Métis principles or are conducted in the Cree language.\(^{18}\) In addition, eight jurisdictions (provinces or territories) have at least one specialized “Gladue court” that attempts to incorporate the Gladue principles of specialized service and considerations for Aboriginal defendants.\(^{19}\) These specialized approaches can range from including reports outlining the historical factors impacting recidivism rates of Indigenous peoples to changing the atmosphere of the process. For example, the courtroom’s layout can be reconfigured so that all parties sit in chairs in a circular formation rather than at opposing tables in front of the bench. This affirms that, as Borrows wrote, “[t]he blending and/or coexistence of legal traditions is possible.”\(^{20}\)

Nevertheless, despite these examples, the question of how to incorporate ILTs within the colonizer common law court system has been a struggle for non-Indigenous judges. Judges regularly exhibit a bias toward colonizer culture and law. Borrows addressed this point, stating, “bias and prejudice will also be hard to overcome; despite recent case law, some people will continue to believe that First Nations laws are inferior.”\(^{21}\) He continued to assert, “as a result, it may take longer for these laws to enjoy the same respect accorded to other categories of the common law.”\(^{22}\)

In the contemporary context, as Borrows predicted, ILTs have yet to receive full recognition in Canadian jurisprudence (e.g., the more circular layout of the courtroom noted above). It is time for Canadian courts to actively recognize the credibility of these laws and incorporate them into the dominant common law system. This is important to ensure that Canada meets its treaty obligations.\(^{23}\) Treaty commitments, as in any contract, are meant to mutually benefit both parties. The descendants of colonizers are certainly enjoying access to this land and resources, and must meet their duties under the agreements. In addition, ILT recognition and use will play an important role in the reconciliation effort with Canada’s legacy of colonialism.\(^{24}\) The erasure of Indigenous

\(^{18}\) Ibid.

\(^{19}\) Research and Statistics Division Department of Justice, “Gladue Practices in the Provinces and Territories” (Ottawa: Department of Justice, 2013) at 4.

\(^{20}\) Borrows, Indigenous Constitution, supra note 12 at 23.

\(^{21}\) Borrows, Recovering Canada, supra note 15 at 24.

\(^{22}\) Ibid.

\(^{23}\) John H Currie et al, International Law: Doctrine, Practice, and Theory (Toronto: Irwin Law, 2014) at 85 (States are bound in international law by their treaty obligations).

\(^{24}\) See generally Truth and Reconciliation Commission, supra note 3.
laws is part of the erasure of a distinct culture, and all aspects of erasure must be addressed as part of our country’s healing process.

II. THE ARGUMENT FOR BLENDING CANADA’S FOUNDING LEGAL TRADITIONS

When Canadian courts do consider ILTs they are applied almost exclusively in relation to Indigenous peoples; however, there are extremely rare exceptions.\textsuperscript{25} For example, in British Columbia, via the Nisga’a Final Agreement, the Indigenous nation has its own legislative assembly with which it can create bylaws that apply to all individuals within that nation’s territory—Indigenous or otherwise.\textsuperscript{26} This is the exception not the rule. In other words, outside of Quebec’s civil code, the majority of Indigenous peoples in Canada are subject to common law and ILTs, but all others in Canadian society are subject exclusively to common law. Such a narrow application of Indigenous law leans toward minimal treaty compliance and away from a broad fusion of legal systems. In \textit{Rediscovering Canada}, Borrows highlighted this dualistic approach, stating:

Courts … have frequently refused to apply First Nations law, preferring to recognize the common law as the sole source of law in Canada… [I]t is unnecessary for courts to approach an interpretation of Aboriginal rights as though each source of law was in competition with the others.\textsuperscript{27}

Thus, a blending of ILTs with the Canadian common law is desirable for several reasons, notably because it would better reflect Canada’s existing social integration, respect existing treaty obligations, and enable the two strands of law to grow and develop together.

In Canadian society today there is integration between Indigenous and colonizer–descendant peoples. A total of 1.8 million people, or 5.6 per cent of Canadians, identify as having an Indigenous familial background.\textsuperscript{28} Moreover, of those individuals who identified as “Indians” according to the government’s legislated requirements, 47.4 per cent currently live off-reserve.\textsuperscript{29} Furthermore, there are also situations that question the need to extend rights to non-Indigenous people who wish to

\textsuperscript{25} Joseph Eliot Magnet, \textit{Litigating Aboriginal Culture} (Edmonton: Juriliber, 2005) at 36: “Courts have to adjudicate claims for injury to Aboriginal culture under one of Canada’s treaties with Aboriginal nations will have to explore the implicit meaning – the gaps – in s. 35 of the \textit{Constitution Act}, 1982.”

\textsuperscript{26} \textit{Nisga’a Constitution}, supra note 11.

\textsuperscript{27} Borrows, \textit{Recovering Canada}, supra note 15 at 4-5.

\textsuperscript{28} Indigenous and Northern Affairs, supra note 4.

\textsuperscript{29} \textit{Ibid.}
Therefore, a realistic account of the way Indigenous and non-Indigenous Canadians interact geographically, economically, judicially, and otherwise includes substantial integration. This fact brings the utility of separate law systems into question.

Combining legal traditions supports and complies with many treaty commitments. In many treaties, the specific judicial provisions, as well as the spirit of the treaties, include values such as cooperation, shared jurisdiction, and mutual benefit. As Borrows articulated, “the *sui generis* doctrine allows for this *intermingling* of common law and [Indigenous] conceptions…building strong ties of cooperation and unity between Aboriginal and non-Aboriginal people.”

Combining the legal systems would allow both strains of law to develop together. Colonial common law allows for ongoing change in the legal system through precedent—a right that has been largely denied to Indigenous cultures. Too many judicial lines of inquiry into Indigenous traditions involve “point of contact” assessment, which focuses on Indigenous culture at the point of colonizer contact; it is an approach with many noted shortcomings.

Increasing the inclusion of ILTs in common law will allow ILTs to continue to develop and grow over time, and will ensure the long-term expression of more diverse legal values than simply what white colonizers introduced. Although common law has a bias toward the competitive Kantian dialectic—which along with stare decisis can lead to a disconcerting Darwinian-inspired legal idea predicated on survival—this competition is not necessary. To this end, Perry Shawana wrote that the desirable, fundamental elements of both systems can coexist in ways more nuanced than a simple merging or blending, but rather through “coexistence, independence and

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complementariness.” While Shawana’s suggested coexistence and complementariness approach may not be as neat as the blender approach, it is nevertheless a laudable and attainable goal. He continued, “[f]rom this perspective, true legal pluralism can be said to apply when two or more independent legal systems co-exist, operating side by side and interacting in ways that complement each other.”

### III. BLENDING THE FOUNDING TRADITIONS AND COPYRIGHT LAW

Despite its many potential benefits, the aforementioned desire to expand Canadian law and incorporate new ideas has not manifested in most areas of Canadian law. This is well exemplified in the copyright law context. Although copyright law is a decidedly Western legal tradition, the historical roots of the legal doctrine need not preclude consideration of relevant Indigenous values. In particular, Canada’s history with incorporating two different schools of copyright thought makes copyright law a natural choice to incorporate ILTs.

#### Copyright Theory and History

Most national copyright laws of the contemporary world flow from two historical systems of protection: the Anglo-American copyright system and the continental European, or the Francophone “authors’ rights/droit d’auteur” system. Each system is rooted in a different philosophy; flowing from the core difference in origin, each manifests different legal foci and features. In the Anglo-American system, copyright is a property tool justified by utilitarianism to create social benefit by protecting the economic incentive to create new works. On the other hand, the continental European system, focused on authors’ natural sovereignty over their works as a matter of basic justice derived from natural law. The creator of the work derives personal and economic benefit on the basis of a personality right instead of a property right.

It is through these two schools of thought that most modern day copyright disputes are viewed. Importantly for this paper, Canadian copyright law includes

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36 Ibid.
38 Ibid.
39 Ibid at 38.
40 Ibid.
41 Ibid.
aspects of both traditions. Despite the differences, a key similarity that links both of these systems is that they were informed by debates between Western—and correspondingly non-indigenous—philosophers and writers, including Locke, Rousseau, Bentham, Mill, Kant, Hegel, Condorcet, Defoe, and Diderot.

Despite its acceptance of both the Anglo and the European systems of copyright, Canadian copyright law has remained resistant to ILTs and Indigenous values; however, the merging of the two schools of Anglophone and Francophone legal thought into modern day copyright laws demonstrates that a creative combination is possible. Indeed, the law needs to approach non-white and/or Indigenous copyright traditions as inclusively as it did the differing schools of white European thought. To do so would result in the benefits of a blended system noted above: the respect for Canada’s social integration, previous treaty obligations, and the desire for the common law to grow and develop.

**Indigenous Copyright Law**

Western legal tradition strongly emphasizes individual property. This viewpoint can be ostracizing to people of Indigenous cultures, which often do not have such a narrow conception of property. For example, the National Indian Brotherhood—the precursor organization to today’s Assembly of First Nations—explained in an early conference paper how Indigenous conceptions of property differ from the one that informs the Colonial-Canadian legal tradition:

We have seen that White society has always valued property over people, and this is reflected in their economy which relies heavily on the production, consumption and stimulation of artificial needs…The worst feature of our situation is that because we stand outside of the White culture and economy we feel powerless to effect any substantial change in the nature of Canadian life.

Evidently, there is a substantial difference between historically Western views of copyright and many Indigenous communities’ views.

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42 Laura J. Murray & Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide*, 2d ed (Toronto: Between the Lines, 2013) at 27 (Our foundational 1921 Copyright Act closely mirrored the UK’s Copyright Act of 1911; however, because of Canada’s commonwealth past, the country is somewhat more aligned with the UK tradition legislatively).


44 Taiaiake, *supra* note 5 at 48.

Generally speaking, with respect to knowledge, ILTs start from a fundamentally different worldview than Western thoughts on the same topic. For example, professor Erica-Irene Daes wrote that Indigenous heritage is “a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity.”46 ILTs—as seen in communities as geographically dispersed as the Indigenous Zuni, Pueblo, and Americans—tend to focus on attributing value in goods such as crops or petroglyphs to the Creator, and to religion generally.47 The emphasis is not on the human creator but rather on the spiritual Creator. Within these cultures, the concept of group ownership is significant. Indeed, scholars have suggested that contemporary “American Indians are searching for ways to have their own emphasis on group ownership, and uses in appropriate context, recognized in efforts to protect their cultural resources.”48

Another way to frame this refusal to isolate ownership is in terms of knowledge and kinship. For example, Professor Michael Coyle from the University of Western Ontario wrote about the falsity of the Western tendency to isolate data, which, he argues, is an unattainable concept:

For Indigenous peoples, understandings of the world typically cannot be reproduced to data that can be comprehended and evaluated in isolation—that is, separated from understandings of relationships between and responsibilities to other beings, to the land, and to the plants and animals on the land…. Indigenous understandings of the world tend to proceed from a worldview that emphasizes kinship between different forms of knowledge and between different beings that inhabit the earth.49

That being said, it must be emphatically stated that Indigenous cultures must not be stereotyped as wholly identical or communal. For example, the Dakelh or Carrier people of interior British Columbia have legal traditions that do recognize a mode of individual intellectual property, and it is at times more restrictive than Western legal culture’s Intellectual Property (IP) rights. For example, Shawana explained that in a

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48 Pinel & Evans, supra note 52 at 51.
49 Michael Coyle, “The Idols of The Cave: Reimagining The Protection of Indigenous Knowledge and Expression” (2011) 26 CIPR at 6-7 [Coyle].
high chief naming ceremony involving songs and regalia, the songs and the regalia are considered public property. At the same time, they are to be used exclusively by the chief being named. That said, different people reuse the name over generations.50

Blending Western and Indigenous Views on Copyright

Copyright law is a colonial legal tradition that bears little or no connection to Indigenous cultures. Tom Greaves wrote about how colonial law’s handling of IP is dominant and the Indigenous approach is subordinate, asserting:

[IP Rights] entails looking for legal vehicles in Western law that could be used by indigenous societies and their advocates to establish their rights of cultural ownership. IPR is not for everyone. IPR is housed in Western law and in its systems of courts, judges and lawyers. Advocacy of IPR assumes that indigenous societies or their advocates will use those Western institutions to secure and defend their rights. Many indigenous persons are uncomfortable with that. Why should an indigenous society, with its own concepts of property and civility, adopt the assumptions, rules and institutions of the dominant society in order to claim their rights? The pursuit of intellectual property rights forces indigenous people to play the dominant society’s game.51

Regardless of one-off instances of Indigenous individual property, it is fair to say there has been a disconnect between Western and various Indigenous IP approaches. As Stephen Bush notes: “…[a]pplying the customary tools of [IP] (patents, copyrights, trademarks, trade secrets, and plant variety protection) to Indigenous knowledge is likely to do more harm than good, both to Indigenous groups and to others.”52 Even international regimes have done little to reconcile the Western copyrights and the variety of indigenous treatments of knowledge. For example, Tirso Gonzales writes:

Intellectual property rights (IPRs) are a product of the logic and the interests of the states and corporations, which have historically been responsible for the cultural, economic, political, and physical violence visited upon indigenous peoples. The question of IPRs has its origins outside indigenous culture and it arises as but one element of the renewed assault against indigenous peoples represented by the promulgation of new economic regimes… the possibilities and prospects for the persistence of social collectivities based on ethnic and

50 Shawana, supra note 35 at 120.
cultural affinities in a modern world in which states and corporations seek to homogenize or destroy them.\textsuperscript{53}

Thus, the current copyright regime actively threatens Indigenous cultures because the law takes a non-cooperative approach.\textsuperscript{54} Indeed, as JR Stephenson notes, the colonial property system is hostile toward Indigenous peoples and their IP:

It protects individual creations rather than those created by tradition, defines knowledge as a commodity, and eventually conveys all intellectual property into the public arena where any use is fair use, and where, in time, no compensation to the originator is required.\textsuperscript{55}

Therefore, it is evident that Western copyright rules are not consistent with many Indigenous traditions and values.

The interaction of ILTs with copyright, both domestically and abroad, is almost singularly focused on engaging copyright to protect Indigenous culture.\textsuperscript{56} Indeed, “[i]n Indigenous societies, the debate about Indigenous knowledge is primarily concerned with the integrity of that knowledge and focuses on maintaining a way of being over time into the future.”\textsuperscript{57} This topic is responsible for the bulk of research connecting copyright and Indigenous peoples.\textsuperscript{58}

Protecting Indigenous culture and individual groups’ agency over their cultures was crucial in earlier decades and necessitated recognizing the dominant legal tradition. Sensitivity to perishing cultural traditions and materials demanded urgency. This urgent need for protection overshadowed important deconstructive and reconstructive theoretical work with aims to incorporate ILTs within all copyright law. This paper is an example of such copyright deconstruction and reconstruction. It moves away from a model whereby colonial common law property rights are used to protect Indigenous


\textsuperscript{57} Shawana, supra note 35 at 117.


https://ir.lib.uwo.ca/uwojls/vol6/iss3/2
cultural practices and products, and towards a model that employs ILTs toward Indigenous groups’ self-preservation. It seems intuitively wrong that the oppressor’s laws should be relied upon to protect the culture of the oppressed.

IV. COPYRIGHT IN CANADA TODAY

In examining Canadian law and its three founding traditions, the colonialist English common law was historically the most dominant force in copyright law; however, copyright law has shifted in recent years. This change has been driven, in part, by the “copyleft” movement, a change that has occurred in many places around the world, including Canada. Copyleft describes a movement focused on the free distribution and use of works, in particular software and coding, without requiring authorization of creators. The rise of the Internet and the adoption of digital telecommunications have given the copyleft movement significant momentum. Canadian courts have been receptive to this in part.59

Johan Söderberg’s “Copyleft vs. Copyright: A Marxist Critique” is rich with discussion of conflict and competition in a modern-day digital copyright context.60 It blends the historical tenets already discussed with contemporary issues such as the distribution of power and control between the two opposing sides of the debate (i.e., open access and copyright). For example, Söderberg wrote the following about the competing views on copyright:

It appears as if capital increasingly will rely on technology to regulate social behaviour in general. In this power struggle resistance must increasingly be fought with technological skills. It is in this context that the hacker community and the Free Software Movement are critical. It is time to examine the other side of the conflict.61

The social conflict and power dissemination through capital discussed by Söderberg provide an underlying narrative to copyright debates.62

Along with the other progressive copyright movements, the copyleft movement takes issue with the recent trend toward the use of copyright as a tool used primarily by corporations against less powerful actors, namely artists. In Canada, large artist collectives have used copyright against media outlets and educational institutions, as

60 Söderberg, supra note 43.
61 Ibid.
62 Brush, supra note 52 at 139: “Proponents of intellectual property rights for indigenous knowledge seek to expand capitalism and market relations to control the exchange of biological resources such as seeds.”
well as against smaller and/or less powerful companies. In *Cultures of Copyright*, Angela Daly and Benjamin Farrand discuss this trend toward increased public consciousness of the need to disseminate culture, stating:

> With citizens becoming increasingly reliant on digitized methods to create, access, and enjoy culture, the effects of overly restrictive copyright laws and policies that benefit only large corporations are felt by more people, and their unfairness and injustice exposed.⁶³

Indeed, there appears to be growing dissatisfaction with the status quo.

The copyright movement in favour of greater social balance as opposed to the protection of corporate interests has been expressed in Canadian Supreme Court rulings, particularly in the last fifteen years. The Supreme Court’s line of inquiry reviews the societal balance of the rights and protections allocated to different parties under the relevant common law and statutes. For example, in the 2002 Supreme Court decision *Théberge v Galerie d’Art du Petit Champlain Inc*, the Court emphasized that copyright protections be “presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.”⁶⁴ Later, the 2004 landmark copyright case of *CCH v LSUC*⁶⁵ began a decade of jurisprudence focused on interpreting fair dealing to balance ownership with the public good:

> When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest …. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas... [emphasis added].⁶⁶

The Court’s strong language choice of “flourish” indicated the importance of the public domain. Moreover, the decision suggests an increasing weight placed on utility garnered by the public domain rather than individual authors. The Court held that “[t]he ‘sweat of the brow’ approach to originality is too low a standard” and it in fact “shifts the balance of copyright protection too far in favour of the owner’s rights, and fails to

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⁶⁵ *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 [CCH].
allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual works [emphasis added].” 67 This public interest emphasis signalled to the legal community a new direction in copyright, with McLachlin CJ stating: “In my view, the Moorhouse approach to authorization shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole [emphasis added].” 68 This decision moved Canadian legal discourse away from the historically capitalist, individualist IP decisions occurring prior and toward a more collective, society-focused balance.

In July 2012, the Supreme Court rendered major judgments in five copyright cases, now referred to as the “Copyright Pentalogy.” The Pentalogy affirmed the importance of a balance that values public needs. The Court affirmed the role of the Copyright Board as more than just a tariff-setting body. The Copyright Board is the federal administrative body responsible for many Copyright Act tasks—for example, supervising licensing agreements when the owner of a copyright cannot be found. The Supreme Court stated explicitly that the Board “sets policies that collectively determine the rights of copyright owners and users, and plays an important role in achieving the proper balance between those actors.” 69 In 2013 the Court further said the following about copyright:

… [It] does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works. For example, “[t]he general stock of incidents in fiction or drama is free for all to use—a substantial part of everyone’s culture, not of any one individual’s work.” 70

Evidently, the Supreme Court was articulating a shift in Canadian copyright jurisprudence.

The legislature responded to the Pentalogy by expanding the idea of fair use and by adding new public-focused defences, such as those codified in the Copyright Act. 71 In Canada, when the Court drives Parliament to update statutory law it is an indication of a great shift away from the legal, juridical, and legislative status quo. It is possible to interpret the shift toward better recognition of fair use as moving the balance toward the

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67 Ibid at para 24.
71 Copyright Act, RSC 1985, c C-42.
public’s favour. It is also possible to view fair use’s increased prominence not as a shift but rather as a rightful interpretation of the original legal intent. Overall, the expanded Copyright Act fair use defences in the post-\textit{CCH} years, particularly after the Pentalogy, confirms a distinct shift.

V. ANALYSIS

This shift made by Canada’s Supreme Court and federal legislature could have been more appropriately articulated by incorporating ILTs. As discussed earlier, it is important to note here that not all Indigenous groups are the same. There are many nations, and their laws are different. These diverse communities are disadvantaged when fused thoughtlessly together, particularly when the overgeneralizations are based on historical stereotypes. Each community’s practices and beliefs are diverse. This point is well summarized by Borrows, who writes “Indigenous peoples in what is now Canada developed various spiritual, political and social customs and conventions to guide their relationships.”\textsuperscript{72} That said, harmony, balanced relationships, and the public interest are values that are frequently present in Indigenous teachings and beliefs. The prominence of balanced relationships with each other and the earth is a central ethos.\textsuperscript{73}

As Lisa D. Chartrand wrote for the Indigenous Bar Association in Canada: “At its root, this belief system is based on the notion that mankind must therefore respect the living Earth and all of its resources, that living in harmony with the Earth and all mankind is ‘the law.’”\textsuperscript{74}

The Court’s move to evaluate copyright based on the need to incorporate community concerns and to create balance between copyright holders and the public could have been naturally elaborated using ILTs. At many points during the \textit{CCH v LSUC} case or subsequent decisions, the Court could have brought up ILTs by outlining balance and the need to consider the good of society as a whole. While these decisions imply that balance and social utility are key factors in the copyright shift, such judgments offer an opportune moment for judges to explicitly draw on ILTs. Furthermore, community knowledge is a collective creation between humans as well as between humans and nature. Artists across different Indigenous traditions often think of the Creator as a key force in creation, as the words naturally imply. The Supreme Court chose to focus on general categories like balance and the social good, without


\textsuperscript{73} Growing up in Coast Salish territory, my childhood First Nations lessons involved lots of storytelling, including about right and wrong, but in a far less punitive manner than my white education classes. I am not aboriginal so I can’t claim to be a knowledgeable voice on Indigenous traditions, but even as a young child, the values differences regarding balance and the importance of the communal were evident.

\textsuperscript{74} Lisa Chartrand, “Accommodating Indigenous Legal Traditions” (Paper delivered at the National Aboriginal Law CLE Conference, 4-5 March 2005) [online: <http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>].
acknowledging the ILTs that have espoused these concepts of community and environmental interconnectedness. This was another missed opportunity for the Court to incorporate ILTs.

To address ILTs only in cases affecting Indigenous peoples provides some recognition; however, it does not go far enough. Proper integration of Indigenous law into Canadian law means application to non-Indigenous people. Borrows articulated this concept in *Recovering Canada*, stating:

> Since the pre-existing rights of First Nations can often function alongside [W]estern legal principles, the task for the courts is to find more appropriate terminology to describe Aboriginal rights. Ultimately this requires recognizing a category of Canadian law to receive First Nations law.75

Copyright is one such category, particularly in regards to what ILTs call “the balance of relationships” in relation to what common law calls “fair use.” To that end, Borrows notes the following:

> In the end, what may simplify the challenge is that the debate that must occur is not about the validity of the norms currently advanced by intellectual property law; it is about whether they should be the *exclusive* values brought to bear on the protection of Indigenous knowledge and cultural expression. In the context of the traditional knowledge protection debate, adopting a methodology that does not discount Indigenous values from the outset is surely the first step in avoiding procrustean outcomes that will neither avoid unfair appropriation nor help to protect Indigenous cultures.76

The Supreme Court could have outlined fair dealing as well as concerns of balance and social needs more substantively by using ILTs. Inserting these legal traditions as well as their underlying values regarding harmony, relationships, and sustainability would provide easier explanations and rationales that Indigenous communities and the broader Canadian public alike could comprehend. Legal scholars would be wise to begin pointing out judicial decisions that could have fluidly incorporated ILTs.77 The mainstream legal community needs to become not only aware of the founding cultures but also be willing to explicitly consider and rely on ILTs when relevant cases arise, regardless of the parties involved.

Importantly, tangible exposure to a potential area of legal cultural integration will hopefully break down anxiety regarding an ambiguous future. Indeed, since individuals could be concerned about the future of a legal system with cultural

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76 Coyle, supra note 49 at 15.
77 Ibid at 13: “Beyond the challenges described above, efforts aimed at Canadian law reform in this area will need to address the plurality of Indigenous traditions and voices.”
integration, a case study of copyright could stem this anxiety. Shawana faces this ambiguity head-on and admits that some negotiation and growth will be required:

In this construction, co-existence is understood to embrace both independence and interdependence. Each legal system is understood to have legitimacy within its own right, denoting a measure of independence of each legal order. This is so because a recognition of another legal order’s legitimacy also entails a recognition of the limits of one’s own legal order. Although it is accepted that a legal order can never be fully independent and is always to some extent dependent upon the recognition of others, this does not mean that the concept of independence does not work….Whether one legal order’s particular concepts of law or normative order are relevant or applicable to another legal order is a matter of negotiation, and one that may evolve over time.78

Decades ago, the National Indian Brotherhood nicely summarized the ideal future at stake—the vision of a better and more mutual future: “[f]inally, a fundamental element of legal pluralism is the notion of complementariness; here, each system is strengthened by the existence of the other through actions that contribute to a wider and deeper understanding of each other.”79 Canadian lawmakers and society in general would be wise to heed these words.

CONCLUSION

The Supreme Court’s contemporary copyright decisions were a prime opportunity to integrate ILTs into modern Canadian copyright law; this opportunity was and continues to be missed. Canadian courts must consider ILTs as often as possible—in cases affecting all Canadians, not just Indigenous peoples. This land once contained only Indigenous legal principles. The dominance of the Anglo-European common law system is a significant remnant of colonization. Similar to many aspects of colonialization, Canada’s legal institutions—and Canadians themselves—should work to reconcile it with Canada’s rich Indigenous history, blending the Western and Indigenous traditions in a way that allows us to explore and take the best of both tradition’s strengths. The ambiguity in such a process can seem daunting, particularly for proponents of traditional common law; however, the copyright decisions—particularly those espousing values of balance and maintaining the public interest—demonstrate that some Indigenous principles already operate within current judicial decision-making. Canada must give voice and expression to those principles, both out of respect for our Indigenous ancestors and for today’s descendants. Genuinely

78 Shawana, supra note 35 at 128-129.
79 National Indian Brotherhood, supra note 45 at 29.
incorporating ILTs will add much-needed Indigenous representation to Canada’s legal system.

Canada must also give voice and expression to Indigenous principles because considering diverse legal principles will make our legal system stronger. Descendants of colonizers inside and outside the legal profession will gain from an improved, more inclusive legal system, and Indigenous Canadians will have at least one less area where they are required to play into the colonizer’s game when pursuing or protecting rights.