



Canadian Library Association
Association canadienne des bibliothèques

CLA Statement on the negotiations currently underway at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

The Canadian Library Association (CLA) is Canada's largest national library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned with enhancing the quality of life of Canadians through access to knowledge, literacy and lifelong learning.

CLA's views have been sought by the Government of Canada on three questions relating to the current negotiations at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

A number of Canadian libraries have both long standing and emerging partnerships with indigenous peoples for the collection, preservation and provision of access to traditional knowledge including oral history, literature, visual and performing arts. Research libraries may act as repositories for scientific data gathered in collaboration with indigenous peoples. Libraries hold, and provide access to, collections of traditional knowledge artifacts and cultural expression, with the understanding that the concerns and wishes of indigenous peoples should be addressed in order to ensure the ongoing collection and preservation of such content.

CLA was pleased by the UN General Council's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007¹ and was especially pleased that the Canadian Government endorsed the *Declaration* in November 2010. In the context of the WIPO IGC deliberations on one or more instruments

¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.unhcr.org/refworld/docid/471255a82.html> [accessed 23 May 2012].

on the protection of traditional knowledge, CLA notes Article 31 of the *Declaration*, which states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Question 1: How might an instrument on traditional knowledge or on traditional cultural expressions affect, positively or negatively, the work of your organization, its members and constituents?

CLA stands firmly behind the principle that a strong democracy requires intellectual freedom and free universal access to information.² While endorsing the rights of indigenous peoples to control their traditional knowledge and cultural expressions, CLA acknowledges that there are fundamental conflicts between indigenous aspirations and the international copyright framework represented by the Berne Convention. CLA notes that the International Federation of Library Associations (IFLA) supports protection for traditional knowledge “as long as suitable checks and balances are in place that do not unduly undermine the ability of libraries and archives to fulfill their core mandates and that do not erode the broader copyright balance”.³ It is understood that it will be difficult to find a balance between the aspirations of indigenous peoples, some of whom see WIPO’s role as the imposition of an intellectual rights regime on traditional knowledge to enable misappropriation, and the desire of

² From the CLA Position Statement on Intellectual Freedom: “It is the responsibility of libraries to guarantee and facilitate access to all expressions of knowledge and intellectual activity... To this end, libraries shall acquire and make available the widest variety of materials.”

³ <http://www.ifla.org/en/publications/guiding-principles-for-ifla-s-position-concerning-international-treaties-to-tr>

many stakeholders to maintain copyright balance through protecting broad concepts such as the public domain.

In its February 1993 Position Statement on Special Collections Interest Group Code of Ethics, CLA developed principles to balance the rights of donors to libraries and the rights of access to information which CLA espouses. These provisions apply to materials held by libraries donated by First Nations or those associated with them:

- Rare books and special collections librarians shall provide equal access and service to all researchers;
- Rare books and special collections librarians shall observe copyright regulations and negotiated donor restrictions;

These provisions are consistent with the position recently taken on these matters by the International Federation of Library Associations (IFLA), of which CLA is a member.

CLA believes that observing donor agreements, but not accepting donations which are permanently to be inaccessible, establishes an appropriate balance between, on the one hand, the current policies of libraries balancing the need to assist in the preservation of knowledge with libraries' longstanding roles in the dissemination of knowledge and, on the other hand, the aboriginal peoples' need to protect their traditional knowledge from misuse and abuse.

CLA also believes that neither access nor preservation in libraries should be achieved without observing the balance of interests legislated through copyright. This balance recognizes both the existence of the rights of the copyright holders and the moral rights of authors and also their limited nature and, in particular, users' rights through the exceptions to the rights of copyright holders and authors and in the expiration of both the economic and moral rights in works and other subject matter.

In the view of the CLA, traditional knowledge that has entered the public domain should not be retroactively secreted away. In some situations, such as Robert Bringhurst's reinterpretations of Haida poems originally transcribed publicly in 1900, traditional knowledge holders' rights may seem slighted, but it is simply an unbiased effect of the workings of the public domain. The dissemination of

printed information cannot be easily reversed and doing so retroactively would violate the copyright of writers such as Bringham who adhered to existing copyright laws at the time of publishing.⁴

Question 2: What are your views on the draft traditional knowledge and traditional cultural expressions texts themselves (and, in particular, the articles related to the subject matter of protection, the beneficiaries of protection, the scope of protection, as well as the exceptions and limitations)?

CLA understands that Canadian indigenous peoples have played a leadership role over many years at the United Nations and in WIPO, in particular, in shaping statements which have emerged from those organizations. It is imperative that Canadian Government representatives consult closely with Canadian indigenous peoples in preparing their future interventions at WIPO.

CLA points to the findings of Charles Maina's recent doctoral thesis in Library & Information Science which, by documenting attitudes amongst elders to traditional knowledge held by indigenous communities in Ontario, gives voice for the first time to its participating First Nations' elders.⁵ By reporting his interviews with elders from various communities, Dr. Maina has demonstrated that these custodians of traditional knowledge were completely unaware of government initiatives and proposals to regulate the use of traditional knowledge. It is therefore doubtful that a number of these elders, often the last flickering flames of traditional knowledge in their communities, are aware of WIPO's current efforts. CLA believes that it is vital that the affected groups, *through their elders* as well as other leaders, play an integral role in the debates surrounding not only whether such protection as outlined in the WIPO drafts should be followed in Canada but also in the drafting of the national or regional provisions themselves.

The elders describe how First Nation's communities each define traditional knowledge from their own perspective and are community specific in the ways in

⁴ Nicholas Bradley, "Remembering Offence: Robert Bringham and the Ethical Challenge of Cultural Appropriation", online: (2007) 76 University of Toronto Quarterly 3 at page 899 http://muse.jhu.edu/journals/university_of_toronto_quarterly/v076/76.3bradley.html#FOOT6.

⁵ Charles Kamau Maina, *The Traditional Knowledge Protection Debate: Identifying and Listening to the Voices of Traditional Knowledge Holders* (PhD, University of Western Ontario, 2009) [unpublished].

which they decide how knowledge is meant to be used.⁶ Therefore CLA believes it is not possible to craft a blanket definition of traditional knowledge internationally that will suit all indigenous peoples in Canada. CLA also therefore believes that room should be maintained in our international agreements for concepts of traditional knowledge and its uses in Canada to be defined at regional or provincial levels, through consultation with elders and leaders of all communities.

The concept of “protecting” traditional knowledge may be at odds with the fact that traditional knowledge, the root of many indigenous cultures, must be shared and not “protected” from dissemination to ensure the culture’s survival. Dr. Maina’s consultations with elders in Canada establishes that because of past misrepresentations of traditional knowledge by researchers and other entities, communities now tend to tightly safeguard knowledge that would traditionally have been shared openly.⁷ For First Nations now the concern is often not about reclaiming ownership of their traditional knowledge, but instead about controlling how their traditional knowledge, and therefore their community’s way of life, is misrepresented.⁸

Overall, CLA believes that WIPO’s draft texts for the protection of traditional knowledge and traditional cultural expressions are thoughtful, comprehensive and ambitious. WIPO’s goals of providing international standards for empowering traditional knowledge holders, respecting traditional knowledge systems, and quashing misappropriation of traditional knowledge and cultural expressions are as laudable as they are necessary. Nevertheless, it is evident in the many alternatives and options contained in the drafts that it is a difficult task to articulate provisions that will satisfy every international interest.

The current draft provisions provide that contracting countries may adopt appropriate limitations or exceptions under national law for the purposes of teaching, learning, display, preservation and presentation in libraries.⁹ These

⁶ *Ibid* at page 139.

⁷ *Ibid* at page 129.

⁸ *Ibid* at page 131.

⁹ World Intellectual Property Organization’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Draft Articles*, Doc ____ (Geneva: 16-20 April 2012) at page 21.

exceptions must be in place in order for the libraries CLA represents to fulfill their fundamental duty to allow individuals to obtain, use and disseminate information held in the libraries' possession.

Question 3: What are your views on the current draft text on genetic resources (and, in particular, how an instrument on genetic resources, and any provision regarding the mandatory disclosure of the origin of genetic resources in patent applications, might affect, positively or negatively, your organization and its work or your community, its members and constituents)?

Should genetic resources come to be part of the information collecting within the purview of Canadian libraries, CLA believes that its existing policies on acquisition, use and dissemination of materials must be extended to collections which include genetic resources.

Conclusion:

CLA encourages Canadian representatives at the WIPO IGC meetings on traditional knowledge to acknowledge and reflect the spirit of Article 31 in their interventions and support for emerging international instruments. CLA believes that it will be possible to address the intent of Article 31 of the *Declaration* to provide indigenous peoples the protection they seek for their traditional knowledge while ensuring these protections do not establish precedents which undermine the broader copyright balance, including the public domain. We urge Canadian Government representatives at WIPO IGC meetings to work to achieve this outcome.

June 2, 2012

For further information, contact
Kelly Moore, CLA Executive Director
kmoore@cla.ca, 613 232 9625