

**Where to Turn When Copyright Fails: Finding a Home for Folklore**

Submitted by Susan Croft

## Where to Turn when Copyright Fails: Finding a Home for Folklore

“A story loses nothing by being repeated”<sup>1</sup>

### **I Introduction:**

In recent years, many academics have argued in favour of using intellectual property law to protect Aboriginal folklore against appropriation. Reasons why such protection is necessary include “unauthorized copying of intangible folklore works is similar to looting of tangible cultural properties;”<sup>2</sup> appropriation contributes to, perpetuates, and capitalizes on stereotypes of Aboriginal groups;<sup>3</sup> and non-Aboriginal groups appropriate and distort Aboriginal culture for their own advantage.<sup>4</sup> It is interesting that all of these arguments are framed in economic terms—“looting,” “capitalize,” “advantage”—and that, in all cases, Western society is cast as the proverbial bad guy, seeking to gain at the expense of traditional cultures. What the arguments fail to recognize is that in an increasingly global society, “[w]ith economic development and inter-cultural communication, long-established social structures in traditional communities are gradually collapsing.”<sup>5</sup> This is not to say that preserving folklore has or should become “The White Man’s Burden,” nor that western solutions—like recording and copyrighting traditional stories—are best. Indeed, every attempt to fit folklore into copyright law has resulted in calls for extreme changes to existing legislation. Instead, I believe the solution is a traditional one—storytellers can preserve and transmit the folklore for future generations as they have always done.

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<sup>1</sup> TR Roberts, *Proverbs of Wales: A Collection of Welsh Proverbs with English Translations* (1885), (Kessinger: Montana, 2009).

<sup>2</sup> Gobin Cui, *The Myth of Collective Authorship in Folklore Works*, online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=1458893> at 9 [“Myth”].

<sup>3</sup> Rebecca Tsosie “Reclaiming native stories: An essay on cultural appropriation and cultural rights” (2002) 34 Arizona State LJ 299 at 308 & 326 [“Reclaiming”].

<sup>4</sup> Cynthia Callison “Appropriation of Aboriginal Oral Traditions” (1995) UBC L Rev 165 at para 11 [“Appropriation”].

<sup>5</sup> “Myth” *supra* note 2 at 23.

The term “storyteller” is often used to denote a member of an Aboriginal or developing community who is responsible for maintaining the oral history and traditional knowledge of the people, but in 2012 the profession of storytelling is still alive and well in developed countries like Canada and the United Kingdom—and not just in the Aboriginal populations.

Unfortunately, this has led to some strife between storytellers from developed countries and storytellers from traditional communities on the usual grounds: money, respect, cultural integrity, and over-dissemination. All of these issues could be easily managed with “storytellers’ ethics,” but only if Aboriginal folklore remained accessible.

Defining the term “folklore” is a difficult prospect at the best of times. It can be used to denote “the traditional beliefs and stories of a people;”<sup>6</sup> “sayings, verbal compositions, and social rituals that have been handed down solely, or at least primarily, by word of mouth and example rather than in written form;”<sup>7</sup> and, more broadly, “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.”<sup>8</sup> For the purposes of this paper, I will be using the term to refer specifically to traditional songs and stories, rather than in the broader sense that includes dance and tactile arts as well. Even this more limited definition encompasses a great deal of material: oral history, creation stories, ballads, spiritual teachings, laws, and stories told for entertainment are all caught up by the definition I intend to use.

The aim of this paper is to show that current intellectual property law—without serious amendments—is incapable of helping Aboriginal communities preserve their folklore, and to

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<sup>6</sup> “Folklore,” *The Oxford Dictionary of Current English New Revised Edition* (New York: Oxford University Press, 1998) at 338.

<sup>7</sup> MH Abrams, *A Glossary of Literary Terms*, 7<sup>th</sup> ed (Boston: Heinle & Heinle, 1999) at 100.

<sup>8</sup> International Bureau of WIPO, *The Protection of Expressions of Folklore: The Attempts at International Level*, online: < <http://itt.nissat.tripod.com/itt9903/folklore.htm> > [Attempts].

suggest an alternative form of preservation. In part II, I will summarize the sociological arguments in favour of protecting folk stories, and suggest that many of these arguments are unfounded or self-perpetuating. Part III will discuss the ways in which intellectual property laws—and particularly copyright law—are inadequate systems for preserving traditional stories unless those systems are seriously amended. Part IV will examine the suggested amendments, and explain why these, too, would be unsatisfactory. In Part V, I will argue that copyright law was developed in response to the growing print culture in the Western world, and that forcing Aboriginal populations to comply with its guidelines is almost as absurd as forcing copyright to accept a form of art it was never intended to encompass. Instead, I suggest that the best form of preservation for folklore is to protect the oral culture rather than the stories themselves. In part VI, I will discuss why storytelling is important both to Aboriginal communities and western society, and explain how folklore will be better protected by storytellers' ethics than copyright law, if only traditional storytellers put their trust in their western counterparts. Conclusions will be offered in part VII.

## **II The Sociological Arguments:**

Folklore is not currently protected by copyright legislation in Canada, the United Kingdom, or the United States, although many Aboriginal groups and sympathetic academics believe, for a variety of reasons, that it should be. Although Gobin Cui does not believe folklore should be protected, he acknowledges that “For many traditional societies, unauthorized copying of intangible folklore works is similar to looting of tangible cultural properties;”<sup>9</sup> Rebecca Tsosie suggests that appropriation contributes to, perpetuates, and capitalizes on stereotypes of

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<sup>9</sup> “Myth” *supra* note 2.

Aboriginal groups;<sup>10</sup> and Cynthia Callison argues that non-Aboriginal people have appropriated Aboriginal voices to such an extent that cultural autonomy has been lost.<sup>11</sup> I will examine, and debunk, each of these arguments in turn.

First, Cui suggests that “[s]ome artists in Indian tribes of Canada ... analogize outsiders’ copying of Indian stories to politicians’ stealing of their lands.”<sup>12</sup> Credence is lent to this observation by the opening paragraph of Cynthia Callison’s article:

The Canadian state and society have deprived Aboriginal peoples of much of what defines our cultures—laws and governance by legislative sovereignty; languages and traditions by residential schools; children through control over education and child welfare laws; land bases through settlement and treaties; spirituality through missionaries and religious influences; and art, artifacts and sacred sites through common law notions of property. One remaining thing that defines our cultural identities is intangible expression such as stories, songs, and dances.<sup>13</sup>

As Gobin Cui points out, there is a distinct difference between intangible culture, like stories, and tangible property like artifacts or land. While the latter can only be enjoyed by one person at a time, the enjoyment of the former is neither exclusive, nor depreciated by simultaneous use.<sup>14</sup>

Second, Rebecca Tsosie’s argument that westerners’ appropriation of Aboriginal stories is detrimental to Aboriginal communities since stereotypes are perpetuated by the way in which Aboriginal history is portrayed by western authors and film makers is not only untrue, but unfair. She argues that

the visual depiction of the story moves it into a realm that audiences respond to on an intensely personal and human level. Thus, film as a medium carries a much greater power than the written word alone ... At a fundamental cognitive level, it is likely that film images become part of the viewer’s overall understanding of history and human behavior in a way that text does not. In other words, the film

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<sup>10</sup> “Reclaiming” *supra* note 3.

<sup>11</sup> “Appropriation” *supra* note 4 at para 12.

<sup>12</sup> “Myth” *supra* note 2.

<sup>13</sup> “Appropriation” *supra* note 4 at para 1

<sup>14</sup> “Myth” *supra* note 2.

may carry a higher potential to impart ‘truth’ than a book of fiction.<sup>15</sup>

Presumably, Tsosie would argue that a book of fiction carries a similar exponential weight of truth to the spoken word. I disagree with her conclusion for two reasons. First, Tsosie previously referenced interviews with First Nations actors who had starred in some of the films she uses to prove her point, who were pleased with the way they had portrayed their characters and with the fact that First Nations were finally, if slowly, starting to have some voice in the film industry.<sup>16</sup> Secondly, Tsosie’s conclusion is founded on the assumption that the viewer or reader is unable to determine the difference between fact and fiction. On a small scale, this may be true; the average viewer or reader cannot be expected to know the minutia of history, as Dr. Bitá Amani points out in her analysis of *The Blood Countess*: “The problem is that one cannot say with any degree of certainty, especially if one has never been exposed to the story of Elizabeth Bathory in the context of history books as opposed to *historical* fiction, which elements of this story are historically *factual*, and which *fictional*.”<sup>17</sup>

However, when applied to broad concepts, as opposed to specific facts, the argument loses a good deal of weight. For example, Tsosie suggests that “cartoons like *Pocahontas*, John Wayne westerns, or the plethora of western and romance novels ... capitalize on stereotypes about Indians as either ‘noble’ or ‘bloodthirsty’ savages.”<sup>18</sup> I find it extremely difficult to accept that the average viewer or reader honestly believes in either the “noble” or “bloodthirsty” savage; while these may have begun as stereotypes, in today’s society I am all but certain that most consumers of the types of popular culture described are well aware of the hyperbolic and stereotypical nature of blockbuster movies and best-selling novels, and in this way the

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<sup>15</sup> “Reclaiming” *supra* note 3 at 325-6.

<sup>16</sup> *Ibid* at 327-8.

<sup>17</sup> Bitá Amani “Copyright, Cultural Industries, & Folklore A Tall Tale of Legal Fiction: Part II” IPJ (1998-9) at 289 [Tall Tale].

<sup>18</sup> “Reclaiming” *supra* note 3 at 308.

stereotypes are no different than those of “the thrifty Jew,” “the zealous Christian” or even “the dumb Newfy.” All are distortions of identifiable groups that adversely affect the reputations of the communities to which they refer, and most people know they are inaccurate.<sup>19</sup>

In addition, this sort of argument also lends itself to the counter-argument of the slippery slope, as Tsosie herself recognizes: “Clearly, such a right [to culture] would have to be carefully tailored to only the most significant harms ... Formulating such a right would depend upon a precise description of the various categories of cultural appropriation and a careful evaluation of the harms caused by each.”<sup>20</sup> Although she does not offer the precise descriptions she suggests would be required, She does offer several criteria that might be considered when addressing the level of harm, such as

Is [the harm that is perpetuated] a harm that interferes with the community’s ability to define itself and establish its own identity? Is it the type of harm that can damage or transform cultural practices, thus interfering with cultural integrity? [and] Does the act allow cultural outsiders to materially benefit themselves at the expense of the injured group?”<sup>21</sup>

Despite these guidelines, the sheer impracticality of implicating such exclusive protection for such a broad range of cultures makes Tsosie’s suggested solution of only permitting members of a culture to represent that culture in any format completely unworkable.

Finally, Cynthia Callison’s argument—that folklore should be protected in order to prevent “The use of Aboriginal voices by non-Aboriginal authors”<sup>22</sup> which she compares to “German authors [writing] about the holocaust in the voice of Jewish victims,”<sup>23</sup> before concluding that “Appropriation of our voices suggests that we are no longer living participants in

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<sup>19</sup> Of course, a detailed sociological study would have to be conducted to prove my assessment of the general perceptions of the public.

<sup>20</sup> “Reclaiming” *supra* note 3 at 351.

<sup>21</sup> *Ibid* at 313.

<sup>22</sup> “Appropriation” *supra* note 4.

<sup>23</sup> *Ibid*.

an ongoing culture. Non-Aboriginal people have studied and written about Aboriginal culture to such an extent, both historically and currently, that we have lost cultural autonomy.”<sup>24</sup> This argument epitomizes the problems inherent in all the pro-protection justifications; it assumes that members of outside communities are incapable of understanding and respecting the importance of the Aboriginal experience and the stories that have developed out of it. It refuses to allow outsiders to explore that experience in a meaningful way that will help create sympathy and understanding, but instead insists on a harsh line being drawn between “us” and “them.” I will return to this point in part VI of this paper.<sup>25</sup>

### **III Why Copyright is Not the Answer:**

The reasons why folklore and current copyright legislation are incompatible have been well-cavassed, but are worth re-examining to show how, even with serious amendments, the resulting protection would be unsatisfactory. Christine Haight Farley identifies three overarching barriers to folklore being protected by copyright law: (a) the originality requirement cannot be met, (b) the term of protection is insufficient, and (c) the fixation requirement is antithetical to oral culture.

#### **(a) The Originality Requirement Cannot be Met**

Despite the low threshold of the originality test, it is difficult for indigenous folklore to meet this requirement, since much of indigenous art is derived from previous generations’ work, and great value is placed on reproducing rather than simply producing: “The problem is that if the work is based on a preexisting work, as it invariably would be, only the variation from that work is protectable ... Thus, an outsider could still use the underlying folklore without

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<sup>24</sup> *Ibid.*

<sup>25</sup> See *infra* note 86 and surrounding text.

authorization. It is this use which is troubling to indigenous communities.”<sup>26</sup> Gobin Cui suggests that “Absent reliable and complete copies of former versions, a court should not presume that the *current version* recently fixed by modern performers or collators is not original. On the contrary, the court should presume the current version was newly created at the date of its first fixation.”<sup>27</sup> To demonstrate the adequacy of this suggestion, Cui points to the *Bai Xiu’E* case, where a Chinese court determined that a modern artist’s patterns, based on traditional patterns, were original until and unless the defendant proved the pattern existed historically.<sup>28</sup>

It is important to recall that Gobin Cui is not in favour of copyrighting folklore, but believes that modern artists from indigenous communities should be free to use the copyright legislation as it was intended to be used. Therefore, his suggestion for overcoming the problem of the originality requirement focuses on the rights of the individual and would likely not be accepted by those who believe in the communal aspect of folklore.

**(b) The Term of Protection is Inadequate**

The “communal author” is one of two issues to be addressed in the term of protection problem. Under the Berne convention, an artistic work is protected for the author’s life plus fifty years.<sup>29</sup> When a community—and generations of communities—have been involved in creating the present-day manifestation of the story in question, to whom should the work be attributed? Gobin Cui’s solution springs at once to mind: use the most recent author’s version and copyright it.<sup>30</sup> But, again, this would prove problematic, as the work would then belong to that individual—an unacceptable situation, if the work is to be kept in common.

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<sup>26</sup> Christine Haight Farley “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” 30 *1 Connecticut L Rev* (Fall 1997) at 22 [“Protecting Folklore”]

<sup>27</sup> “Myth” *supra* note 2 25.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Berne Convention for the Protection of Literary and Artistic Works*, WIPO 1971, art 7, 1 [Berne Convention].

<sup>30</sup> “Myth” *supra* note 2 25.

Several ways of dealing with this problem have been put forward: (1) Having modern Aboriginal artists copyright their version of folklore, then assign their rights to their respective communities;<sup>31</sup> (2) have the artist and the elders copyright the work as joint authors;<sup>32</sup> (3) recognize an employee-employer relationship between the artist and the elders;<sup>33</sup> (4) allow the community to be recognized as a juristic person.<sup>34</sup> None of these options are particularly useful.

- (1) Although the idea of having Aboriginal artists copyright the folklore and then transfer their rights to the community seems, at first, to be a workable solution, “modern” artists might not be willing to transfer their rights, and thus the community risks losing their hold on their own culture.<sup>35</sup>
- (2) Having the creator and the community elders author the work has even less potential than the previous option. In order to be joint authors, each author must collaborate in the work, and the contribution of each must be individually copyrightable. As Farley herself points out, typically, although the elders will train, initiate, and even oversee the artist, rarely do they contribute to the work in such a fashion.<sup>36</sup>
- (3) Christine Hate Farley favours the option of viewing the created material as work done for hire.<sup>37</sup> When determining whether an employee-employer relationship exists, courts typically consider

factors such as the skill required, the source of the instrumentalities, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects, the extent of the hiring party’s

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<sup>31</sup> “Protecting Folklore” *supra* note 25.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> “Tall Tale” *supra* note 17.

<sup>35</sup> “Myth” *supra* note 2 23.

<sup>36</sup> “Protecting Folklore” *supra* note 25at 33.

<sup>37</sup> *Ibid.*

discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, and the provision of employee benefits.<sup>38</sup>

Farley acknowledges that “The only factor that would clearly favor a finding of an employment relationship in almost all cases is the fact that clan elders often exercise a high degree of control over the execution of the work,”<sup>39</sup> but such control does not decide the matter. The skill required to create such intricate indigenous art would also lean toward a finding of employee status.<sup>40</sup>

Beyond the fact that it seems unreasonable to view an individual as an employee of the community, I think this puts an undo hardship on indigenous artists; if they are recognized as employees of their community, even their original creations could be recognized as communal property, a fact that could put them at a disadvantage should they wish to compete in the arts and crafts market. A similar, but potentially less-intrusive solution has been used in Australia, where the courts found in *Bulun Bulun & Milpurrurru v. R. & T. Textiles Pty Ltd* that artists owed a fiduciary-like duty to their communities to protect the culture with which they had been entrusted.<sup>41</sup> It is important to note, however, that the courts only considered this during the assessment of damages, and did not find that the communities had an equitable claim on the copyright of the individual artists. Thus, even this compromise would not solve the problem of finding the

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<sup>38</sup> *Ibid* at 35.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Ysolde Gendreau, “Rejuvenating Moral Rights through Immemorial Claims” (June 2005) 19 IPJ 227 at 231 [“Rejuvenating”].

community itself to be a copyright holder.<sup>42</sup>

- (4) Perhaps the most logical solution to the problem of the communal author has been offered by Dr. Bitá Amani in “A Tall Tale of Legal Fiction,” where she argues that Aboriginal communities could own their folklore if they were recognized as juristic persons, like corporations are. In fact, she argues, recognizing a community as a juristic person would be even less of a legal fiction since “a community *can* have a nationality and does *create* works (though collectively) and certainly can be deemed an owner as much as a corporation can.”<sup>43</sup> Yet, even this suggestion is problematic, since, as Dr. Amani acknowledges, under the BERN convention, the community would still not be recognized as an “author,” which must be a natural person. Only a natural person can enforce moral rights—the aspect of copyright law that protects the integrity of the work and the right of the author to attribution. This last option would, nevertheless, solve the basic problem of finding a “person” by whose “life” the term of protection could be measured.

Here, though, we discover the second problem inherent in the term of protection issue: the term of protection afforded under the BERN convention (the life of the author plus 50 years)<sup>44</sup> is entirely insufficient. As Farley points out, protecting artistic work that has been thousands of years in the creating for fifty years is almost laughable, and certainly not enough.<sup>45</sup> In addition, the law would have to be made retroactive to protect folklore that would otherwise suddenly be in the public domain. Such protection would severely limit the material from which

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<sup>42</sup> It is important to note that these cases are also the only cases in which copyright to folklore has been found, and it was found because it was an individual and not a community seeking to impose the right.

<sup>43</sup> “Tall Tale” *supra* note 17 at 297.

<sup>44</sup> “Berne Convention” *supra* note 8.

<sup>45</sup> “Protecting Folklore” *supra* note 25 at 17.

modern artists currently draw, and would certainly impede both freedom of expression and innovation—even more than copyrighting written words. Written material, after all, eventually finds itself in the public domain, where it is free to be reworked into something new. No one is arguing (nor do I believe they should be arguing) for perpetual protection of western literature, though it is as much a part of western culture as traditional stories are of Aboriginal culture; there is a “delicate balance achieved by copyright”<sup>46</sup> that can only be maintained if a time limit to the right exists. This threat to freedom of expression is one of the many reasons Gobin Cui objects to a *sui generis* legal system of protecting the copyright of folklore. Other reasons include: “difficulties in verifying folklore works and identifying a right owner; the bureaucracy involved in managing copyrights; difficulties in allocating the benefits; [and] increasing the awareness of intellectual property rights in traditional communities.”<sup>47</sup>

### **(c) The Fixation Requirement**

The third barrier to protecting folklore is that folklore is not fixed: “In essence, folklore is the antithesis of recorded culture.”<sup>48</sup> Indeed, Callison vehemently objects to the idea of having Aboriginal culture recorded, saying: “Non-Aboriginal people believe oral traditions must be saved and preserved through written records for Aboriginal peoples' own good. This defies the very nature of ‘oral’ tradition that has survived and flourished without the printed page.”<sup>49</sup> Essentially, recording the culture would effectively push “pause” on the development of songs and stories, entirely defeating the purposes of having an oral culture that grows and develops over time. In addition, although stories and songs can be transcribed, translated, audio or video-

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<sup>46</sup> “Protecting Folklore” *supra* note 25 at 18.

<sup>47</sup> “Myths” *supra* note 2 at 16.

<sup>48</sup> “Protecting Folklore” *supra* note 25 at 28.

<sup>49</sup> “Appropriation” *supra* note 4 at 12.

recorded, the originality barrier would still need to be overcome if copyright was to subsist in the folklore.<sup>50</sup>

#### **IV If Not Copyright, then What?**

Clearly, copyright as it currently exists is entirely incompatible with oral culture; it was never designed to accommodate such a thing. Many pro-protectionists suggest creating a *sui generis* type of protection that will overcome or circumvent the problems inherent in fitting folklore into copyright law. On an international level, this movement began in 1967, with the introduction of “unpublished” works to the Stockholm text of the Berne Convention, and continued through the Paris version in 1974, culminating in the publication of the *WIPO/UNESCO Model Provisions for National Laws on sui generis Protection of Expressions of Folklore against Illicit exploitation and other prejudicial actions*<sup>51</sup> (Model Provisions) in 1982. These provisions brought together many of the suggested solutions. The Model Provisions are acknowledged to be a guide for national governments to follow when creating their own legislation, and have only been adopted by a handful of countries in Africa. Nevertheless, the thoroughness of the suggestions is worth examination—and the arguments against them require such.

The *Model Provisions* identify two broad categories of “acts” against which folklore should be protected: illicit exploitation and other prejudicial effects. Illicit exploitation is defined in section 3 of the *Model Provisions* as “any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority

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<sup>50</sup> *Ibid* at 374.

<sup>51</sup> “Attempts” *supra* note 8.

or the community concerned.”<sup>52</sup> Certain uses are exempt from the authorization requirement: Education, “‘by way of illustration’ in original work, provided it’s compatible with fair practice”, “Borrowing” by an author for creation of original work, and “incidental utilisation.”<sup>53</sup> In addition, “The Model Provisions do not hinder the use of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research or archival purposes is not hampered by the Model Provisions.”<sup>54</sup>

Much of the reasoning outlined above is in direct opposition to the sociological arguments outlined in part II. The lack of authorization for “borrowing” would frustrate academics like Rebecca Tsosie, who find it distasteful that non-Aboriginal artists have been able to use Aboriginal folklore in their own creations—films, books, and visual arts alike—even with attribution. Allowing research and conservation purposes are eschewed by Aboriginal academics like Cynthia Callison, who see such uses as an attack on the oral tradition itself.<sup>55</sup> In addition, it seems likely that authorization by a state-appointed “authority” would also be unsatisfactory, since such an authority would not necessarily represent the communities in question.

This has become a problem in Ghana, one of the countries that instituted the WIPO Model provisions. A.O. Amegatcher identifies a number of problems with the Ghanaian copyright act, which states that “The rights of authors under this Law in such folklore are hereby vested in the Republic of Ghana as if the Republic were the original creator of the works.”<sup>56</sup> An

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<sup>52</sup> “Attempts” *supra* note 8.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* note 48 and surrounding text.

<sup>56</sup> Amegatcher, “Protection of Folklore by Copyright – A Contradiction in Terms” (2002) 36:2 Copyright Bull at 36 [“Contradiction”].

“authority” as described in the Model Provisions was developed to moderate the use of Ghanaian folklore, but Ghanaian artists are opposed to this because “it is unfair that Ghanaians are not exempted from paying for the use of Ghanaian folklore which is a heritage collectively bequeathed to all Ghanaians by their forebears.”<sup>57</sup> This response is not unique to Ghana; Farley identifies a group she calls “realist” Aboriginal artists—those who want to make a name for themselves and compete, as individuals, in the arts and crafts market—who would be dissatisfied if a retrospective and perpetual protection was put on the folklore from which they draw in creating their own artistic constructs.<sup>58</sup>

Similarly, determining who is to decide what is considered “authentic” folklore raises questions of representation, and since many stories are common to a variety of groups, the question of who owns an “authentic” piece of folklore also rears. Amegatcher suggests that each country create a database of folklore, from which those unfamiliar with the traditional arts can draw for a fee. The country from whom the artist draws, regardless of the commonality of the art, will receive the payment.<sup>59</sup> While at first this idea has merit, there are, as always, unanswered and problematic questions: who is to decide what is authentic enough to be included in the database? What if one country charges less for access than another for similar works? What if members of the traditional community believe they know the “true” version, but are mistaken? This last question could be answered using the penal aspects of the WIPO model provisions (to be determined by each country, respectively), but implies that folklore will not change over time, which returns us to the danger of freezing a culture by protecting it.

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<sup>57</sup> *Ibid.*

<sup>58</sup> “Protecting Folklore” *supra* note 25 at 14.

<sup>59</sup> “Contradiction” *supra* note 56 at 40.

Ysolde Gendreau, among others, suggests using moral rights to protect culture.<sup>60</sup> Moral rights are an aspect of copyright law that protects an author's rights to attribution and the continued integrity of her work. Elizabeth Adeney explains that "In the beginning ... [t]he point of the protection was to allow the creator the enjoyment of an inalienable right to control the form and manner in which the work reached the public."<sup>61</sup> The idea of using these rights— isolated from copyright or not—to protect culture from materialistic corporations is by no means new:

During the fascist period of the late 1920s and 1930s embarrassment arose at the notion that an author could have personality-based rights. Such rights were altogether too individual to conform to the collectivism of the time. Nevertheless it was recognized that strong authorial protection was a way of safeguarding the national culture against the materialism of the exploiter and the entrepreneur.<sup>62</sup>

The reasons behind allowing an individual to stand in place of his or her community for the purposes of protecting culture have already been explained, but since only "natural people" can use moral rights, it is impossible for a community—even if recognized as a juristic person for the purpose of establishing copyright ownership—to rely on the protection of moral rights.<sup>63</sup>

Dr. Amani suggests Aboriginal communities recognized as juristic persons should have a greater legal capacity than corporations since, unlike a corporation—and like individual authors—communities have a nation and culture to protect.<sup>64</sup> There is, however, one important difference between community-created material and corporation-created material: a corporation is comprised of employers and employees, so the work automatically falls under work-for-hire. In a community setting, the artists are individual, and not all of their work will be sacred or vital

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<sup>60</sup> "Rejuvenating" *supra* note 40.

<sup>61</sup> Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis*, (New York: Oxford University Press 2006) at 4.

<sup>62</sup> *Ibid* at 384

<sup>63</sup> "Tall Tale" *supra* note 17 at 297.

<sup>64</sup> *Ibid*.

to the community. Who is to determine which creations belong to the individual, and which to the community? In addition, as Dr. Amani recognizes, the only way to have protection extended to the Aboriginal communities is to have “The Canadian Legislature ... expressly address these social and cultural concerns through statutory changes, rather than rely on the creative interpretation of an unelected judiciary ...”<sup>65</sup> This suggestion, though well-meaning, touches the heart of the issue.

Many Aboriginal groups in Canada and the United States are frustrated by their lack of control in their own intellectual property—frustrated that their own courts do not have jurisdiction.<sup>66</sup> Presumably, having the legislature step in to address the issue would be seen as just one more attempt on the part of non-Aboriginals to control the way in which Aboriginals manipulate their own culture. Indeed, Cynthia Callison speaks against the “Canadian state” in the first sentence of her article.<sup>67</sup> Rebecca Tsosie points out that

Anglo-American intellectual property law responds to commercial harm, which is seen as providing a disincentive to the development of socially useful knowledge. In a case where the appropriation of culture causes a cultural harm rather than a commercial harm, the law does not have a category to redress the harm ... If the non-Indian defendant is not amenable to suit under tribal law in a tribal court, and if Anglo-American law does not have the capacity to redress the cultural harm, then the Native plaintiff will always suffer the burden of harm.<sup>68</sup>

What is being called for here is not minor adjustments to Canadian copyright law to allow Aboriginal communities to participate, but a complete overhaul of the law as we know it. Dr Amani questions whether copyright itself should be eliminated, and acknowledges that “some believe it should.”<sup>69</sup>

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<sup>65</sup> *Ibid* at 299.

<sup>66</sup> “Reclaiming” *supra* note 3 at 352.

<sup>67</sup> “Appropriation” *supra* note 2 at para1.

<sup>68</sup> “Reclaiming” *supra* note 3 at 353.

<sup>69</sup> Bitá Amani, “Fact, Fiction or Folklore? It's Time the Tale Were Told ...: Part I.” (1998-1999) *IPJ* at 270.

## **V Compromise:**

The majority of the arguments in favour of protecting Aboriginal folklore focus on past exploitation and denigration, and on the potential for future commercial use of traditional folklore. While there is no denying the historical misdeeds of western colonialists, Gobin Cui points out that the exploitation permitted under copyright law has not all been one way: “traditional communities may be unable to exploit their traditional knowledge (including folklore) as effectively as the developed world, but they may more effectively exploit modern knowledge put in the public domain by the developed world.”<sup>70</sup> To prove this, he points to developing countries like India and China, where

perhaps all manufacturing industries are based on Western knowledge in the public domain. These industries have defeated most Western competitors in the world market. Additionally, the developed world is enlarging the public domain everyday. That means traditional communities’ possibility of benefiting from the public domain is increasing every day. So, it seems inaccurate to conclude that the public domain is ‘sharply titled[sic] in favor of the developed world.’<sup>71</sup>

This does not, of course, mean that members of a developing community should be forced to conform with a system that (a) was never designed to accommodate the particulars of their way of life, and (b) they had no say in creating. Nor does it mean that the developed world should be forced to conform to the demands of the developing world. Doing so would serve no obvious purpose. Rather, what it suggests, and what Paul Kuruk has recognized—is that

it does not make sense to try to fit folklore within the rigidities of national intellectual property law. If the uniqueness of folklore cannot be successfully accommodated under modern intellectual property concepts, then perhaps, it is expedient to consider new legal arrangements to give effect to the traditional community's fundamental right to protect its interests from undue exploitation.”<sup>72</sup>

In order to appease all parties involved—Farley’s realists and traditionalists, academics

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<sup>70</sup> “Myths” *supra* note 2 at 11.

<sup>71</sup> *Ibid.*

<sup>72</sup> Paul Kuruk “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States” (April 1999) *Am U L Rev* at 837-8.

like Gobin Cui who believe in the rights of the modern artist, and those like Rebecca Tsosie who think that the right to represent any aspect of Aboriginal life should be restricted to Aboriginals alone—a good deal of negotiation and political dexterity will be required. It will certainly not be a quick fix, nor will it be a one-size-fits-all solution. Undoubtedly, some group will feel their rights have not been sufficiently protected. Nevertheless, this is the only absolute way of ensuring the issue is adequately addressed. What can be done in the meantime to ensure culture is not damaged or lost?

The demand to protect folklore is, in effect, two demands: a demand to protect the traditional stories, and a demand to protect oral traditions. This, in effect, is why folklore is so difficult to protect under the existing intellectual property regime: if the stories are protected, the culture is frozen; if the culture is protected, the stories remain available to the public. Harry Robinson, a member of one of Canada's First Nations, "laments the erosion of his native language, and the replacement of storytelling by television and radio."<sup>73</sup> He believes that he is one of the last of his kind, and that when he "disappear[s], ... there'll be no more telling stories."<sup>74</sup> If the storyteller is the guardian of traditional stories, and the storyteller is a dying breed, perhaps the best way to protect the stories is to encourage storytelling—which can only be done if oral culture is preserved. Although this would make the traditional stories available to the public, there is a thriving culture of storytellers both in Canada and abroad whose respect for and love of stories would help to protect the folklore.

## **VI Protecting Storytellers, Protecting Stories:**

In order to understand why storytelling is worth protecting, we must first understand the

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<sup>73</sup> Bradley Bryan, "Property as Ontology: on Aboriginal and English Understandings of Ownership" (January 2000) Can JL & Jur at 19.

<sup>74</sup> *Ibid.*

importance of the storyteller's roll in society. "For Aboriginal peoples," Russell Binch explains, "the oral format is itself the embodiment of their history, in much the same way as the written format is the embodiment of English history; and in the same way that books are among the most treasured resources of knowledge in Western culture, [s]torytelling is possibly the oldest and most valued of the arts [in First Nations communities]."<sup>75</sup> Beyond simply recording history and providing entertainment, storytelling is used by Aboriginal groups "for ... persuasion or instruction; ... to answer who we were and where we came from; ... for social conduct and control; and [to teach] beliefs, morals and philosophy."<sup>76</sup> Thus oral culture—whether in the form of oral history, folklore, ceremonies or songs—provides much more to Aboriginal groups; it, in effect, "gives indigenous peoples their identity."<sup>77</sup>

Despite this claim, Aboriginal groups are not the only communities in which storytellers do more than entertain, nor are they the only communities that historically derive their identity from folklore. A thorough examination of the history of the storyteller in various western communities would be beyond the scope of this paper, but the example of the medieval Welsh bards serves to demonstrate the importance of oral cultures to western civilization: Welsh minstrels were, in addition to being renowned entertainers, also celebrated historians and genealogists.<sup>78</sup> Historically, bards retained great power in their ability to recollect and create stories. They could gain a king his throne by tracing his lineage back to a legitimate ruler;<sup>79</sup> preside over marriages;<sup>80</sup> and even impose obligations by way of the *glam diem*, a form of

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<sup>75</sup> Russell Binch "'Speaking for Themselves' Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (February 2002) NJCL at 252.

<sup>76</sup> "Appropriation" *supra* note 4 at para 4.

<sup>77</sup> "Attempts" *supra* note 8.

<sup>78</sup> George Borrow, *Celtic Bards, Kings and Chiefs*, (London: John Murrey 1928) at 88.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* at 54.

satire.<sup>81</sup> Like Aboriginal storytellers, Welsh minstrels brought people together, entertained, regulated society, and imparted wisdom through the spoken word.

The modern western storyteller is no different. Anna Fancett,<sup>82</sup> a Scottish storyteller, provides a list of reasons why storytelling is valuable in modern society: First, she argues that “Storytelling teaches all people, but children especially, how to take things from another point of view and how not to put up big divides between people...Stories can connect time frames and generations, societies and religions.”<sup>83</sup> Secondly, “It opens creativity—people are not just perceiving the story passively, but shaping the story, even if they aren’t dictating how it’s going to end. By being the audience, they’re changing how the story will be told ... They’re engaging with it in a way that they can’t if it’s on a big screen.”<sup>84</sup> Thirdly, “Telling familiar stories reiterates how we communicate and use conventions. But it also is important to have stories that break conventions.”<sup>85</sup> Finally, “It engages people in a communal way—you can get a lot of the same things from a book, but you engage with the narrative and the people around you differently with storytelling.”<sup>86</sup> Thus, we see many of the same reasons in Fancett’s defense of storytelling as we saw in Cynthia Callison’s: reinforcing social order, teaching, learning about spirituality, and, of course, basic entertainment. Storytelling enhances a community by forcing communion.

In a legal sense, storytelling is, in many cases, the main form of evidence—testimony. It engages,

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<sup>81</sup> Peter Berresford Ellis, *The Druids*, (London: Constable and Company 1994) at 141.

<sup>82</sup> Anna Fancett is an accredited storyteller with the Scottish storytelling centre. She is the past-chairwoman of the Grampian Association of Storytellers and the past-president of the Aberdeen University Storytelling Society.

<sup>83</sup> Anna Fancett, personal interview 4 Feb 2012 [Anna Fancett]; also see Tim Sheppard, “Why Tell Stories?” *The Storytelling FAQ*, online: <<http://www.timsheppard.co.uk/story/faq/html>>.

<sup>84</sup> Anna Fancett *supra* note 82.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

imagination, which can bridge the gap between the needs and interests of the individual and those of the community ... by developing sensitivity for the suffering of the other as well as a capacity for identification with him or her. Through this process, the other is transformed into one of us, and our acknowledgement of his or her pain is deepened.”<sup>87</sup>

This is important in every-day life as well as in law because it “leads to human solidarity.”<sup>88</sup>

In order to let storytelling thrive, the stories must remain open to everyone. Both Anna Fancett and Pauline Cordiner<sup>89</sup> indicated that if too strong a protection was placed on folklore “the exchange would die.”<sup>90</sup> Stories, Fancett explains, must be told to live. Indeed, in interview with Fancett and Cordiner—and in surveying just a few of the websites that result from an internet search containing the terms “storytellers,” “copyright,” and “folklore”—it becomes apparent that western storytellers have many of the same concerns that have been expressed by pro-protectionists, including the dangers of mass-commercialization of culture, the authenticity of the tales they tell, and the “death” of oral traditions. Surprisingly, the storytelling community in the western world is well-equipped, with “storytellers’ ethics” to handle these concerns.

The most contentious issue is, of course, money. Consider the way in which cultural appropriation was described in the opening paragraph of this paper—in monetary terms. There is a distinct difference, though, between the returns of Hollywood blockbuster movies, and the small sum professional storytellers receive. Despite being a “professional storyteller,” storytelling is not Pauline Cordiner’s “main job or source of income.”<sup>91</sup> Fancett explains that

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<sup>87</sup> Shulamit Almog, “Windows and Windows: Reflections on Law and Literature in the Digital Age” (Fall 2007) UTLJ 755 at 759.

<sup>88</sup> *Ibid* at 759-60.

<sup>89</sup> Pauline Cordiner has been telling stories professionally since 2007, and has been a member of the Grampian Association of Storytellers since 2004, and acted as its treasurer from 2008-2012.

<sup>90</sup> Anna Fancett *supra* note 82.

<sup>91</sup> Pauline Cordiner, personal interview 28 Mar 2012 [Pauline Cordiner].

“[t]here’s not a lot of money in storytelling; people do it because they love it.”<sup>92</sup> Thus, no one storyteller is going to get rich by “exploiting” Aboriginal folklore. Rebecca Tsosie’s concerns about large film companies would, of course, still be valid, but it is a concern shared by western storytellers: Anna Fancett cited teller Taffy Thomas, who says “I don’t care what you do with my stories, so long as you don’t sell them to Disney.”<sup>93</sup> Indeed, Fancett went on to say quite forcefully that “If someone tried to sell [a story] to Disney, I’d do everything to stop it.”<sup>94</sup>

In addition to the mass-commercialization of folklore, Fancett points to the second concern of pro-protectionists (authenticity) when objecting to the Walt Disney Corporation, saying “I have issues with Disney and what they do to stories. They’ll take a story that belongs to the people, change it, and then make it out to be the real story. That’s just Disney’s version, and it’s not being true to the story.”<sup>95</sup> Tim Shepherd, host of *The Storytelling FAQ*, is equally concerned with maintaining the integrity of the tales. He suggests storytellers keep a notebook or create a database to record each story’s “source, cultural origin, age suitability, length etc.”<sup>96</sup> He also recommends writing out a “skeleton” of every story both as an aid to learning the tale in the first place and as a refresher for later tellings.<sup>97</sup> This desire to protect the integrity of stories is born of a respect both for the story, and for the culture from which it comes, and could easily take the place of moral rights. Both Fancett and Cordiner indicated that they were particularly careful with the Scottish Travellers’ tales and with the stories of Stanley Robertson in particular, since he was “specific about the story remaining the same.”<sup>98</sup> The respect that Cordiner and Fancett show for the Travellers’ tales is a result of their close proximity to the culture, and there

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<sup>92</sup> Anna Fancett *supra* note 82.

<sup>93</sup> Taffy Thomas, quoted by Anna Fancett, personal interview 4 Feb 2012.

<sup>94</sup> Anna Fancett *supra* note 82.

<sup>95</sup> *Ibid.*

<sup>96</sup> Tim Sheppard, “How do I keep Track of all the Stories I Learn?” *Storytelling FAQ*, online: <<http://www.timsheppard.co.uk/story/faq/html>>.

<sup>97</sup> *Ibid.*

<sup>98</sup> Anna Fancett *supra* note 82.

is no reason why such respect would not be echoed in North American storytelling circles. It is common practice in the storytelling world to tell the audience where the story came from; it is both a mark of respect, and often a mark of authenticity for the work,<sup>99</sup> and, in a way, acts as a fluid sort of geographic indicator.

Storytellers in the western world are as concerned as Harry Robinson<sup>100</sup> about the continuation of oral culture. “Stories die when you write them down,” says Fancett, “But a story being told is loved and living.”<sup>101</sup> This does not, however, mean that western storytellers believe they have an all-encompassing right to tell any story they please; in fact, “Storytelling ethics demands that a storyteller should ask permission before telling.”<sup>102</sup> This includes re-telling personal stories, as well as cultural stories. Storytellers recognize that there are some stories that are sacred, forbidden, or limited with respect to when they can be told. Fancett says that she would always ask the person from whom she got the story if it was free to tell,<sup>103</sup> and Tim Sheppard suggests that “if you weren't forbidden to tell it (or given other restrictions) when you heard it, your duty as a teller is to tell it ... Every storyteller should make considerable effort to research traditions and contexts, but don't be afraid to start off telling while ignorant and grow in wisdom.”<sup>104</sup> Pauline Cordiner often tells folk stories from outside her own culture, and says that “If I have been made aware that a certain story should not be told by myself (either because the original teller is a bit touchy about it or for cultural reasons) or if I feel I can't tell a story ‘to the letter’ without feeling uncomfortable, then I won't.”<sup>105</sup> Storytellers are human; mistakes will

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<sup>99</sup> Pauline Cordiner *supra* note 90.

<sup>100</sup> See *supra* note 72 and surrounding text.

<sup>101</sup> Anna Fancett *supra* note 82.

<sup>102</sup> Rose Owens, “Storytelling and Copyright”, (Winter 2006) Storyline (Storytelling Association of Alta California Newsletter), online: <<http://www.civprod.com/storylady/articles/Copyright.htm>>.

<sup>103</sup> Anna Fancett *supra* note 82.

<sup>104</sup> Tim Sheppard, “Are there any Stories I Can't Tell?” *Storytelling FAQ*, online: <<http://www.timsheppard.co.uk/story/faq/html>>.

<sup>105</sup> Pauline Cordiner *supra* note 90.

undoubtedly be made, but a respect for stories and the cultures that produce them resonates in the oral traditions. Aboriginal communities have nothing to fear, and much to gain, in trusting in their western counterparts.

## **VII Conclusion:**

Since the mid-twentieth century, academics, indigenous groups, and international bodies have been trying to force the round hole of copyright to accept the square peg of folklore. They have known since the beginning that copyright was designed and developed to protect static works, and yet they have persisted into the twenty-first century that there must be a way to accommodate this unmanageable difference. Only Paul Kuruk has suggested that, rather than beating senselessly at a problem that refuses to be mended, we should perhaps seek a different solution altogether—all together. A satisfactory solution for everyone will not be made by legislatures alone. First Nations, traditional communities, academics, and legal professionals will all have to be approached, questioned, and accommodated to make sure the ultimate protection suits everyone. In the meantime, I suggest that we let culture do what it does best: grow.

Walter Benjamin claimed in 1936 that the art of storytelling was dying: “Less and less frequently do we encounter people with the ability to tell a tale properly. More and more often there is embarrassment all around when the wish to hear a story is expressed. It is as if something that seemed inalienable to us, the securest among our possessions, were taken from us: the ability to exchange experiences.”<sup>106</sup> Yet, in 2012, oral storytelling is still very much alive—from traditional stories to anecdotes, from jokes and riddles to spiritual teaching, but

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<sup>106</sup> Walter Benjamin, “The Storyteller: Reflections on the Works of Nikolai Leskov”, (1936), online: <[http://www.slought.org/files/downloads/events/SF\\_1331-Benjamin.pdf](http://www.slought.org/files/downloads/events/SF_1331-Benjamin.pdf)>.

some stories are more easily told than others, and some are more easily lost. In order to protect those stories that are most at risk, Aboriginal storytellers must learn to trust their western counterparts, and to let respect do what the law has so far failed to do.

Undoubtedly, the solution I have suggested above will be criticized as idealistic, but it is no more idealistic than Tsosie's "hands-off, westerners" approach, and a good deal more practical. With traditional ways of life giving way before the rush of "progress," the only way for indigenous populations to protect their culture is to seek outside themselves. As Gobin Cui points out, many indigenous artists are leaving their communities and seeking western forms of protection for their own artistic creations. It is, perhaps, ironic, that while forward-thinking Aboriginal artists seek copyright, tradition-loving westerners are seeking to protect oral cultures, not out of any idealistic view of "the nobility" of the culture, but out of a genuine respect for the tales and the way they have and should continue to develop. "We see a mountain and tell a story about someone climbing it. That's what we do; we're human,"<sup>107</sup> says Fancett. It is time traditional and western storytellers began working together to find a way over the mountainous difficulty of preserving folklore without pausing culture. It is a climb that cannot be made alone.

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<sup>107</sup> Anna Fancett *supra* note 81.