Draft Notes --

It is deeply humbling to be speaking during the timeslot intended for Dr. Gregory Younging. I have only read his work, but was looking forward to meeting him during this conference. Earlier this year, I had written to Dr. Younging, asking if I could discuss with him a paper of mine—a paper that has stalled. I want to move it forward, because it illustrates that the Copyright Act is tri-jural. Indigenous precepts, what Dr. Younging describes in his work as customary law, underwrite the very system that we have come to associate with both common law and civil law doctrines of copyright.

My thanks to the Steering Committee for their encouragement that I share some of my work – what I hope is that perhaps we could end the artificial separation between Indigenous and nonindigenous understanding of what creativity is, what property is.

But to unravel this a bit messy – I am a little worried that this will degenerate into a stream of consciousness type of recitation. It may help to keep a little of Lord Blackstone's ruminations on English Property law in mind:

Slide 2 - "Pleased as we are with the possession [of property], we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built."

We ought to look at and question our assumptions about the creation and acquisition of property in the realm of intellectual or creative activity.

2. Why do we have a system of copyright? (What is its purpose?)

Going back to my initial statement – that the Copyright Act is trijural – that discover began with questioning the very system of copyright. Why do we have it? What purpose does it serve?

Depending on whether one looks at common-law or civil law foundations for the system of copyright, people lean towards either a goal of natural rights or social utility. [I should point out that exemplar countries of those

two doctrines, France and the United States, both strategically shunned ideology when it suited their interests to do so.]

Canada is perhaps the most fortunate of nations, to have been born of both these founding systems of law. A world famously characterizd by Hugh Maclennan as being of two solitudes. But the two solitudes were not the ending, only the beginning. Looking backwards, I would argue that from those isolated walks of life, Canada evolved into what is prized –in its ideal–a multiculturalism that offers unity, without imposing uniformity.

Slide 2: This the work of sculptor Walter Seymour Alward, depicting those partners towards responsible government Robert Baldwin and Louis Lafontaine

If we actively look for common cause between the ideological poles of copyright, we find that natural rights meet social utility in the belief that creativity itself is valued. Otherwise, the implementation of copyright in either tradition becomes meaningless, raising the question of why have such laws at all? Natural rights must apply to everyone, including past, present, and future creators. Likewise, consideration of societal benefit must ensure that future creative processes are not stifled by the system purporting to encourage creative effort.

Therefore, the purpose of having a system of copyright is to protect the process of creativity itself. While our Supreme Court has operationalized this as balancing the needs of creators and the public, that is not the purpose. And, any statutory or legislative analysis with respect to the changes to the *Copyright Act*, or the settling of disputes under the Act, should be examined against the backdrop of protecting, or even better, enhancing the creative process.

Which invariably then raises the question of how do you enhance the creative process? Well, a precise answer is far beyond the scope of my understanding. But history offers some fairly compelling evidence that creativity feeds off itself – the process relies to at least some degree of accumulation, and exposure to, other works.

3. Alternative metaphor re: property

But where we run into difficulties is by our predilection to name the outcome of the creative process, as property. To lay people, and even in the hands of some lawyers, a property right is absolute. Which is simply not true. Even that most coveted type of property – land – is not governed by absolute control. A landholder must still bow to building codes, zoning divisions, and environmental laws. But in the nonindigenous popular imagination, ownership of physical property means a fiefdom. But such absolutism applied to the fodder on which the creative process relies, meaning other creative works, will not enhance or maximize the creative process. Quite the contrary, it will ultimate limit creativity.

If we must rely on the metaphor of property to shape the development and use of intellectual creations, there is a better paradigm. And by that I mean, we should look to Indigenous perspectives. Because, while both non-Indigenous and Indigenous perspectives of creativity and intellectual effort endure on traditions related to land use, differences in the underlying systems of belief have led to substantially different outcomes.

Before I go further, I do want to emphasize that when I speak of Indigenous paradigms, or principles, perspectives or culture, I am not suggesting a uniformity of thought, custom, or experience from the many Indigenous communities that exist within and across the formal borders that make up the Canadian state. I am simply trying to describe a mode of thought that differs from the views shaped by various colonial administrations put in place after John Cabot (Cabo) and Samuel de Champlain arrived on the Eastern coasts.

Coming back to the nonIndigenous paradigm of property...

In the Judeo-Christian tradition, land was bequeathed to mankind, with instructions to replenish and subdue it. Dominion over all other creatures was also part of the heavenly instruction.[1] For the more secular-minded, the predominant interpretation of John Locke's writings believes that

[1] "And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." Genesis 1:28, *King James Bible*, 13 March 2017 <https://www.blueletterbible.org/kjv/gen/1/1/s_1001>.

property rights arise via the contribution of labour,[2] encouraging the subjugation of untamed land, under an implied ideology of the supremacy of individual property and title.[3]

Whereas many Indigenous communities see land use based on a holistic view of title, and blend spirituality with group responsibility for preservation of the land and all that is found on it. This was made abundantly clear through Founding Declaration of First Nations, which was adopted in 1981:

> **Slide 3 - We the Original Peoples of this land know the Creator put us here. The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The Laws of the Creator defined our rights and responsibilities …. We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the land upon which we were placed….[4]**

Use of land was governed through stewardship of community holdings, not ownership of individual property. To the extent that *ownership* is an item of vocabulary among indigenous communities, the word implies a sense of belonging within a community, and being *of* the land as compared to dominion *over* the land.

This lies in stark contrast to so-called Enlightenment conceptions where *dominion* expressly means having the power to exclude others from the land.

This semantic distinction is identified not only by contemporary indigenous people,[5] but was present during 19th century treaty negotiations with the Crown. For instance, drawing from archival records and their accompanying oral history, with respect to Treaty One negotiations with the Crown, lawyer and legal scholar Aimée Craft writes:

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[2] John Locke, Two Treatises on Government, the conventional Lockean interpretation can be found via C. B. Macpherspon; while some Lockean principles could be argued as preserving the idea of public domain (i.e. leave enough as good for the rest), Macpherson neatly explains that the fungiblity of money effectively sanctions unrestrained taking **[citation].**

[3] A noted break from this line of thought emanated from James Tully …. **[citation].**

[4] Founding Declaration of First Nations, adopted in 1981, quoted in *The Quest for Justice—Aboriginal Peoples and Aboriginal Rights*, eds. Menno Boldt and J. Anthony Long, in association with Leroy Little Bear (Toronto: University Toronto Press, 1985) at 359.

[5] Ibid. Indeed, the entire volume/ case studies of Bell and Napoleon bears witness to this distinction. So too does a special issue of Windsor Yearbook of Access to Justice Vol. 33 (No. 1) 2016. **citations**

> The Anishinabe did not surrender their land … It was not in their power to do so, for they did not own it. In their eyes, they were in a sacred relationship with the land … . [Whereas the] Crown viewed the treaty as a transfer of land… . The conceptual differences between these views of land … were explained at the treaty negotiations, but it is unclear if either party truly understood the other's concepts of land and authority over its use. … .[6]

The stewardship model of ownership did not preclude sharing with others beyond the community, where sharing was usually a managed affair. Of note is a recollection from Kerry Sloan, also a lawyer and legal scholar, concerning her own experiences of tension between Metis and First Nations' people:

> … [the Metis] obtained use, occupation and passage rights through First Nations territories through diplomacy, blended legal systems, marriage, adoption, and, occasionally, warfare. We gained territory through relationships with our First Nations relatives and also enjoyed communal property holding with them. … there were and are Metis territories, and established Metis use rights …. I hoped Metis and First Nations people could have [continued] dialogue about territories and about rights.[7]

The activity and the arrangements made, were not limited in consideration of the impact on the present. There was always an eye to the future. As to how far ahead Indigenous leaders should look when considering a course of action—the phrase *seven generations* recurs.[8] The burden of responsibility was heavy, as even those leaders had no real claim to authority—authority was vested in the customs or traditions, not the people who served as the stewards.[9]

Roughly speaking then, one could say that uses of landed holdings were managed according to a social contract established within communities and

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[6] Aimée Craft, *Breathing Life into the Stone Fort Treaty*, (Saskatoon: Purich Publishing Ltd., 2013) at 99-100.
[7] Kerry Sloan, **citation**, 138-140.
[8] Craft, **citation.** Craft likens that span of time to 140 years (coincidentally, about the same amount of time one could expect a work to be protected by contemporary copyright term.)
[9] *Boldt and Long*, supra note 49 at 338.

between communities, with emphasis on the traditions more so than the wishes of any individual steward. It was permissable to take from the common resources, but there was expectation of continued access to those same resources as necessary to protect them and to uphold the traditions of the community at large. One could say that such takings were a mode of non-exclusive sharing, offered to outsiders as well, with an important caveat; as expressed by the esteemable Leroy Little Bear, "… sharing certainly cannot be interpreted as meaning that one is giving up his rights for all eternity."[10]

And here is where we find commonality with one modern tradition – namely, the public domain.

4. more complex public domain – WIPO, Theberge and CCH

This may sound odd; particularly as that Dr. Younging expressly referred to "the Problem of the Public Domain," given that it affords license to all and sundry to help themselves to Indigenous traditional knowledge and creative works.

Which is true. That structure of that public domain, one that is defined and bounded on the basis of time, is part and parcel of the problems experienced by Indigenous communities attempting to protect their intellectual/creative works, or to safeguard use according to their principles.

But there is an alternative conception of the public domain, one that is simultaneously of greater extent, and more limitation, than is usually considered.

Slide 4 – Noon Dance

This would be a good time to talk about the artwork on the slides.

As I went searching for an artist's work that I felt reasonably confident in using for this venue of semi-public, semi-private display, I discovered the work of the late Joane-Cardinal Schubert. Her paintings and installations have been described as "visual stories of personal experiences layered on a backdrop of social and historical events. She weaves bold Aboriginal

[10] Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm' " in J.R. Ponting, ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland and Stewart, 1986) at 246.

motifs into colourful statements about subjects that touch her." As I read more of her life story, she is crediting with vigorously pushing back the prior tendencies of museum and art curators to consign aboriginal art as reflective of only the past, that they were inclined to ignore that those Indigenous customs, practices, traditions continue to live and breathe, maybe adapt, but throughout, they endure.

I found this work, titled Noon Dance in Galleries West; a magazine focused on artists from Western Canada. They had a few articles about Dr. Schubert, written both before and after her death in 2009. In one published exchange between the editor Jennifer Macleod and Dr. Schubert, Macelod writes in connection to this painting, "I see constant movement in your work. A continuous march of history, of events. I feel, at once, a sense of urgency and a sense of hope when I look at many of your paintings. But I'm never sure I'm getting it. You're speaking a language of your own." To which Schubert responded "It appears you are getting it - if you have an emotional response like this one. My painting exists on many levels. It has to be beautiful so as not to alienate, but I want to engage the intellect too. Allow the viewer room to make a choice. I am simply creating a mirror for them to look into. They see what they want to see and therefore they have a part in the process. I know that I really don't have any control over how they interpret my work."

This imagery and language spoke to me as I delved into the literature about altering our perspective about the nature of the public domain, that it is more complex than just a calculation of time. Canadian could choose to exercise that choice of seeing a domain that takes form by function of use.

And the good news is that again, Canada is better positioned than other nations to make this alteration. We've had heavy-hitting assistance in gaining this awareness.

The tip to Canadians came in 2002 via then-Justice Ian Binnie in the Théberge case. He wrote, "Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole." But he went further and said "This is reflected in the enumerated exceptions to copyright infringement … which seek to protect the public domain in traditional ways such as fair dealing…."

The sharp-eyed among us would have asked: if the public domain is confined to old works, those whose term of copyright protection had expired, why single out fair dealing? Fair dealing is only required when using works protected under copyright. The only logical answer to my question is that the public domain must also be composed of protected material.

Much as I worship the words of then-Justice Binnie, as some of you likely know, this was hardly a new idea—a few legal scholars have offered compelling arguments that the public domain is also composed of protected content when such content can be lawfully used without seeking permission, or making payment, in connection to that use. Said another way, when copyright-protected material is used in accordance with statutory exceptions – at that moment, under those circumstances – the work becomes part of the public domain.

For instance, Jessica Litman's landmark paper of 1990—titled *The Public Domain*—comes to mind as does James Boyle's book of the same title, published in 2003. Litman describes the most important part of the public domain as "the part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect."

Boyle identifies that the public domain includes "those reserved spaces of freedom inside intellectual property." And from Paul Saint-Amour – via his book *Copywrights: Intellectual Property and the Literary Imagination*, – also published in 2003, he says that "the end of copyright releases the protected aspects of the work into the public domain as some unprotected aspects have resided there since its publication."

But it may come as a surprise to know that the World Intellectual Property Organization predates them all. In a glossary dating to 1980, the public domain was defined without fanfare as "The realm of all works which can be exploited by everybody without any authorization, *mostly* because of the expiration of the term of protection."

The use of "mostly" indicates that expiration of term is not the only condition that may render a work as public domain. And please don't miss the critical element – the definition is in terms of "works." Not content, not information, not data, facts or ideas, but works.

So, the public domain includes copyright-protected material that, by virtue of law, maybe be used without seeking authorization or making payment.

But what are those avenues, by virtue of law, that are available? Statutory exceptions in general, fair dealing in particular. And the reason I say that, dates to the Supreme Court decision of 2004, CCH, when with unanimity the Court stated that custom or practice has a part to play in a decision of fair dealing.

The multi-factor analysis required to establish fairness, bears some resemblance to the idea of a social contract, or customary law, in the use of resources, established by communities and between communities, with emphasis on preserving traditions attached to a resource, along with the resource itself.

Extending that principle into all walks of life, communities may be that of scholars who must begin as students, or researchers starting from a deficit of knowledge, or writers, artists and musicians all of whom will better hone their talents by immersing themselves in the works of their predecessors and peers.

But throughout, that social contract which permits use, does not mean that others are unilaterally excluded from that opportunity as well.

So this is why, I feel the paradigm of property espoused by Indigenous traditions exemplifies the characteristics of the broader definition of the intellectual public domain and brings us closer to a shared understanding between Indigenous and non-Indigenous views concerning creative works.

Said another way, the public domain is not merely a conceptual idea, the public domain was, and is, a practice that continues in the culture of Indigenous people. Given the integral nature of the public domain to protecting the process of creativity, which I've described the purpose to the system of copyright, Canada's Copyright Act reflects a tri-jural system influenced as it is by the customs of all three Founding Nations.

5. A more honest understanding of creativity

To stop here though, would be premature. Under the combined weight of individualism and the belief in absolute control of property, creative effort is

usually stripped from its moorings to a collective creative past. That other people contributed to the creation is quickly erased from public consciousness. While all music, poetry, art and so on are creative outcomes from communities, nonIndigenous laws deem that creative effort is alienable property because it is deemed to be only an original creation from a known individual, or known individuals.

Given this reality, an alternative theory of the public domain is not sufficient to arrest these tendencies. Whereas, heightened awareness of Indigenous perspectives—that there are no bright lines of separation between concepts of property and culture, or, individual and community—might overcome the challenge of theory.[11]

For instance, Andrea Sanborn, described how totalizing the idea of owning things deemed cultural is to the Kwakwaka'wakw First Nations: "Cultural property, to me, is anything about us, for us, given to us by our Creator, [anything] to be used by all of us with respect." The aspect of use with respect may be guided by others, but again it is the tradition of use that carries the authority, not the guides, even if the language of ownership is invoked.

From past to future, it is the inalienability of property and ownership that fosters and maintains relationships between individuals and communities. There is an overt consciousness to not betray one's ancestors, nor to compromise one's descendants. Both tangible and intangible elements remain attached to their ancestral communities. This Indigenous paradigm of existence, exemplifies an immersive, relational experience within a community, and imbues everyone with some much-needed humility.

It is this aspect that is sorely lacking from nonIndigenous conceptions of creativity. What is needed is a more honest acknowledgement of how fluid, how interconnected, the creative process is.

[11] Granted, this approach is the reverse of the prevailing trend to find some means to protect aboriginal IP through the framework of Western IP; for instance, The relevance and application of copyright to aboriginal culture is discussed in Catherine Bell and Val Napoleon eds., *First Nations Cultural Heritage and Law* (Vancouver: UBC Press, 2008) at #. Similarly, CIPPIC offered a proposal to frame distribution of aboriginal cultural property via Creative Commons see CIPPIC, **(citations).** See also Sara Bannerman, Brian Noble, Michael Young,**(citations)**

Slide 5 – Litman

To this end, Jessica Litman makes a valiant effort: “An author, be she writer, composer, or sculptor, seeks to communication her own expression of the world. Her views of the world are shaped by her experiences, by the other works of authorship she has absorbed (which are also her experiences), and by the interaction between the two. Her brain has not organized all of this into neat, separable piles into ‘things that happened to me,’ and ‘things I read once,’ and ‘things I thought up in a vacuum’ …” Litman, supra note 42 at 1010

Nothing of life is experienced in separation to the rest of life. But we deny this through the fiction of the author as an isolated creative genius. It is worth remembering that portrayal of an author needed to be constructed, in order to anchor the system of copyright.

So in that respect, it’s a fairly recent construction. It followed the rise of the reading public, the developing market for books, that characterized the Romantic era. Those poets were none too happy with a world in which books were articles of sale, and writers were mere producers of commodities. As authors wrestled with changing streams of income and the need to compete in a marketplace, the idea of the individual creative genius whose work is original unto himself served to shelter the esteem of an author and justify the boundary of property around a creation.

Even though, for a far longer period of time, writers, artists, and musicians were only conduits of creative endeavor. The work was attributed to heavenly inspiration, its rendering was in service to the Divine – to some god or the other. This too shows affinity to Indigenous perspectives on the roots of creative undertakings.

Slide 6 – Notre Dame

And, given the recent global display of a visceral pain felt as the world watched flames surround the spire of the Notre Dame Cathedral – I think many people saw something much more than a historic building at risk of demise. I think people’s emotional responses were to some degree because of the spiritual aspects that underpinned Gothic Cathedrals. One did not have to be Catholic to share some feeling that places of worship are

special. That it is much more than just timber, stone, stained glass, tapestries …

But if we must insist on a staunch secularism between art and the viewing public, again, Canadians are attuned to the principals encoded through moral rights, that there is at least relationship between art and artist. Canada was the first common-law country to recognize moral rights – we did this in 1931.

6. The artificiality of separating Indigenous intellectual creations from what are deemed intellectual property.

And yet, despite the commonality of method and relationship that affect the creation of any art, music, literature — we artificially separate Indigenous works from nonindigenous works. We describe the former as cultural property, and the latter as intellectual property. Where as, it is all cultural property. Creative effort is always an outcome of experience, and this would be a good time to invoke Raymond Williams' definition of culture, as everyday lived experiences.

So where I am going with all of this, is to suggest that Canadians recognize that our ideas of creativity and ownership of intellectual effort, have far more in common with the practices of Indigenous people, than the individualist conceptions that have framed contemporary law. That on this point, we might do well to heed the thoughts of Lord Blackstone, and ask where do any of our so-called original creations come from?

Slide 7 "TRC"

As I wrote in my brief to the Industry Committee last year; "… recognizing Indigenous traditions that we implicitly already follow, supports the objectives of the Truth and Reconciliation Commission, particularly the recurring call for better integration of Indigenous law into Canadian life.

Much as we acknowledge that the physical ground beneath our feet is Indigenous territory, we ought also to acknowledge those Indigenous paradigms which serve as the foundation to our own creative and intellectual undertakings.