

By Design The Protection of Intellectual and Creative Rights

Introduction

Good Afternoon. We would like to thank the Union of BC Indian Chiefs for inviting us to sit on this panel with colleagues from the Pacific Rim to talk about the protection of our art. Let us briefly introduce ourselves before we proceed:

Lou-ann Neel is from the Mamalillikala, Da'naxda'xw, Ma'amtagila, and Kwagiulth peoples in the Northern Vancouver Island area. Lou-ann is the grand-daughter of Ellen Neel (Kwagiulth), who was a recognized master in the disciplines of carving and textiles. Lou-ann is initiated within the Potlatch system, having receiving a name and a dance from the Mamalillikala side of her family during her family's feast in 1994. With the guidance and mentorship of accomplished Kwakwakawa'kw masters, Lou-ann has been creating works in textiles, painting and silver-engraving for over 10 years, and has been involved in community development work for the past 15 years.

Dianne Biin is from the Tsilqhot'in peoples along the Chilcotin Plateau region of BC. She comes from a tradition of basket weavers, textile makers, and beadwork designers. For the past few years, Dianne has been learning the disciplines of beadwork and painting with her mother, aunts, and grandmother as her teachers. Dianne's other energies are focused upon her business where she shares her expertise of over 10 years in economic/community development and her lifetime of expertise in entrepreneurship with various First Nation communities across the province.

Our Perspectives

We are here today as First Nation artists; community developers; and entrepreneurs to share our belief that there needs to be a great deal more discussion -- directly with First Nations artists -- on the practical solutions

around issues of copyright, intellectual properties, and the traditions of artistic disciplines amongst all First Nations peoples. That which the market sums up as "art".

Let us first clarify a crucial point in our discussion. As with many Indigenous groups throughout the world, our respective languages have no one-word for 'art'. We also do not have a singular word for 'artist'.

Instead, we have words and phrases that describe individuals or groups of individuals as being knowledgeable or skilled in a particular area of creative works -- professionals who are, for example, 'knowledgeable in the way of the songs' (composers, singers) or 'knowledgeable in the legends and histories' (storytellers, painters, carvers, etc.).

The past few generations of ethnographers, anthropologists and industry participants have elected to use the terms 'artist', 'artisan' or 'craftsperson' when referring to our practitioners and masters in the disciplines.

While we would prefer to use a more suitable designation, for ease of discussion we will use the terms "artist" and "artistic" but offer a definition of our own making to define artists as "*trained practitioners and masters of the formal artistic and creative disciplines of our people*".

In Kwakwala, we would say "*Xa nax'wa ni'nogad kotla'xees dlax-wa-tla-as*" ("*those who are knowledgeable know where they stand*"). Many languages speak this same truth.

By definition, then, our artists inherently carry more than an individual right to create our unique forms and styles of work; they carry obligations, responsibilities and accountabilities that are learned through our traditional disciplines in the artistic and creative works. Yet there are no formal disciplines currently in place within which artists can undertake formal studies and apprenticeships.

What is especially unfortunate about this current (and shortsighted) reality is that the industry itself is set up exclusively to reap the benefits of our 'art' and 'artists'. It makes no investment in current or future quality and applies no standards.

Worst of all, it does little to nothing to support or encourage the development of the artist through arts training and apprenticeship programs and/or formal higher-level studies in the traditional formal artistic and creative disciplines.

Instead, the imposition of the 'Western' value judgement of art, artist, artisan and craftsperson has served only to cheapen the true value, meaning and significance of our work, and has resulted in a mis-informed public and already-saturated tourist and gift markets.

Case in point -- there is a phenomenon in Victoria called Government Street, a hot spot for local and international tourists all year round. There have been many First Nation artists who have walked store to store to try to sell pieces – pieces that were created based on a set design and discipline.

When the artist walks out with their lower-than-average fee, retailers place the pieces beside replicas, most of them are of poor quality, made by non-First Nations artists, with the majority of them manufactured overseas.

Potential markets beyond local tourist or gift shops are not being explored with any regularity, and for many of our artists, access to other markets is limited to artists who are already "recognized".

In terms of ongoing copyright issues, most artists feel that their rights to a finished piece are severed once a purchase and sale has been made. Very few artists, both First Nation and non-First Nation however, are aware of the fact that Canadian copyright affects them and their work. Even

professional art institutes do not touch upon the legal or business realities of the art industry.

In the end, many artists enter the marketplace with no idea or experience in negotiating a contract and asserting their rights. Business savvy for the average artist instead, comes through the school of hard knocks.

For these reasons (and more), we believe that our formal disciplines must be properly re-established in order to create the appropriate context for ongoing discussions on formal development, industry development, and on matters pertaining to copyright and intellectual rights.

The disciplines provide the social, political, economic, cultural and legal frameworks and guiding principles of our artistic and creative works, and illustrate the inter-connections of all our traditional systems.

200 years - The passing of Seven Generations

The past 200 years overall have had devastating and irreversible effects on our people and on our traditional disciplines.

In the first hundred years, smallpox, tuberculosis and other contagious diseases decimated communities rendering them unable to carry out the traditions of our artistic and creative disciplines (i.e., creation of artistic works, potlatching).

Legislation stifled any and all efforts toward self-government (i.e., the creation of formal studies in the arts); and policies demoralized people (i.e., assimilation preventing and interfering with the transference of the disciplines to the next generation).

The paralyzing indifference of government and the public have, over the course of the past two centuries, systemically and systematically deteriorated our traditional systems to the brink of collapse.

In its place, we find a commercial marketplace and industry that is founded upon the illegal use of the forms, elements, characteristics, principles, and histories of First Nation cultures.

Our forms, elements and histories have been trivialized into sound-bytes and clip-art, and continue to profit primarily those involved in the commercial marketplace.

The strict traditional disciplines that establishes the methods, techniques and rules for formal creative works have been cast aside in the interest of mass production of cheap knock-off items for a quick profit.

These manufactured and/or assembly-line items are not subject to any standards to measure the quality of the work or to ensure appropriate permissions have been granted for use of cultural, historical and artistic elements of the work.

As a result, the market is flooded with meaningless trinkets bearing miserably deficient copies, forms and elements of our traditional designs.

116 years ago

A great majority of the more ambitious legislative, legal and policy campaigns against our people unfolded over the course of the past 116 years (1884-2000).

This was the beginning of the most intense legislative attack on our artistic and creative rights; all of which were, through the Canadian law, made illegal and punishable by law. It began in 1884, when a particular section was added to the *Indian Act*. It came to be known as the "Potlatch Ban" and read:

Every Indian or other person who engages in or assists in celebrating the Indian festival known as the "Potlach" or in the Indian dance known as the "Tamanawas" is guilty of a misdemeanour, and shall be liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement; and any Indian or other person who encourages, either directly or indirectly, an Indian or Indians to get up such a festival or dance, or to celebrate the same, or who shall assist in the celebration of same is guilty of a like offense, and shall be liable to the same punishment

This meant that for 67 years it was illegal in Canada for First Nations people to carry out our traditions; three generations of our people were stifled, no new pieces were to be created, and any remaining pieces were to be destroyed unless a collector or museum fancied 'accessioning' them.

The formal disciplines could not be openly practiced, and thereafter, three more generations were forbidden to learn of their rights to the rich and sophisticated artistic and creative works of our people.

Of course, in Canada there's almost always an exception to the rule. Pieces could certainly be produced for the purpose of sale (to collectors or

tourists). But none of the related histories, dances, songs, and legends that corresponded with those pieces could be demonstrated or claimed.

Once the Potlatch Ban was dropped from the *Indian Act* in 1951, our carving, singing, and language masters could openly display the disciplines and share it within a public context without fear of retribution. However, Section 35 was merely 'dropped from the books' not formally rescinded, so it remained difficult for a time to know whether one would be punished for creating traditional works again.

In addition, the ongoing battles all of our communities faced with diseases such as smallpox and tuberculosis claimed many of our skilled masters, and with them, the knowledge of the disciplines. We were fortunate to have some who survived and remembered the disciplines and their processes in transferring the knowledge to the next generation.

It appeared to be a renaissance within our communities, and by the 1950's our pieces started to receive recognition in the marketplace. Practitioners and masters in the discipline created exciting works using modern supplies, tools and equipment, and created a unique industry that flourished through to the 1970's.

In the early 1970's, the BC Indian Arts and Crafts Society was established and started to assert First Nations' art as a legitimate complement to the tourism and gift industry.

The society's Board of Directors included First Nation artists from across the province. Some programs offered included a carvers program – artisans could apply for a grant to assist in acquiring the proper tools to start practicing the disciplines and if artists required supplies like hides, the society would leverage a bulk purchase of finished hides and provide the necessary supplies to artists.

Every year, the society coordinated an exclusive trade show in Vancouver for artists to showcase their pieces and receive fair market value in a

structured environment. The society continued until the early 1980's until funding restrictions led to the society's dissolution.

Since then, there has not been a structured organization in place to whom artists can turn for proper information, education, training, apprenticeship, professional development, or market development expertise.

The past 6 years

Gaining a foothold in the industry will once again require some form of organizational structure and industry support; however, the work in this area, particularly for us, has been slow moving. And despite a number of studies and reports on First Nations artists across the province, minimal action has been seen.

For instance, back in 1995, Lou-ann and Dianne were involved in a provincial initiative, the Aboriginal Artists Project. It involved conducting artist surveys across the province to determine current benchmarks in the industry and what artists would like to see offered to enhance the industry they were struggling within.

Artists pointed out that in BC, there are:

- No systems to formally train, educate, apprentice, and provide appropriate support to First Nations artists in all artistic fields;
- No formal institutions, curriculum, culturally relevant industry models, standards or support systems to ensure the integrity of our artistic works;
- No systems of measure by which to distinguish between beginners, apprentices, mentors and masters; and
- No public awareness and education initiatives that speak specifically about First Nation ownership and usage rights.

Five years after the Aboriginal Artists Project and its report conveying four key recommendations, things have not changed much. We realized at this point that government priorities did not fit our agenda to protect and reinstate the disciplines.

As artists, we have begun the task of establishing some form of organizational structure and networking mechanism to begin addressing the important issues facing us.

Current Discussions

In all of our discussions with artists we arrive at the same basic principles - the best protection to be found for the traditions and the discipline itself is within the framework of our traditional systems. Artists agree that traditional systems (such as the potlatch) are the very basis of their rights to do the work they do.

Several Kwakwakawa'kw artists have explained that, in terms of their understanding of ownership, the traditional potlatch system is made up of all the families of the Kwakwala-speaking people. Individuals and families hold these rights in every component of creative expression; each item is manifested within the strictest contexts of the traditional governance systems and disciplines.

Each generation of each family has invested and re-invested tremendous wealth over countless generations to retain the rights of ownership and usage over the elements, forms, and expressions of their respective creative works.

For instance, songs, dances, masks, ceremonial objects, regalia, dance screens, poles, house posts etc. etc. are all creative works that have been paid for and are owned by (or carry certain usage rights) amongst one or more families within the system.

Ownership and usage are intrinsic to the system and vice-versa.

As a result, access to the forms, elements, characteristics and principles of design and creativity that arises from the histories of our people is limited to those within the traditional systems themselves.

Those outside these traditional systems may only access rights of usage by way of permission from those within the system.

Within the potlatch system, there are formal processes for this type of permission to be established and acknowledged as legitimate transactions. This is what we mean when we talk about protocol.

The purpose for obtaining permission to utilize the forms is to maintain the complete integrity of the forms that shape every song, dance, item of regalia, ceremonial object, musical instrument, prop, and history that comprises a family's box of treasures.

In this way, families can maintain their rights of ownership and transfer these rights, fully intact, to the next generation. This forms an important part of our economic and legal systems.

The traditional system and the formal disciplines contained therein are the social, political, economic, and legal framework for all aspects of the culture -- particularly with respect to one's roles, responsibilities, obligations, rights and prerogatives within the system. Upholding the integrity, dignity and ultimate value of creative works is of central importance to the artist working and creating within the discipline and the system.

By design, the traditional system and formal disciplines provide a means by which families and practitioners of the discipline can exercise, uphold and validate their respective rights of ownership and usage. We need to use these as our framework for the future, and need to carry out research and development in this area immediately.

Practitioners of the Discipline

In our view, understanding what it means to be a 'practitioner of the discipline' is to be *"the trained practitioners and masters of the formal artistic and creative disciplines of our people"*. It is crucial to understand the extensive degree of responsibility "artists" carry within our communities and our traditional disciplines; hence, each artist's creation conveys the inherent nature of the rights in matters pertaining to copyright and intellectual properties.

We view this as central to any discussion of First Nations art, as it is part and parcel of the intentions of a creative works, and therefore directly linked with the issue of individual, familial, and collective rights of ownership and usage.

In a modern context, while artists can certainly exercise some control over their work and it's reception and distribution outside of the community, there are still responsibilities linked directly to family in terms of creating commercial versus ceremonial works.

Properly trained artists have an understanding of the pieces that cannot be produced for commercial sale, and pieces that can be commissioned by families within the potlatch system.

The forms in our designs follow a strict 'artistic' discipline in terms of how they are shaped and connected to create everything from the most simple to the most complex of designs.

Forms cannot simply be thrown together randomly. The discipline demands that the elements are meticulously organized with exacting proportion. This is why it is important for 'artists' to apprentice with those who are recognized as knowledgeable and skilled in the disciplines.

'Artists' within each family group have to train and apprentice in order to learn which designs they have the right to create and use, and which designs they would need to seek permission to use.

As practitioners of the disciplines, ownership of works created using the disciplines are partially ours (as artists) and partially our families' (i.e.,

extending out to both maternal & paternal grandparents' families = four tribal affiliations).

Each branch of our extended family tree is represented within the potlatch system. This means that each family member is responsible and accountable to carry the families' rights, responsibilities, obligations and prerogatives with dignity and integrity. At this point, an "artist" is formerly recognized as a master; they carry the knowledge and know where they stand.

In other words, the artist in our community exercises their rights to create by virtue of their belonging within the system; they have the right to create the forms, shapes and elements of our traditional design works.

This is what we mean when we say that those outside the system do not have the right to reproduce, sample, or use any of these pieces -- most especially outside of their intended context.

This is why we regard the use, abuse, and appropriation of all elements of our designs and creative works as outright theft.

Practical Solutions: Re-emerging Disciplines

How do we begin to re-establish the disciplines and clarify the rights to practice the discipline? Some folks have talked about defining the discipline and having it protected through a treaty. In BC, treaty making is a reality – however, treaties may come too late.

In our experience working within the realm of treaty making, active discussion on the formal recognition and protection of our expressions is not happening. At the same time, countless artists lose valuable time in exercising their rights of ownership and usage over the forms and elements of our creative works.

We recommend that treaty societies who are not currently resourced for managing substantive issues such as arts, culture, language and heritage identify funds to immediately undertake this important work.

All of the rights of ownership and usage to which we refer are indeed, inherent to our people, and in our opinion, can most certainly be fully expressed and managed within the spirit and context of Section 35(1) of the *Canadian Constitution Act* (1982), which states:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Giving expression and definition to Section 35(1) is an effort that must be undertaken at all levels and driven by First Nations artists and communities.

Rather than attempt to map out this recommendation in this small space, we refer you to a paper entitled *Aboriginal Custom, Copyright and the Canadian Constitution* (1999, David Robbins) (contained in conference package). We were pleased to work with David in the development of his paper, and commend him on his work!

In practical terms, we believe that our communities can become involved in the restoration of the disciplines and family treasures through local arts and culture initiatives. The entire process of preserving the endless museum and private collections of audio, video, film, pictorial, as well as utilitarian works and items of décor is an opportunity waiting to happen. Training, employment and entrepreneurship opportunities abound, if we take immediate action.

Collectively, the preserved treasures will help communities to piece together a more complete understanding of the histories and enable foundations and frameworks for our disciplines to be re-established at the communal level.

Quite simply, communities must not be hindered, and should indeed be supported, in exercising the rights of ownership and usage inherent within our systems.

We recommend that a specific legislative strategy for protection of these rights by way of the *Canadian Constitution Act* (1982) be developed, along with support for models of community initiatives that promote the re-establishment of the disciplines.

One example of this is already underway in Victoria, Alert Bay, Nanaimo and Vancouver. Entitled "Knowledgeable in the Way of the Songs", the project is designed to develop a model by which we can re-instate the discipline of singing and composing Kwakwakaw'akw songs.

Research methods, location of songs, restoration of the original songs, translation and transcription, tracing the ownership of the songs back to the respectful families, and teaching the song is a whole process few know how to use.

In addition, the project demonstrates how technology can be used in restoring and preserving songs and audio/reel-to-reel interviews and that a multi-media application can be used as learning tool in conjunction with a complete cultural education program. The project was developed through a community-agency partnership between the Consortium of Indigenous Arts (CIA) and the Victoria Kwagiulth Urban Society (VKUS).

The CIA is a newly established artists network that is currently developing its initial organizational designation and formal structure. The CIA's focus is on:

1. Gaining better access to arts and culture training, education, career & business information and opportunities for First Nations artists; and,
2. Organizing as a formal entity to begin shaping of the First Nations arts and culture industries.

VKUS is a not-for-profit community organization that has been involved in community development for over 12 years. VKUS's mandate includes the provision of programs and services in the areas of:

1. Arts and Culture
2. Education and training

3. Healing, Healing and Wellness

Together, the CIA and VKUS were able to receive funding for this project from Canada Council's First Peoples Music Program, BC 2000 Millennium Fund, and the National Aboriginal Achievement Foundation.

Continuing this work and giving artists a voice within the industry is the shared goal of the CIA and VKUS. Current trends, community realities, and dynamic growth opportunities in the art, tourism and culture industry reveal that we, as First Nations artists, have to shape and steer the industry through definitions and standards we develop.

The direct and ongoing involvement of artists, families, and communities in mapping out the traditional systems is required. Re-instating the formal disciplines of our people, and communicating this to the public will ensure that our culture will not follow the path of a predictable consumer and market trend, but will instead serve as an excellent model of social and economic certainty for our communities.

Closing Thoughts

Discussions with respect to current legislation, international law, and public policy are certainly important; however, in BC, First Nation artists and those who create works within the traditional disciplines of their respective nations continue to be under-resourced and largely unprotected.

Copyright laws enable the creator to receive recognition and fair compensation for an original creation to facilitate trade. Yet our creations are not original pieces that were created out of thin air, and the ownership of the form does not cease with the death of the artist + 50 years.

Those artists who do know the legislation and incorporate it into their businesses still find it a nuisance due to self-enforcement and a high set of fees to protect creations for a short period. Even still, for First Nations artists, existing copyright laws fall short of providing the kind of

protection of rights that is found within traditional systems such as the potlatch.

The unrelenting commercialization of First Nation art forms has seriously impacted individual and collective rights of ownership and usage for artists, our families, and our communities. An arts organization or network for First Nation artists would enable constructive dialogue with practical doable solutions. We cannot and will not allow the history of the past 200 years to further impair our ability to exercise our rights to the forms, elements, shapes and designs that come from our people.

Where do we go from here?

There are a few things that need to happen to create meaningful and long-lasting solutions -- not the least of which is the development of First Nation arts organizations and other formal networks.

1. First Nation artists need to connect with one another to discuss these issues in depth. Conferences, symposia, workshops, and community gatherings must be organized to obtain advice and direction from the artists themselves and to provide artists with the most up to date information on issues that will effect them directly.
2. First Nation artists must have an arts organization or network organizations that are adequately funded, resourced and mandated to provide programs and services that will support the professional development of First Nations artists in the discipline of their choice.
3. Treaty tables have to develop position papers and related research departments to ensure the protection of artistic, creative and intellectual rights in all agreements with other levels of government.
4. Each level of government (municipal, provincial, and federal) along with international organizations such as the United Nations must re-examine their legislation, policies and processes to specifically (and

more adequately) address the rights of First Nations peoples' arts, culture and heritage.

5. Instill a public education strategy at the market level. Ensure that instead of an attractive price point, items are placed within the context of their origins and that consumers feel they have a closer connection to the artist – a cultural experience that goes beyond a paid experience. Demystifying current views of First Nations by including us in the marketplace will create a market niche that has not been successful to date.