

Is a New Legal Framework Required for Digital Preservation or Will Policy Do?

Building a legal framework to facilitate long-term preservation of digital heritage: a Canadian perspective

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Abstract

What is “law” and how can law reform facilitate digitalization and preservation of cultural heritage? The current UNESCO Charter on the Preservation of Digital Heritage contains an excellent start, but would benefit from defining its terms and broadening its scope to add issues that States should consider in developing their laws. These issues start with State constitutions, and include tax reform, copyright law reform, protection and preservation of the cultures of indigenous peoples, and the practical problems of law enforcement in the digital era. Some Canadian solutions are discussed in this paper. It is also suggested that the role of UNESCO as contained in the current Charter could be expanded to include the drafting of model provisions with commentary to assist States in improving their domestic laws.

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1. Introduction

The provocative topic of this panel, “Is a new legal framework required for digital preservation or will policy do?” might be misunderstood as it appears to offer a false dichotomy between law and policy as alternatives, and that it would be open to a society governed by the rule of law, to bypass the formalities of law by adopting the expedient of policy. In a state where the rule of law prevails, it is impossible to divorce policy from law, however. Policy is subject to the rule of law through judicial scrutiny. Governmental policy must be founded on legislation. Under the rule of law, Parliament must enact the legislative basis for the iteration of policy. On this legislative basis the Executive can develop policy, which would take the form of delegated legislation, known as “regulations.” The rule of law only requires that the bare bones of Parliamentary intent to authorize the Executive to make regulations appear in the

statute, leaving plenty of scope for policy development in regulations. The rule of law requires that regulations must be subject to judicial review to ensure that they do not exceed the underlying legislation.¹ The *United Nations Millennium Declaration* articulates the supremacy of the rule of law and connects it with digitization and cultural heritage.²

Law features prominently in the UNESCO, *Charter on the Preservation of Digital Heritage*.³ First of all, the *Charter* defines the scope of digital heritage to include “legal” heritage materials.⁴ Second, the *Charter* identifies “the lack of supportive legislation” as a factor contributing to the endangerment of digital heritage worldwide.⁵ Third, the *Charter* urges States to adopt legal measures safeguarding digital heritage.⁶ Fourth, and giving rise to the topic of this article, the *Charter* recommends that States enact appropriate legal frameworks to secure the protection of their digital heritage.⁷ The *Charter* states that a legal framework for the protection and preservation of digital heritage should provide for legal deposit and for reasonable access by the public to the deposited heritage material.⁸ States are also encouraged to develop another legal framework for ensuring “authenticity” of digital heritage and to prevent its “manipulation or intentional alteration.”⁹

This paper offers some suggestions whereby the law might cease to be part of the problem, as is alleged by the *Charter*, Article 3, and become part of the solution in eliminating or reducing impediments to the preservation of digital heritage. Protection of cultural heritage is not only an important Canadian constitutional value, but also a worthwhile endeavour in its own right.¹⁰

What reforms might be included in a State’s effort at building a comprehensive series of legal frameworks to facilitate long-term preservation of digital heritage? A revised *Charter* might define “legal frameworks” to inform States of the broad scope of issues to be addressed, including constitutional, fiscal and taxation, and copyright impediments to the preservation and protection of cultural heritage. The perilous future of indigenous cultural heritage invokes the honour of the Crown as protector of human rights and cultural diversity in relation to Canada’s First Nations, Métis and Inuit peoples.

The *Charter* raises another issue: what is the most constructive role for UNESCO to play in regard to the legal aspects of preserving and protecting digital heritage? Article 12 of the *Charter*, which defines “[t]he role of UNESCO” only refers to proposing standard “**legal** and technical guidelines, to support the

The author gratefully acknowledges the many helpful comments and suggestions offered by Ken Cavalier, PhD, LL.M., LL.B., and B.A. on a draft of this paper.

¹ Catalyst Paper Corp v North Cowichan (District), 2012 SCC 2, [2012] 1 SCR 5 at paras 12-15.

² UNGAOR, 55 Sess, UN Doc 55/2 (2000), Articles 20 [digitization], 24 [rule of law] and 25 [cultural heritage].

³ UNESCO, *Charter on the Preservation of Digital Heritage*, online: http://portal.unesco.org/en/ev.php-URL_ID=17721&URL_DO=DO_TOPIC&URL_SECTION=201.html (15 October 2003)[*Charter*].

⁴ *Ibid* Article 1, which identifies “digital heritage” as follows: “The digital heritage consists of unique resources of human knowledge and expression. It embraces cultural, educational, scientific and administrative resources, as well as technical, legal, medical and other kinds of information created digitally, or converted into digital form from existing analogue resources. Where resources are “born digital”, there is no other format but the digital object. Digital materials include texts, databases, still and moving images, audio, graphics, software and web pages, among a wide and growing range of formats. They are frequently ephemeral, and require purposeful production, maintenance and management to be retained.”

⁵ *Ibid* Article 3.

⁶ *Ibid* Article 4.

⁷ *Ibid* Article 8. For an explanation of “legal deposit,” please see Library and Archives Canada, *Legal Deposit*, online: <http://www.collectionscanada.gc.ca/legal-deposit/index-e.html>.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ See *Windsor (City) v Paciorka Leaseholds Limited*, 2012 ONCA 431 at para 27 (cultural heritage resources provide economic, environmental and social benefits).

preservation of the digital heritage.”¹¹ A revised and amended *Charter* might propose a broader role for UNESCO in building model legal frameworks to overcome specific legal impediments, which it would recommend for adoption by State legislatures.

2. The Nature and Sources of Law

What is law? International bodies’ aspirational statements about the role of cultural heritage in economic and societal development are calls for immediate action, but they do not have the force of law.¹² Unlike laws, they do not require obedience or penalize disobedience.

International law comprises international conventions, treaties and declarations, but domestic enforceability requires legislation that has been enacted locally by a competent legislature rather than international instruments that have not attained implementation by local legislation. Implementation of international law into the domestic law of Canada generally requires federal, and sometimes provincial, legislation. Implementation of international law can occur in either of two ways: either by enactment of new legislation bringing the treaty into effect or by the presence of existing federal and provincial legislation that is consistent with the new treaty.¹³

Upon ratification of a treaty, Canada becomes bound by it and cannot enact legislation contradicting it.

Even without implementation by domestic legislation, expressions of international values and aspirations are influential with judges and may influence domestic case law, particularly judicial interpretation of domestic legislation.¹⁴

3. Treaties

On the topic of the preservation of digital cultural heritage, the most significant treaty ratified by Canada is the UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*.¹⁵

The Treaty¹⁶ refers to law only twice.

First, in Article 5.4, the Treaty¹⁷ refers to law as follows:

¹¹ *Charter*, *supra* note 3, Article 12 [emphasis added].

¹² E.g., Commonwealth Foundation (2008), *Putting Culture First* (London: The Commonwealth Foundation, 2008), online: <http://www.commonwealthfoundation.com/LinkClick.aspx?fileticket=16LU0GdSEto%3D&tabid=247>; Commonwealth Foundation (2010), *Commonwealth Statement on Culture and Development: Prepared by the Commonwealth Group on Culture and Development* (London: Commonwealth Foundation, 2010), online: <http://www.commonwealthfoundation.com/LinkClick.aspx?fileticket=n4AYwvbYDEI%3D&tabid=167>.

¹³ Parliament of Canada, Library of Parliament Research Publications, *Canada’s Approach to the Treaty-making Process*, by Laura Barnett (Background Paper No. PRB 08-45-E, 24 November 2008), online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0845-e.htm>; see also *Society of Composers, Authors and Music Publishers of Canada*, 2004 SCC 45, [2004] 2 SCR 427.

¹⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, at paras 69-72; *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 at para 175; *Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281, at paras 34-35. The Canadian Parliament is presumed not to legislate in breach of a treaty, the comity of nations and the principles of international law: see *Daniels v. White*, [1968] SCR 517, at p 541.]

¹⁵ UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 23 July 1976, 1037 UNTS 151, CanTS 1976/44 (entered into force 17 December 1975) [Treaty].

¹⁶ *Ibid.*

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

4. to take the appropriate **legal**, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; [emphasis added]

What does UNESCO mean by the phrase, the “appropriate legal measures?”¹⁸ Giving specificity to the phrase, UNESCO refers to a State’s implementation of treaties as legislation protecting treaty rights within the State’s “legal framework,”¹⁹ but does not define the term. The *Charter* also refers to but does not define “legal framework.”²⁰

At its most fundamental level, a State’s legal framework is based on protection of treaty rights by its “constitution.” UNESCO also includes within a State’s legal framework, protection of treaty rights by “a basic legislative text or by any other national provision.”²¹ Incorporation of the UNESCO treaty into “national legislation” also qualifies as a building block within a State’s legal framework.²² Mixing law and administration, UNESCO includes a State’s conferring of authority in relation to treaty rights on a competent authority in the jurisdiction as part of its legal framework.²³

The second reference to law is contained in Article 34 of the Treaty,²⁴ which recognizes that States, such as Canada, having a federal or non-unitary constitutional system divide their legislative powers among legislative bodies and that complete implementation of treaty obligations may also be divisible between legislatures. For example, the Canadian federation divides legislative competence between a Federal Parliament in Ottawa, and provincial and territorial legislative assemblies located within each province or territory. Each of these legislative bodies is sovereign within the legislative powers assigned to it by the Canadian constitution.

Article 34 requires a federal government to implement the convention as far as it is able within its constitutional powers and to inform the other provincial or territorial governments of the treaty obligations within their legislative competence with a recommendation for adoption by their legislatures.

Because the Internet transcends territorial legislative boundaries, it can be important for such purposes as copyright or taxation to identify which level of government can legislate extra-territorially. In Canada, only the federal government can do so, the provinces and territories can impose their legislation only within their respective borders.²⁵

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ UNESCO, Executive Board, “Framework Guidelines,” 177EX/Decision 35 II, 177th Sess., 01 Oct 2007 at para 1.(b); online: http://portal.unesco.org/en/ev.php-URL_ID=41897&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html [*Framework Guidelines*].

²⁰ *Charter*, *supra* note 3.

²¹ *Framework Guidelines*, *supra* note 19.

²² *Ibid.*

²³ *Ibid.*

²⁴ Treaty, *supra* note 15.

²⁵ *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 [*Society of Composers, Authors and Music Publishers*].

Canada has been a party to other significant treaties on cultural property, however, such as the following:

Title	Date of Signature or Accession	Treaty Series Reference	Other information
<i>Constitution of the United Nations Educational, Scientific and Cultural Organization</i>	16 November 1945	4 UNTS 75; CanTS 1945/18	(entered into force 04 November 1946)
<i>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property</i>	28 March 1978	CanTS 1978/33	(entered into force 24 April 1972; implemented by <i>Cultural Property Export and Import Act</i> , RSC 1985, c C-51)
<i>Convention for the Protection of Cultural Property in the Event of Armed Conflict</i>	11 December 1998	249 UNTS 240; Can TS 1999/52	(entered into force 07 August 1956)
<i>Protocol for the Protection of Cultural Property in the Event of Armed Conflict</i>	29 November 2005	249 UNTS 358; CanTS 2006/26	(entered into force 07 August 1956) (referred to as “The First Protocol”)
<i>Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict</i>	29 November 2005	CanTS 2006/27	(entered into force 09 March 2004)
<i>Convention on the Protection and Promotion of the Diversity of Cultural Expressions</i>	28 November 2005	CanTS 2007/8	(entered into force 18 March 2007)

4. Building the Legal Framework

4.1. The Constitution

Building a legal infrastructure for digitalizing and preserving cultural heritage can start by laying a strong foundation. The foundation of a country’s laws and society is its constitution.²⁶ Therefore, in building a legal framework for the preservation of digital cultural heritage within a State, the starting-point should be consideration of whether or not to reform its constitution. Canada’s constitution comprises statutes and related principles. An important part of the Canadian constitution is a statute entitled, *The Canadian Charter of Rights and Freedoms*,²⁷ which in turn is based on foundational constitutional principles, such

²⁶ *Citizen’s and The Queen Insurance* (1880), 4 SCR 215; *Re Manitoba Language Rights*, [1985] 1 SCR 721; *Quebec (Attorney General) v Laroche*, 2002 SCC 72, [2002] SCR 708; *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473.

²⁷ *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11.

as the rule of law²⁸ and respect for the (minority) French language and culture as expressed in sections 16-24, and for multiculturalism as expressed in section 27. Section 27 of the *Canadian Charter of Rights and Freedoms* states as follows:

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 27 recognizes the fundamental principle that the heritages of the French, First Nations, Métis and Inuit peoples and other cultural groups are worthy of preservation and enhancement.²⁹ The revised and amended UNESCO *Charter* should define “legal framework” and include a State’s constitution in the definition.

4.2 Legislation: the preferable method of building a legal framework

Domestically, States and their subdivisions are ruled by constitutional laws, legislation and case law. Case law is an important source of domestic law, but court decisions can only effect incremental change in the law through individual cases and cannot establish a comprehensive legal framework for change. For a comprehensive legal solution to a problem such as the preservation of cultural heritage by digital technology, legislation following a review of the legal consequences is the preferred method of achieving meaningful reform.³⁰ The rule of law is satisfied by a basic outline in legislation, with authority to formulate policy delegated to the Executive through the making of regulations pursuant to the statute. This arrangement facilitates responsive rule-making on a rapidly evolving topic such as digital preservation.

Domestic legislation, within limits permitted by the local constitutional law of the jurisdiction, would be necessary to provide a valid and enforceable legal framework for facilitating the long-term preservation of digital heritage. In framing such legislation, a legislature can incorporate concepts developed in international law, foreign law, or case law. The drafters of legislation can borrow legal terms and concepts from anywhere or create their own, as permitted within constitutional limits. Also, proposed legislation should be consistent with other established legislative provisions and case law of the local jurisdiction.

Harmonization of the domestic laws of different jurisdictions is also desirable, to improve efficiency and certainty, in dealing with a common problem such as the preservation of digital heritage. A possible route would be for each jurisdiction, separately and independently, to develop its own domestic legislation dealing with the preservation of its digital heritage. So far, results of this approach are mixed: see the UK’s attempted *Digital Heritage Bill 2010* and Quebec’s *An act respecting the governance and management of information resources of public bodies and government enterprises*.³¹ Turkey’s legislative

²⁸ Ibid Preamble to the Canadian Charter of Rights and Freedoms.

²⁹ See *R v Monteith*, (1991) 132 NBR (2d) 203, 5 CR (4th) 241 (QB).

³⁰ *Watkins v Olafson*, [1989] 2 SCR 50, 61 DLR (4th) 577; *R v Salituro*, [1991] 3 SCR 654, 68 CCC (3d) 289; *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420; *Myers v Director of Public Prosecutions*, [1965] AC 1001 (HL).

³¹ *An act respecting the governance and management of information resources of public bodies and government enterprises*, RSQ, c G-1.-3.

attempt to protect its cultural heritage, *The Cultural and Natural Heritage Protection Act 2863*, is well-intentioned but has been criticized as unfair to property rights.³²

From an international perspective, if each State develops its legislation on its own, the result would be a patchwork of domestic laws at best. Collective effort under the auspices of an international body such as UNESCO might be more effective to harmonize domestic laws. Since 2005, UNESCO has been developing a *Database of National Cultural Heritage Laws*.³³ Proposing model legislation would be a logical next-step for UNESCO to take.

The revised and amended *Charter on the Preservation of Digital Heritage*³⁴ might articulate a broader role for UNESCO than the current Article 12 provides for.

Is it worth considering a role for UNESCO in the development of a model enactment with commentary at the global level? The model provisions would draw upon concepts from local precedents and from the work of others. UNESCO might recommend the model enactment as suitable for adoption by domestic legislatures, with scope for variations as might be considered necessary in each jurisdiction and as described in the commentary to the legislation. The overarching objective of the project would be international harmonization of domestic laws as much as possible. The proposed commentary to the model provisions could contain an informative comparison of the diverse domestic laws on such common issues as authentication of digital records, intellectual property rights, protection of privacy, e-discovery, existing legal duties to preserve digital information and spoliation. Would this be an appropriate and attainable task for UNESCO?

4.3. Suggested topics for additional legal frameworks

For greater certainty, a revised and amended *Charter on the Preservation of Digital Heritage*³⁵ might indicate which topics are significant legal frameworks to improve the preservation and protection of a State's digital heritage. As discussed in the pages that follow, tax reform could create a fiscal framework for donations and other resources to be applied to digital heritage. A framework for copyright law could facilitate digital heritage, too. Finally, the endangered cultural heritage of indigenous peoples should be contained in a legislative framework that is sensitive to the issues.

4.3.1. Funding: tax law reform

The UNESCO *Convention Concerning the Protection of World Cultural and Natural Heritage*,³⁶ Article 5.4, requires States to take appropriate “**financial measures** necessary for the identification, protection, conservation, presentation and rehabilitation of [natural and cultural] heritage.” The *Charter on the*

³² Compare Sevil Yildiz, “The Model of Turkey in Legal Protection of Cultural Heritage” International Archives of Photogrammetry, Remote Sensing and Spatial Information Sciences, Vol. XXXVIII, Part 5, Commission V Symposium, Newcastle Upon Tyne, UK. 2010, p 627. Online:

<http://www.isprs.org/proceedings/XXXVIII/part5/papers/119.pdf>; with Nida Celik and Bayrum Uzun, “Cultural Heritage versus Property Rights” TS09C-Surveying and Cultural Heritage II, 5686; FIG Working Week 2012; Knowing to manage the territory, protect the environment, evaluate the cultural heritage; Rome, Italy, 6-10 May 2012, online: http://www.fig.net/pub/fig2012/papers/ts09c/TS09C_celik_uzun_5686.pdf.

³³ UNESCO *Database of National Cultural Heritage Laws*, online: <http://www.unesco.org/culture/natlaws>.

³⁴ *Charter*, *supra* note 3.

³⁵ *Charter*, *supra* note 3.

³⁶ Treaty, *supra* note 15.

Preservation of Digital Heritage,³⁷ in Article 3, says: “Digital evolution has been too rapid and costly for government and institutions to develop timely and informed preservation strategies.” If the costs of digital protection and preservation of cultural heritage exceed public resources, recourse to private resources is necessary. The *Charter* does not spell this option out clearly: Article 4 merely states: “Member States will benefit by encouraging legal, economic and technical measures to safeguard the heritage.”³⁸

A revised *Charter on the Preservation of Digital Heritage* could make explicit reference to the need for a legal framework dealing with fiscal incentives to encourage private funding and allocation of other private resources to the protection and preservation of digital cultural heritage. Legislation is necessary to authorize the imposition of taxes, and incentives are commonly introduced to encourage heritage preservation, such as heritage buildings. Projects for the digitalization and preservation of cultural heritage require funding to pay for supplies, equipment and personnel. Though the cost of digital equipment might be falling, other costs rise continually. Government grants can be made available, but current economic realities constrain public funding, necessitating greater recourse to private sources of capital for funding. In a market economy, cultural heritage may not compete favourably for funding against other less risky and more lucrative endeavours. Canadian law currently offers a wide range of exemptions from legal obstacles and provides numerous financial incentives to encourage investing in cultural heritage, because such heritage benefits society.

Canadian courts recognize that technological advances, on balance, are beneficial to society and that the law should encourage their lawful usage.³⁹ Digitalization of cultural heritage increases its availability to the public over the Internet. The resulting efficiencies, cost reductions and expanding accessibility benefit the public. Canadian law regards philanthropic or not-for-profit funding of digitalization and preservation of cultural heritage as charitable. Donations to charitable activities qualify for tax credits. More generous tax incentives could increase the allocation of private resources to these activities.

A revised *Charter* could encourage States to develop a fiscal framework for the protection and preservation of digital cultural heritage through new tax incentives encouraging private investment. The framework should encourage legitimate, good faith preservation, but penalize attempted abuses of the tax incentives.

4.3.2. Intellectual property rights: copyright law reform

Fear of the possible consequences of a copyright violation should not deter digital preservation of imperilled material by public institutions to prevent irretrievable loss of cultural property. Canada proposes to reduce this obstacle to the preservation of endangered material by exempting it from claims of copyright infringement. When implemented, Canada’s *Copyright Modernization Bill*⁴⁰ will add an expanded paragraph 30.1(1)(c) to the *Copyright Act*,⁴¹ stating as follows:

³⁷ *Charter*, supra note 3.

³⁸ *Ibid* (emphasis added).

³⁹ *BMG Canada Inc v John Doe*, 2005 FCA 193, [2005] 4 FCR 81 at para 41; *Voltage Pictures LLC v Jane Doe*, 2011 FC 1024 at para 14; *R v Schroeder*, 2012 ABPC 241 at para 24.

⁴⁰ Canada, Bill C-11, *The Copyright Modernization Act*, 1st Sess, 41st Parl, 2011 (assented to 29 July 2012).

⁴¹ *Copyright Act*, RSC 1985, c C-42.

30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection

...

(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable;

The Bill unfortunately permits copyright holders to over-ride this otherwise laudable provision, among others, with the installation of inviolable digital locks. Despite criticism⁴² of digital locks, the Canadian government persevered with its provisions upholding the primacy of locks.

The problem of “orphan works” obstructs efforts in various States to digitalize vast amounts of cultural heritage and threatens loss of these works to posterity, unless legislation is enacted to resolve the dilemma. When copyright protects a work from use without consent of the current owner, and the owner of the copyright cannot be identified or located to give consent, the work is said to be an “orphan.” In the absence of legislation, usage of the orphan work is frozen.

Section 77 of the Canadian *Copyright Act*⁴³ removes this stumbling block for orphan works covered by Canadian copyright. Basically, the person who wishes to use a work that is subject to Canadian copyright held by someone whose identity or whereabouts cannot be ascertained (called the “unlocatable copyright owner”), may apply to the Copyright Board of Canada for permission to copy the work. If the application is successful, the applicant receives a licence from the Board permitting the proposed use of the work, which prevents the unlocatable owner from suing the applicant for breach of copyright. The Board has a discretion to grant such permission by way of a non-exclusive licence upon being satisfied that the work is subject to a current Canadian copyright and the applicant has made reasonable but unsuccessful efforts to identify and locate the copyright owner. The Board can impose terms and conditions on granting the licence that require the user to pay a (usually) nominal royalty, which the unlocatable owner may claim anytime up to five years after expiry of the licence. In practice, unlocatable owners rarely come forward to claim their modest royalties. The Canadian regime for authorizing usage of orphan works has gained general acceptance in this country, but its adoption by other jurisdictions remains a live issue. The United Kingdom and the European Union are currently in the process of enacting controversial proposals.⁴⁴

Canada’s orphan work provision, section 77 of the *Copyright Act*,⁴⁵ provides as follows:

Section 77 (1) Where on application to the Board by person who wishes to obtain a licence to use

- (a) a published work,
- (b) a fixation of a performance,
- (c) a published sound recording, or

⁴² Canadian Library Association, *Call to Action on Copyright: Bill C-11* (January 2012), online: www.CLA.ca.

⁴³ Copyright Act, supra note 41.

⁴⁴ UK, Bill 61, *Enterprise and Regulatory Reform Bill*, 2012-2013 sess., 2012; s. 59; EU Directive, *Certain Permitted Uses of Orphan Works*, passed by the European Parliament, 13 September 2012.

⁴⁵ Copyright Act, supra note 41.

(d) a fixation of a communication signal in which a copyright subsists, the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located, the Board may issue to the applicant a licence...

(2) A licence issued under subsection (1) is non-exclusive and is subject to such terms and conditions as the Board may establish.

(3) The owner of a copyright may, not later than five years after the expiration of a licence issued pursuant to subsection (1) in respect of the copyright, collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction.

The revised and amended *Charter on the Preservation of Digital Heritage*⁴⁶ should identify the need for a legislative framework to deal with copyright, and list these two issues, imperilled and orphan works, as primary issues for resolution in the framework. Is there a role for UNESCO in developing optimal legislative solutions to the thorny problems of protecting digital works from loss due to changing technology and overcoming copyright obstacles concerning orphan works?

4.3.3. Digitizing and Preserving the Cultural Heritage of Indigenous Peoples

The United Nations *Declaration on the Rights of Indigenous Peoples*⁴⁷ contains many references to States' responsibilities in protecting and preserving the cultural heritage of indigenous peoples. Article 31 of the *Declaration*⁴⁸ is especially pertinent, stating as follows:

Article 31

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

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

After initially opposing the *Declaration on Indigenous Peoples*, Canada reversed its position and approved of it, as an aspirational statement.⁴⁹ The revised and amended *Charter on the Preservation of Digital Heritage* might make specific reference to development of a legal framework relating to the

⁴⁶ *Charter*, supra note 3.

⁴⁷ Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UNDOC A/RES/61/295 (2007)[Declaration on Indigenous Peoples].

⁴⁸ Ibid.

⁴⁹ Aboriginal Affairs and Northern Development Canada, *Backgrounder: Canada's Endorsement Of The United Nations Declaration On The Rights of Indigenous Peoples*, (Ottawa: AAND, 2010), online: <http://www.aadnc-aandc.gc.ca/eng/1292353979814/1292354016174>.

digital preservation of the cultural heritage of indigenous peoples, as especially significant. Consistently with Article 31, Canadian courts recognize the cultural significance of Aboriginal rights over their heritage.⁵⁰

4.3.4. Enforcement by States of Treaty Obligations and Other Responsibilities in the Digital

Era

In recent decades the volume of illicit trade in cultural objects has grown spectacularly and beyond traditional legal control. To counteract this abuse, UNESCO recommends⁵¹ that States should immediately ratify and implement the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.⁵² The prevalence of E-commerce poses challenges to the regulation of international transactions in cultural heritage property. Transactions by email or through websites transcend geographical borders and do not occur in places known to traditional law.

Following the definitions in international law, Canadian export/import controls on cultural heritage property apply only to certain types of tangible movable cultural property.⁵³ E-commerce threatens to put electronic trade in cultural heritage property beyond the practical reach of domestic law. The Internet “exists” in cyberspace, transcending national boundaries, yet laws are usually territorial rather than international. This geographical limitation challenges the effectiveness of attempting to regulate transactions over the Internet by domestic law.⁵⁴ UNESCO seeks to avoid such impracticalities by taking a broader approach, to the effect that “all countries should attempt to respond to the illicit trade in cultural objects via the Internet by taking appropriate measures,” and offers practical suggestions for trade barriers to impede illicit Internet dealings.⁵⁵ Domestic laws can help to regulate the sale and export of culturally significant materials by requiring export permits and conferring pre-emptive rights of first refusal on local purchasers, prior to export. Should a revised and amended *Charter on the Preservation of Digital Heritage*⁵⁶ offer guidance to States on a model legal framework for enforcement?

5. Conclusion

A global approach to building domestic legal frameworks for the preservation of digital heritage is attainable with the active involvement of UNESCO and preferable to individual States proceeding on their own. UNESCO should review its instruments and increase its activities to facilitate this most worthwhile but complex of human endeavours.

⁵⁰ *William v British Columbia*, 2012 BCCA 285 at para 171.

⁵¹ UNESCO, *Illicit Traffic of Cultural Property*, online: <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/>.

⁵² *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 28 March 1978, 823 UNTS 231, CanTS 1978/33, (entered into force 24 April 1972).

⁵³ Canadian Heritage- Movable Cultural Program, *A Guide to Exporting Cultural Property from Canada*, online: <http://www.pch.gc.ca/pgm/bcm-mcp/frm/guide-eng.cfm>.

⁵⁴ Society of Composers, Authors and Music Publishers, *supra* note 25.

⁵⁵ UNESCO, Basic Actions concerning Cultural Objects being offered for Sale over the Internet, online: <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf>.

⁵⁶ *Charter*, *supra* note 3.

