Welcome to DHSI 2015!

Thanks for joining the DHSI community!

In this booklet, you will find essential course materials prefaced by some useful information about getting settled initially at UVic, finding your way around, getting logged in to our network (after you’ve registered the day before our courses begin, and received your login information), and so on.

Given our community’s focus on things computational, it will be a surprise to no one that we might expect additional information online for some of the classes – your instructors will let you know – or that the most current version of all DHSI-related information may be found on our website at dhsi.org.

Do check in there first if you need anything that’s not in this coursepak.

And please don’t hesitate to be in touch with us at institut@uvic.ca or via Twitter at @AlyssaA_DHSI or @DHInstitute if we can be of any help ....
Sunday, 31 May - Friday, 5 June 2015

Your local hosts for the week are Alyssa Arbuckle, Dan Sondheim, and Ray Siemens

Sunday 31 May

Arrival

7:45-8:20: DHSI Registration (outside Hickman Building, Room 105)
8:30 to 9:20: Welcome, Orientation, and Instructor Overview (Hickman Building, Room 105)
♥ 9:30 to Noon: Classes in Session (click for locations)

Monday 1 June

12:15 to 1:15: Lunch break
1:30 to 3:45: Classes in Session (locations as above)
4:00 to 5:00: Reception (Graduate Student Centre, Pub)

Tuesday 2 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 4:30: Classes in Session

Wednesday 3 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 4:30: Classes in Session
6:30 -: Informal drop-in, for those who wish, downtown at the Garrick's Head!

Thursday 4 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 4:00: Classes in Session
♥ 4.15 to 5:15: DHSI Colloquium Session 1 (MacLaurin A144)

♥ Chair: Alyssa Arbuckle (U Victoria)
• "The Undergraduate Scholar-Citizen: A Case Study for the Development of an Undergraduate Critical DH Pedagogy", Emily Murphy and Shannon Smith (Queen's U)
• "Sharing the Digital Imaginary: Dissertation Blogging and the Companion Website", Steve Anderson (U California, Riverside)
• "Multicultural, Bilingual, and Interactive Arabic and Hebrew Digital Edutainment", Abeer Aloush (U Pennsylvania)
• "Bringing DH into the library: pedagogy, games and online ed", Juliette Levy & Steve Anderson (U California, Riverside)

Friday 5 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 2:30: Classes in Session
2:45 to 3:30: A Week in Review / Show and Tell (Hickman Building, Room 105)
♥ 3:30 to 4:30: Institute Lecture, Malte Rehbein (U Passau): "Ethical Aspects of Digital Humanities" (Hickman Building, Room 105)

Abstract: While obvious legal issues connected to Digital Humanities research such as copyright are widely discussed, though probably not yet satisfactorily clarified, ethical issues in Digital Humanities have so far not been addressed let alone systematically studied. Recent publications on Big Data computing which plays a more and more important role for the Humanities show a certain slowly growing awareness for questions concerning privacy, identity, or reputation, on a general level, but one only timidly begins to investigate them thoroughly. For instance, in June 2014 the University of Oxford announces a postdoctoral position in "ethics of big data" aiming at formulating "a blueprint of the ethical aspects, requirements and desiderata underpinning a European framework for the ethical use of Big Data" in the context of biomedical research. For the Digital Humanities, however, no such effort has yet been undertaken. Along several case-studies of recent research mainly in quantitative analysis, such as authorship attribution or psychological profiling, this talk categorizes and
Saturday, 6 June 2015 [Suggested Outings!]

Some ideas, for those who’d like to explore the area!

▼ Suggested Outing 1, Botanical Beach (self-organised; car needed)
A self-guided visit to the wet, wild west coast tidal shelf (and historically-significant former research site) at Botanical Beach; we recommend departing early (around 8.00 am) to catch low tide for a better view of the wonderful undersea life! Consider bringing a packed lunch to nibble-on while looking at the crashing waves when there, and then have an afternoon drink enjoying the view from the deck of the Port Renfrew Hotel.

▼ Suggested Outing 2, Butchart Gardens (self-organised)
A shorter journey to the resplendently beautiful Butchart Gardens and, if you like, followed by (ahem) a few minutes at the nearby Church and State Winery, in the Saanich Peninsula. About an hour there by public bus from UVic, or 30 minutes by car.

▼ And more!
Self-organised whale watching, kayaking, brew pub sampling (at Spinnaker’s, Swans, Moon Under Water, and beyond!), paddle-boarding, a tour of used bookstores, and more have also been suggested!

Sunday, 7 June 2015 [DHSI Registration, Meetings, Workshops]

8:30 to 4:30

DHSI Registration: At UVic Housing / Residence Services Office (Craigebarroch Building)
See the University of Victoria @ Google Maps

After registration, many will wander to Cadboro Bay and the pub at Smuggler’s Cove OR the other direction to Shelbourne Plaza and Maude Hunter’s Pub.

9:00 to 4:00

DHSI Select Course Meetings (as per course descriptions)

▼ Meeting (2 hrs): #6 Open Journal Systems for the Digital Humanities (Elliott Building 162, Classroom)
For those new to journal publishing, this online course provides the knowledge and skills required to get a new publishing project up and running quickly and efficiently. Students will work through a series of modules with the support of an online instructor and be able to develop and practice their skills on their own, dedicated OJS test journal installation. Topics will include standard journal configuration requirements, production workflow overview, web site customizations, publication statistics, and more. The only technical requirement for this course is the ability to use a web browser and fill in online forms.

Following on-line engagement during the week of 1-5 June, there will be an optional in-person, two-hour meeting for those enrolled in this course on Sunday 7 June, further details TBA. The instructor will be available for discussion and consultation in the week prior to 7 June.

▼ Meeting: #11 [Foundations] DH For Department Chairs and Deans (Cadboro Commons, McKenzie/Sinclair Room; adjacent to registration)
Intended for university administrators who seek an understanding of the Digital Humanities that is both broad and deep, this offering establishes a cohort that [1] meets as a group for two dedicated sessions before the first day of DHSI (Sunday 7 June) and one dedicated session midweek (Wednesday 10 June) to survey and discuss pragmatic DH basics and chief administrative issues related to supporting DH and those who practice it at their institution, [2] allows those enrolled to audit (as a non-participatory observer, able to go from class to class) any and all of the DHSI courses, and [3] individually engages in consultation and targeted discussion with the instructors and others in the group outside of course time over during the institute.

Please note that this course begins with a meeting on Sunday 7 June, further details TBA.

1:00 to 4:00

Workshops and Mini-Conference

▼ Workshop: Accessibility & Digital Environments (Cadboro Commons, Haro Room; adjacent to registration)
A hands-on workshop introducing participants to accessibility features in WordPress and Omeka to make digital resources more easily accessible for users with disabilities. This workshop is kindly led by Erin E. Templeton [Converse C] and George H. Williams [U South Carolina Upstate]! Click here for more information and for registration.

▼ Workshop: Up and Running with Compute Canada (Clearihue A015, Lab)
Targeting both digital humanities researchers who are new to Compute Canada and the services that it offers this tutorial/workshop will share a range of use cases and methods from the spectrum of disciplines that make up the digital humanities. Opportunities will exist for hands-on work and sandboxing and attendees can expect to walk away with access to--and introductory training in--Compute Canada installations of OwnCloud, Globus, Vidyo, and a virtual machine cloud environment. Click here for more information and for registration.
Mini-Conference: Social Knowledge Creation in the Humanities (Hickman Building, Room 105)

This event is intended to provoke conversation and stimulate activity around issues of social knowledge creation. We welcome researchers, students, and practitioners who wish to engage intellectually with this topic, as well as to do some hands-on experimentation with related practices and initiatives. Featured activities include: Opening presentations by leading figures in this area; Lightning talks, where authors present 4 minute versions of longer papers that have been circulated prior to the gathering, followed by a brief discussion (papers may be conceptual, theoretical, application-oriented, and more); and Aligned workshops, where session leaders present tools and platforms for social knowledge creation and attendees have the opportunity to play and experiment in this environment.

Details at http://dhsi.org/events.php#skc.

Workshop: Twitter Basics (Cadboro Commons, Campus View Room; adjacent to registration)

An informal introduction to community building and engagement with Twitter, for those new to social media. Bring your smartphone/tablet/laptop/and pop on by! (This is kindly led by Angela Courtney [Indiana U], Jenny Korn [U Illinois Chicago] and DHSI volunteers! While RSVPs are not required, we would love to hear from you if you plan to stop by via email at ancourte@indiana.edu and KornPublic@comcast.net or Twitter, @JennyKorn and @englishlitlib.)

Monday, 8 June 2015

7:45 to 8:15  Last-minute Registration (MacLaurin Building, Room A100)

8:30 to 10:00 Welcome, Orientation, and Instructor Overview

MacLaurin A144

Classes in Session (click for details)

- 7.2 Foundations: Text Encoding Fundamentals and their Application (Cleanhur D102, Lab)
- [Hopkins] Foundations: Fundamentals of Programming/Coding for Human(s)ists (Cleanhur D105, Lab)
- 10. Foundations: Understanding the Pre-Digital Book (McPherson Library A003, Classroom)
- 11. DH For Department Chairs and Deans (Hickman 120, Classroom)
- 14. Sound of :: in Digital Humanities (David Strong C108, Classroom)
- 15. Digital Pedagogy Integration in the Curriculum (Cleanhur D130, Classroom)
- 16. Introduction to Electronic Literature in DH: Research and Practice (Cornell Building A121, Classroom)
- 17. Digital Humanities with a Global Outlook (Elliott Building 162, Classroom)
- 18. Games for Digital Humanists (Cleanhur D132, Classroom; M PM and Tu PM in Cleanhur A103, Lab)
- 19. Feminist Digital Humanities: Theoretical, Social, and Material Engagements (Elliott Building 061, Classroom)
- 20. Digital Indigeneity (Cornell Building A120, Classroom)
- 21. Digital Documentation and Imaging for Humanists [look for this next year!]
- 22. Physical Computing and Desktop Fabrication for Humanists (MacLaurin D016, Classroom)
- 23. Pragmatic Publishing Workflows (MacLaurin D103, Classroom)
- 24. Crowdsourcing as a Tool for Research and Public Engagement (MacLaurin D101, Classroom)
- 25. Creating LAMP Infrastructure for Digital Humanities Projects (Elliott Building 161, Classroom)
- 26. Digital Humanities Databases (MacLaurin D010, Classroom)
- 27. Text Mapping as Modelling (Cleanhur A314, Classroom)
- 28. 3-D Modeling (MacLaurin D105, Classroom)
- 29. RDF and Linked Open Data (Cornell Building A128, Classroom)
- 30. Visualisation: Where Data Meets Design (MacLaurin D109, Classroom)
- 31. Stylometry with R (Human and Social Development A160, Lab)

10:15 to Noon

12:15 to 1:15 Lunch break / Unconference Coordination Session (MacLaurin A144)

1:30 to 4:00 Classes in Session (locations as above)

Institute Lecture: David Hoover (New York U): "Computers and Literary Studies: Doing DH in One Corner of the Big Tent" (MacLaurin A144)

Abstract: In this talk I want to take up three related issues in the recent history of the Digital Humanities. The first is the often-repeated lament that DH has had little influence on traditional humanities disciplines. The second is the project of Jerome McGann’s Radiant Textuality, and more recently, Stephen Ramsay’s Reading Machines, to transform DH into a tool to help literary critics do what they already like to do. The third is Stanley Fish’s recent attack on DH, which argues that DH (and more specifically, distant reading) is a whimsical and insufficiently serious method that is “dictated by the capacity of the tool.” I will argue that the recent avalanche of interest in DH in literary studies and elsewhere is making the lament less valid. I will also argue, by doing some
new analysis of my own, that Ramsey’s provocative intervention into Woolf’s The Waves/ is deeply flawed (partly because it mistakes computationally tractable problems for intractable ones), and that Fish’s criticism badly misses the point by failing to see that the kind of criticism he wants to do is not only compatible with DH but more easily and more effectively done using DH methods.

~5:00 to ~6:30

Tuesday, 9 June 2015

9:00 to Noon
Classes in Session

12:15 to 1:15
Lunch break / Unconference (various locations)

Special Session: DH + CC = !!! : Powering up DH research with Compute Canada (Cleanthes A015, Lab)

1:30 to 4:00
Classes in Session

DHSI Colloquium Session 2 (MacLaurin A144)

Chair: John Barber (Washington State U, Vancouver)
*Analyzing E-Lit*, Dene Grigar (Washington State U, Vancouver)
*Speaking in code-mixing: the language of bilinguals*, Jose Manuel Medrano (U California, Riverside)
*Water through a net: long-term preservation of the digital humanities on the web*, Corey Davis (U Victoria)
*Experiste and Imposter Syndrome: The Reluctant Digital Humanist*, Julia Panko (Weber State U)
*Panopticon or Panacea? Googledocs, word processing, and Collaborative Real-time Editing*, Mark Perry & Taylor Morphet (Simon Fraser U)

Wednesday, 10 June 2015

9:00 to Noon
Classes in Session

12:15 to 1:15
Lunch break / Unconference (various locations)

1:30 to 4:00
Classes in Session
DHSI Colloquium Session 3 (MacLaurin A144)
- Chair: Diane Jakacki (Bucknell U)
- "Social Knowledge Creation and Big Data", Matthew Hiebert (U Victoria) & William Bowen (U Toronto, Scarborough)
- "Recovering the First World War Illustrated Gift-Book in a Digital Environment", Nick Milne-Walasek (U Ottawa)
- "Linking the Middle Ages: Applying Linked Open Data to the Field of Medieval Studies", Ece Turnator (U Texas, Austin)
- "The Autobiographical Writing of Infinite Jest Reading Group Blogs", Philip Miletic (U Waterloo)

Multimedia Performance, Meridian (Student Union Building, Cinecenta)
Kevin Mazutinec, Robin Davies, Marian van der Zon, and Justin McGrail

Thursday, 11 June 2015

9:00 to Noon
Classes in Session

12:15 to 1:15
Lunch break / Unconference (various locations)
[I]nstructor lunch meeting

1:30 to 4:00
Classes in Session

DHSI Colloquium Session 4 (MacLaurin A144)
- Chair: Mary Galvin (University College Cork)
- "First Year English as a DH Course", Nicholas van Orden (U Alberta)
- "Collaborative Reading in The Readers' Thoreau", Paul Schacht (SUNY Geneseo)
- "Radio Noupaspace", John Barber (Washington State U, Vancouver)
- "The 19 Voyages of Henry James", Shawna Ross (Arizona State U)
- "Archive as Network: a project conducted in the John Ringling Library Special Collections", Margaret Konkol (New C of Florida)

Electronic Literature Reading / Exposition (Student Union Building, Felicitas)
James O'Sullivan (Penn State) and Dene Grigar (Washington State, Vancouver; Electronic Literature Organisation), Organisers

Friday, 12 June 2015

DHSI Colloquium Session 5 (MacLaurin A144)
- Chair: Shawna Ross (Arizona State U)
- "A Project Based Pedagogy Developing the EULA Tool", Aaron Mauro (Penn State Erie, The Behrend C)
- "Founders Online 'Early Access': Best Practices and Lessons Learned about Working on Large Scale Digital Editions", William Kurtz (Virginia Foundation for the Humanities)
- "Fanny Kemble's Shakespeare", Maria Chappell (U Georgia)
- "Teaching with TEI: The Victorian Women Writers Project and Virtual Learning Environments", Mary Borgo (Indiana U)
- "Finding Your Family Tree in The Joseph Smith Papers: An Example of DH Engaging the General Public", Nathan Waite (The Joseph Smith Papers)

8:00 to 9:20
Classes in Session

Presentation of Bursaries and Awards

Institute Lecture: Claire Warwick (U Durham): "The End of the Beginning: Building, Supporting and Sustaining Digital Humanities Institutions" (MacLaurin A144)

Abstract: In his welcome to the DH2009 conference at University of Maryland, Neil Fraistat memorably declared 'This is our time'. His prediction has proved to be correct. The Centernet map now shows 196 DH centres across the world, and the foundation of a new centre is not not seen as particularly innovative or noteworthy. How have we moved from niche discipline to international ubiquity in such a short time? Is DH simply this decade's big thing, or are we here to stay? What are the reasons for success, and what can we learn in terms of continuing our endeavours and making them sustainable? This talk will address these questions by considering institutional models of DH activity, and examining the challenges we face now we have reached the end of the beginning.

1:30 to 2:30
Remarks, A Week in Review (MacLaurin A144)

A preview of DHSI 2016
(including Dene Grigar speaking about the integrated conference of the Electronic Literature Organization)
Saturday, 13 June 2015 [Suggested Outings!]

Some ideas, for those who’d like to explore the area!

▼ Suggested Outing 3, SaltSpring Island (self-organised; a full day, car/bus + ferry combo)

Why not take a day to explore and celebrate the funky, laid back, Canadian gulf island lifestyle on SaltSpring Island. Ferry departs regularly from the Schwartz Bay ferry terminal, which is about one hour by bus / 30 minutes by car from UVic. You may decide to stay on forever ....

▼ Suggested Outing 4, Canadian Pacific Lawn Bowling Club (organized event; departing 9.00 am)

A shorter time, learning the finer and more refined points of lawn bowling at the historic Canadian Pacific Lawn Bowling Club. Cucumber sandwiches and tea might be served afterwards, if you’re nice, before returning you to wilds of downtown Victoria at about 12.30 pm.

▼ And more!

Self-organised High Tea at the Empress Hotel, scooter rentals, visit to the Royal BC Museum, darts at Christies Carriage House, a hangry breakfast at a local diner, and more have also been suggested!

Sunday, 14 June - Friday, 19 June 2015

Your local hosts for the week are Daniel Powell, Dan Sondheim, and Ray Siemens

| Sunday 14 June |
| Arrival (unless you’re staying on from the previous week!) |
| After arriving, getting checked in at the Residence Services Office (Craigdarroch Building), and poking around the campus a bit (see the University of Victoria @ Google Maps), many will wander to the beach at Cadboro Bay and the pub at Smuggler's Cove OR the other direction to Shelbourne Plaza and Maude Hunter's Pub. |

| Monday 15 June |
| 7:45-8:20: DHSI Registration (outside Hickman Building, Room 105) |
| 8:30 to 9:20: Welcome, Orientation, and Instructor Overview (Hickman Building, Room 105) |
| ▼ 9:30 to Noon: Classes in Session (click for locations) |
| • 12. Advanced TEI Concepts / TEI Customisation (Clearihue A105, Lab) |
| • 32. Professionalizing the Early Career Digital Humanist: Strategies and Skills (MacLaurin D107, Classroom) |
| • 33. Drupal for Digital Humanities Projects (Human and Social Development A270, Classroom) |
| • 34. Geographical Information Systems in the Digital Humanities (Human and Social Development A170, Lab) |
| • 35. Understanding Topic Modeling (MacLaurin D105, Classroom) |
| • 36. Open Source OCR Tools for Early Modern Printed Documents (Clearihue C110, Classroom) |
| • 37. Data Mining For Digital Humanists (Elliott Building 162, Classroom) |
| • 38. Advanced Criticism and Authoring of Electronic Literature (MacLaurin D010, Classroom) |
| • 39. A Collaborative Course to XSLT [look for this next year]! |
| • 40. Data, Math, Visualization, and Interpretation of Networks: An Introduction (Clearihue A012, Lab) |
| 12:15 to 1:15: Lunch break |
| 1:30 to 3:45: Classes in Session (locations as above) |
| ▼ 4:00 to 5:00: Institute Lecture, Constance Crompton (U British Columbia, Okanagan): "Courses, Communities, and Collaboration: Learning in The Digital Humanities" (Hickman Building, Room 105) |

Abstract: As humanists we have the methodological training to read past the "Great Man" theory of history (which is an endemic in popular accounts of Thomas Watson, Steve Jobs, and Sergey Brin's triumphs as it once was in chronicles of Isaac Newton, Charles Darwin, and Edmund Hillary’s successes). The humanists' engagement with the past shows us that collaboration and community made fulfillment of the good ideas at the heart of each man’s accomplishment possible. Drawing on the developments in the codex form following the Gutenberg printing press, the development of personal computing after the microprocessor, and the relationship between documents following the introduction of hypertext to the internet, all the products of communities of practice, this keynote address proposes a new opportunity for humanists to collaborate across disciplines to build a better Web for both human and machine readers. Considering the changes in information and knowledge exchange in the context of collaboration is key to the Digital Humanities as it draws us in as a community, the sort of community that brings us to the DHSI to learn from and share with one another.

| Tuesday 16 June |
| 9:00 to Noon: Classes in Session |
| 12:15 to 1:15: Lunch break |
| 1:30 to 4:00: Classes in Session |
| ▼ 4.15 to 5.15: DHSI Colloquium Session 6 (Hickman 105) |
| • Chair: Jonathan Martin (U Massachusetts, Lowell) |
| • "Whatis Under the Big Tent? A Study of ADHO Conference Abstracts, 2004-2014", Nickoal Eichmann (Mississippi State U) & Scott Weingart (Indiana U) |
| • "Forging New Learning Pathways: Reflections on ‘Connected Courses’ & ‘Writing Electronic Literature’", Mia Zamora (Kean U) |
| • "Who Is In the Space, and Why?: Building a Digital Scholars Lab at UC Riverside", Steve Anderson (U California, Riverside) |

http://www.dhsi.org/schedule.php
5/8/2015

DHSI | Digital Humanities Summer Institute


9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 4:00: Classes in Session
▼ 4.15 to 5.15: DHSI Colloquium Session 7 (Hickman 105)

Wednesday 17 June

- Chair: Élka Ortega (U Kansas)
- "#nohomo: Mapping the Social Functions of Homophobic Twitter Hashtags", Bonnie Ruberg (U California, Berkeley)
- "British History Online: a case study of long-term digital projects", Sarah Milligan (Institute of Historical Research)
- "Graduate Training in the 21st Century: Progress and Development", Daniel Powell (U Victoria) & Melissa Dalglish (York U)
- "Cultural Taste-making: Mining the Vogue Archive for Art History", Lindsay King (Yale U Library)
- "A Data Dictionary for TEI Projects", Joe Easterly (U of Rochester)
6:30:- Informal drop-in, for those who wish, downtown at the Garrick's Head!

Thursday 18 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 4:30: Classes in Session

Friday 19 June

9:00 to Noon: Classes in Session
12:15 to 1:15: Lunch break
1:30 to 2:30: Classes in Session
2:45 to 3:45: A Week in Review / Show and Tell (Hickman Building, Room 105)
4:00 to 5:00: Reception (Student Union Building, Felicitas)

Contact info:
insttitu@uvic.ca P: 250-472-5401 F: 250-472-5681

http://www.dhsi.org/schedule.php
NEW UVic wireless configuration utility
The UVic wireless configuration utility will automatically configure the "UVic" wireless network on your Windows XP SP3, Windows Vista, or Windows 7 computer.

Download now

Note: The UVic wireless configuration utility is still experimental; use this application at your own risk. UVic is not responsible for any damage caused by the use of the wireless configuration utility. Please report any problems to the Computer Help Desk.

If the above doesn't work, please follow the manual instructions listed below. After the initial configuration, you should automatically connect to UVic (the secure wireless network) when you are using UVic's wireless network.

1. Before you start this procedure, ensure the following:
   - Your wireless card and its drivers have been installed and you have rebooted your laptop since the installation.
   - Your laptop is powered on and booted up.
   - You are in an area with wireless coverage.
   - You have a NetLink ID and password.
   - You are using Windows to manage your wireless connections. If you are using a third-party application (sometimes network adaptors come with their own applications), you may experience problems during the configuration process.

2. Temporarily connect to the Internet using UVic Open, an Ethernet port, or your home network. Download the security certificate by right clicking thawte Primary Root CA and saving the thawte.cer file to your computer. Once the file is saved to your computer, locate the file and double click on it to install the certificate.
3. Open your **Start** menu and drag your cursor over **Connect To**. Right click **Wireless Network Connection** and choose **Properties**.

4. Click on the **Wireless Networks** tab, located at the top of the window. Ensure that the **Use Windows to configure my wireless network settings** checkbox is selected. Then click the **Add...** button.
5. In the **Network name (SSID)** field, enter **UVic** (case sensitive).

6. Click on the **Authentication** tab, located at the top of the window. Change the **EAP Type** to **Protected EAP (PEAP)**. Then click **Properties**.
7. Check the box beside **thawte Primary Root CA** in the list of **Trusted Root Certification Authorities**. Ensure that the **Authentication Method** is **Secure password (EAP-MSCHAP v2)**. Click **Configure**.

Note: If you cannot find the correct certificate listed, please return to step 2 to download the certificate.

8. Deselect the checkbox for **Automatically use my Windows logon name**... and click **OK**.
9. Click **OK** on the remaining windows. In the bottom-right corner of your screen, you should see a small window pop up informing you that a certificate or other credentials are required to connect. Click on it to provide additional information.

10. Enter your personal **NetLink ID** in the **User name** field, and your **NetLink ID password** in the **Password** field. Enter **UVIC** (case sensitive) in the **Logon domain** field. Click **OK**.

11. Click on the **Wireless Network Connection** window when it pops up again.

12. Click **OK** when prompted to **Validate Server Certificate**. The certificate should appear as the **thawte Primary Root CA**.

You should now be connected to the **UVic** secure wireless network.

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**Related support**

**Related services**

**How-tos**

- **AirNet wireless coverage**

**Setups**

- **Connect to eduroam**: HTC mobile device
- **Connect to eduroam**: Mac OS X 10.5 or newer
- **Connect to eduroam**: Windows 7
- **Connect to eduroam**: Windows Vista
- **Connect to eduroam**: Windows XP
- **Connect to UVic**: Android version 4 and newer
Connect to UVic: Windows XP - University of Victoria

- Connect to UVic: iPhone or iPod Touch
- Connect to UVic: OS 10.5 and newer
- Connect to UVic: Windows 7 and Vista
- Connect to UVic: Windows XP
- Connect to UVic wireless
- Connect to UVic Wireless: eduroam
- Wireless Internet
NEW UVic wireless configuration utility

The UVic wireless configuration utility will automatically configure the "UVic" wireless network on your Windows XP SP3, Windows Vista, or Windows 7 computer.

Download now

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If the above doesn’t work, please follow the manual instructions listed below. After the initial configuration, you should automatically connect to UVic (the secure wireless network) when you are on campus.

1. Before you start this procedure, ensure the following:
   - Your wireless card and its drivers have been installed and you have rebooted your laptop since the installation.
   - Your laptop is powered on and booted up.
   - You are in an area with wireless coverage.
   - You have a NetLink ID and password.
   - You are using Windows to manage your wireless connections. If you are using a third-party application (sometimes network adaptors come with their own applications), you may experience problems during the configuration process.

2. Temporarily connect to the Internet using UVicStart, an Ethernet port, or your home network. Download the security certificate by right clicking thawte Primary Root CA and saving the thawte.cer file to your computer. Once the file is saved to your computer, locate the file, double click on it, select Install Certificate..., and follow the Certificate Import Wizard instructions.
3. Once you have successfully installed the certificate, open your Start menu and click on Control Panel.

4. Click on Network and Internet or Network and Sharing Center.
5. Click on **Network and Sharing Center**.

6. Click on **Manage wireless networks**, located on the left menu.
7. Click **Add**.

8. Click **Manually create a network profile**.
9. Enter the following information:
   - Network name: **UVic** (case sensitive).
   - Security type: select **WPA2-Enterprise**.
   - Encryption type: automatically sets to **AES**.
   - Security Key/Passphrase: (leave blank).

   Ensure **both checkboxes are selected** (by default, the second box is not). Click **Next**.

10. Click **Change connection settings**. For now, ignore the pop-up window in the bottom-right corner.
On the **Connection** tab, ensure the **Connect to a more preferred network if available** checkbox is not checked.

11. Click the **Security** tab. Ensure the authentication method is **PEAP**. Then click **Settings**.

12. Check the box beside **thawte Primary Root CA** in the list of **Trusted Root Certification Authorities**.
If you cannot find the correct certificate listed, please return to step 2 to download the certificate.

At the bottom of the dialogue, ensure that the Authentication Method is Secured password (EAP-MSCHAP v2). Click Configure.

13. Deselect the checkbox for Automatically use my Windows logon... and click OK.

14. Close the remaining windows. In the bottom-right corner of your screen, you should see a small window pop-up informing you that Additional information is required to connect to UVic. Click on it to provide additional information.

15. Enter your personal NetLink ID followed by @uvic.ca in the User name field, and your NetLink ID password in the Password field. Click OK.
You should now be connected to the UVic secure wireless network.

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<tr>
<th>Related support</th>
<th>Related services</th>
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Connect to UVic: Mac OS X 10.5 and newer

After the initial configuration, you should automatically connect to UVic (the secure wireless network) when you are using UVic's wireless network.

1. Before you start this procedure, ensure the following:
   - Your wireless card and its drivers have been installed and you have rebooted your laptop since the installation.
   - Your laptop is powered on and booted up.
   - You are in an area with wireless coverage.
   - You have a NetLink ID and password.

2. At the top-right corner of your screen there should be the AirPort icon (a semi-circle). If you do not see this icon, your AirPort card or AirPort software may not have been installed properly.

3. Click on the AirPort icon (it may be partially darkened) to reveal a menu. Ensure your AirPort is On.

4. Scroll down the AirPort menu and select Join Other Network ...

5. In the window that opens, enter the following information:
   - Network Name: UVic (case sensitive)
   - Security: WPA2-Enterprise
   - User Name: your NetLink ID
   - Password: your NetLink ID password
   - 802.1X: Automatic

Click Join.
6. If you see a message about Mac OS X wanting to access your Keychain, click **Always Allow**.
7. A **Verify Certificate** window will open saying that the certificate is not trusted.
   - Click **Show Certificate**.
   - Check the box that says **Always trust "sac1cled050..."** (the exact name may vary) and click **Continue**.
   - If you are prompted for your computer password, enter it and click **OK**.
You should now be connected to the UVic secure wireless network. To disconnect from the wireless network, click on the AirPort icon and click Turn Airport Off. Next time you connect to UVic, you should not need to enter any additional credentials.

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**How-tos**
- AirNet wireless coverage

**Setups**
- Connect to eduroam: HTC mobile device
- Connect to eduroam: Mac OS X 10.5 or newer
- Connect to eduroam: Windows 7
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- Connect to eduroam: Windows XP
- Connect to UVic: Android version 4 and newer
- Connect to UVic: iPhone or iPod Touch
- Connect to UVic: OS 10.5 and newer
- Connect to UVic: Windows 7 and Vista
- Connect to UVic: Windows XP
- Connect to UVic wireless
- Connect to UVic Wireless: eduroam
- Wireless Internet
Connect to UVic: iPhone or iPod Touch

After the initial configuration, you should automatically connect to UVic (the secure wireless network) when you are using UVic's wireless network.

1. Before you start this procedure, ensure the following:
   - Your device is using firmware version 4.0 or higher.
   - Your device is powered on and booted up.
   - You are in an area with wireless coverage.
   - You have a NetLink ID and password.
2. From the Home screen, press the Settings button.
3. Press the Wi-Fi option.
4. Under the Choose a Network... heading, select UVic.
5. Enter your personal NetLink ID followed by @uvic.ca in the Username field. Enter your NetLink ID password in the Password field. Press Join.

6. If prompted, press Accept to verify the thawte Primary Root CA certificate.
Your device should now be connected to the UVic secure wireless network.
Connect to UVic: Android version 4 and newer

Please note: Android devices do not fully support Exchange ActiveSync encryption so they are not recommended standards.

After the initial configuration, you should automatically connect to UVic (the secure wireless network) when you are using UVic's wireless network. Please note that University Systems only supports devices running Android version 4 or newer; all other devices are best-effort support only.

1. Before you start this procedure, ensure the following:
   - Your device is running version 4.0 or higher
   - Your device is powered on and booting up.
   - You are in an area with wireless coverage.
   - You have a NetLink ID and password.

2. Go into Settings.
3. Press Wi-Fi.
4. Select **UVic**

![Image of Wi-Fi settings on Android device]

- **Wi-Fi networks**
  - **UVicOpen**
    - Connected
  - **eduroam**
    - Saved, Secured
  - **UVic**
    - Secured
  - **5099251212**
    - Not in range
  - **BELL_WIFI**
    - Not in range
  - **Add network**

- **Scan** | **Advanced**

5. In the window that opens, enter your UVic **NetLink ID** followed by @uvic.ca (e.g. helpdesk@uvic.ca) in the **Identity** field. Enter the corresponding NetLink ID **password** and press **Connect**.
6. Your device should now be connected to the UVic wireless network.
Course Description
The scope of this course ranges from histories of collaboration between aboriginals and non-aboriginals in the collection of ethnographic materials since the turn of the twentieth century to contemporary practices of collaboration between anthropologists and indigenous peoples working together on the digital preservation and repatriation of traditional knowledges and cultures. Collaboration has often been a mask worn by practitioners of cultural appropriation, so it stands to reason that any program of digital repatriation needs to be wary of the legacies of aboriginal and imperial relations. By engaging with practices of digital repatriation—that is, practices of restoring cultural heritage to aboriginal communities by using participatory computer-based technologies of digitization, transmission, and preservation—we will investigate ways to reinitiate and rethink the long history of collaborative exchange among colonizing, colonized, and decolonizing agents.

At a time when neoimperial and neoliberal conceptions of public domain and open access see the recirculation and reappropriation of indigenous texts and objects online, we will address how to redress the effects of early salvage ethnography and artifact expropriation, how to adopt repatriation protocols appropriate to the curation of aboriginal cultural heritage, and how to respect indigenous conceptions of the commons. By understanding why we need to indigenize the repatriated commons, we will follow currents in critical race and postcolonial studies by entering into activist interventions into the digital humanities and its material and ideological investments in technologies of imperial modernity. In doing so, we will examine several leading North American repatriation initiatives—Mukurtu, Intellectual Property Issues in Cultural Heritage, the Sustainable Heritage Network, Great Lakes Research Alliance for the Study of Aboriginal Arts and Cultures, among others—that have already developed partnerships with and within aboriginal communities to implement digital technologies that enable ethical, respectful, and participatory acts of collaboration among indigenous and non-indigenous agents. Participants will gain familiarity with the digital content management systems adopted by these repatriation initiatives and receive training in best practices for the curation of aboriginal cultural heritage.

Readings


Archives, Exhibits, Other Resources
American Philosophical Society, Digital Library http://www.amphilsoc.org/library

Critical Ethnography and Cultural Heritage Initiative http://cedhi.sfu.ca/


Great Lakes Research Alliance for the Study of Aboriginal Arts and Cultures https://grasac.org/gks/gks_about.php

Inuvialuit Living History
http://www.inuvialuitlivinghistory.ca

Making Culture Lab
http://hennessy.iat.sfu.ca/

Mukurtu
http://mukurtu.org

Plateau Peoples’ Web Portal
http://plateauportal.wsulibs.wsu.edu/html/PPP/

Reciprocal Resource Network
https://www.rrncommunity.org/

Smithsonian Institution, National Museum of the American Indian Collections
http://www.americanindian.si.edu/searchcollections/home.aspx

Sustainable Heritage Network
http://www.sustainableheritagenetwork.org/

**Tentative Schedule**

**Monday**
- Repatriation
- Tangible and Intangible Cultural Heritage
- Public Domain
- Traditional Knowledge Licences and Labels
- Intellectual Property Issues in Cultural Heritage

**Tuesday**
- Dane Wajich – Dane-zaa Stories and Songs: Dreamers and the Land
- Inuvialuit Living History
- Mukurtu

**Wednesday**
- Mukurtu (cont’d)
- Plateau Peoples’ Web Portal
- Sustainable Heritage Network

**Thursday**
- Reciprocal Resource Network
- Smithsonian Institution, National Museum of the American Indian Collections
- American Philosophical Society, Digital Library

**Friday**
- Presentations of group project Mukurtu sites
- Project planning
"Chuck a Copyright on It": Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels*

Jane Anderson and Kim Christen

Abstract: This article focuses on the creation of an innovate network of licenses and labels delivered through an accessible, educational, and informative digital platform aimed specifically at the complex intellectual property needs of Indigenous peoples, communities, and collectives wishing to manage, maintain, and preserve their digital cultural heritage. The Traditional Knowledge (TK) Licenses and Labels answer a grassroots, global call by Indigenous communities, archivists, museum specialists, and activists for an alternative to traditional copyright for the varied needs of Indigenous communities and the cultural materials they steward. Local Contexts is a project and educational website dedicated to the production of new intellectual property frameworks for Indigenous materials that depart from colonial histories of collection and Western legal frameworks.

[Keywords: Archives, Collaboration, Cultural Property, Digital Media, Heritage, Indigenous Peoples, Intellectual Property, Repatriation, Technology. Keywords in italics are derived from the American Folklore Society Ethnographic Thesaurus, a standard nomenclature for the ethnographic disciplines.]

We have both worked quite closely with Aboriginal communities throughout Central and Northern Australia to try and navigate the thorny and oftentimes confusing legal issues that emerge when communities, their representative bodies and individuals within them attempt to reuse or have repatriated local cultural materials that are owned or housed in distant institutions. While there are often creative and compelling constructive solutions to the challenges presented when Indigenous communities’ cultural sensibilities and local laws push up against Western notions of property and propriety, there is very little in the way of progressive, flexible solutions that offer Indigenous peoples alternative engagements with legal systems and their representatives. As a fall back, and quite often out of exacerbation and exhaustion, community representatives will use the very legal systems they wish to alter or subvert in order to gain some type of control over materials that are no longer in their possession. Although intellectual property law has been quite inflexible and even hostile to Indigenous needs and concerns, for example demanding individual and recognizable “authors” and “original” works in order to offer any protection, it has quite recently provided a path with limited success for communities wishing to defend and manage their cultural heritage materials. As one Aboriginal community member put it, we have to “chuck a copyright on it and it’ll be right.”¹

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* This peer-reviewed work is licensed under the Creative Commons Attribution 3.0 Unported License. To view a copy of this license, visit http://creativecommons.org/licenses/by/3.0/ or send a letter to Creative Commons, 171 Second Street, Suite 300, San Francisco, California, 94105, USA.
The notion that “a copyright”—or other types of legal frameworks—might aid in the preservation and protection of Indigenous cultural materials as they circulate outside of Indigenous communities in both their analog and digital forms is quite prevalent and also quite misunderstood by all parties involved. Traditional copyright together with its more progressive alternative, Creative Commons’ licenses, form a complicated layer of legal scaffolding that, within the larger international intellectual property rights framework, provide limited sets of rights to and over Indigenous cultural materials that constitute copyright subject matter—namely photographs, sound recordings, films, and manuscripts that document Indigenous cultural heritage. The very precarious legal position that many Indigenous peoples have to their cultural heritage materials, as well as the collective responsibilities of stewardship and care towards these materials, often limits the effective use of copyright law.

As part of the colonial collecting endeavor, Indigenous peoples lives and cultural practices were often documented and recorded to a remarkable degree. Framed as the “subjects” of these works, not as their authors and owners, Indigenous people and communities have had no legal rights to determine how and when this documentary material should be accessed or by whom—that is, they cannot just “chuck a copyright on it.” As Indigenous peoples have increasingly re-found these disparate collections and demanded legitimate access to them, cultural institutions all over the world are now facing the task of how to adequately deal with these collections—both in terms of recognizing the conditions that led to their creation and creating new possibilities for renegotiating their access and control. This is a slow process and one somewhat dependent upon the political will and motivation of each individual collecting institution and those working within it. The increase in new technologies to archive and share materials stewarded in collecting institutions has facilitated the beginning of digital return and repatriation projects. But this return generally only deals with the problem of access to the community; it has not yet been able to adequately deal with the problem of navigating the legal terrain, nor how to manage access by third parties also eager to have access to the material for various commercial and non-commercial reasons.

Inspired by our work with and alongside Indigenous individuals and communities and also with the complexities of institutional responses, in this article we tackle several of the dilemmas associated with these diverse and difficult processes of digital return. Specifically we focus on the creation and distribution of a specific initiative aimed at addressing some of these legal, ethical, historical dilemmas: the Traditional Knowledge (TK) Licenses and Labels. Much like the manner in which the Creative Commons arose and answered the clarion call of software developers and artists in largely first world settings, the TK Licenses and Labels seek to fill a void left by current intellectual property regimes that fail to address the particular needs of Indigenous peoples in relation to their cultural heritage materials. The Licenses and Labels are aimed specifically at the complex intellectual property needs of Indigenous peoples, communities, and collectivities wishing to manage, maintain, and preserve their digital cultural heritage in relation to multiple sets of rights and stakeholder obligations. Following the principles established in the 2007 Declaration on the Rights of Indigenous Peoples, the aim of the TK Licenses and Labels is to support Indigenous, traditional, and local peoples’ rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. The TK Licenses and Labels will ultimately be delivered through an accessible educational digital platform: Local Contexts (www.localcontexts.org).
Variations on “Making it Right”

Intellectual property law is one of the most powerful bodies of law in contemporary society because it is the current mechanism for identifying specific kinds of knowledge, creating a value for this knowledge, and establishing conditions for how it can be accessed, used, and shared. In making certain knowledge legally identifiable, quantifiable, ownable, and proprietary, inevitable questions about the capacity for intellectual property law to make new practices and realities regarding the sharing of knowledge must arise. The current operation of intellectual property law necessarily invites reflection upon issues of power and agency in understanding how it produces specific kinds of recognizable knowledge, how some knowledge becomes valued and legitimized over others, and how law is involved in establishing regulatory frameworks for sharing knowledge within our present moment. While not altogether new, these questions and concerns have taken on a new valence within the digital age. As objects and knowledge move, are reused, and reanimated quickly (and often with little documentation), the emphasis on defining and defending ownership, authorship, stewardship, and creative attribution has taken on a new urgency for multiple stakeholders and under very different conditions.

Intellectual property is actually an umbrella term used to cover specific laws that are loosely united in their efforts to manage the relationships between an idea and the tangible expression of that idea (a book, a photograph, an artwork, a sound-recording, a design on fabric, an invention). There is no specific intellectual property law named as such. Rather, the independent legislation for copyright, patents, designs, trademarks, trade secrets, and confidential information together constitute the “laws of intellectual property.” They are grouped under the term intellectual property because they are seen to share some dimension of the problematic of determining legally recognized and justifiable rights in the expression of ideas and treating this expression as some kind of “property.”

Copyright is probably the most commonly cited and critiqued area of intellectual property pertaining to digital heritage. This is because it is encoded into older analog material, into the behaviors of archives, libraries, and museums, into the capacity to deliver material digitally, and into the rhetoric of open access (Anderson 2013). The language and practice of copyright do very different things and effect policy, procedures, and the making and circulation of digital materials in complex and varied ways. Although battles have been waged from the courtroom to the boardroom over the right and proper place and reach of copyright, it remains a thorny and tense issue that divides more than it unites. One current site that aptly displays the divisive politics that copyright can produce is in the current negotiations at the World Intellectual Property Organization (WIPO) on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (TKGRTCES). For 12 years, 180 Member States, numerous NGOs and IGOS, as well as Indigenous representatives have been negotiating for an agreeable solution for the protection of traditional knowledge through various intellectual property rubrics. Marked by disagreements over definitions and terminology, WIPO negotiations have slowly moved towards the final hurdle of text-based negotiations on three new legal instruments. Along the way, inequity (in terms of participation) and a more accurate comprehension of whose interests these negotiations really serve have come to the fore. The most recent meetings in 2012 were full of
anxieties regarding the full and comprehensive participation of Indigenous delegates. Moreover, the coordinated protest against WIPO representatives at the UN Permanent Forum on Indigenous Issues meeting in May 2012 further illustrates how high the tensions run and how deep the concerns regarding the legitimacy of intellectual property governance frameworks over knowledge resources are.

Indigenous people are not alone in having problems with intellectual property law generally and copyright in particular. It seems like there are vast numbers of people who also have problems with copyright: it protects too much for too long, it privileges certain interests over others, it creates frameworks of property upon material that perhaps should not be considered as property, it curtails creativity rather than promoting it, it is too culturally specific to be of any use to certain communities. With the growth of intellectual property, and especially of copyright over the last 40 years, we have seen this body of law become more embedded within our global society. As a result, we have correspondingly seen a rise in the development of a critical intellectual property discourse. While this discourse is broadening and importantly includes “Development Agenda” politics (and more recently a specific focus on international standards of limitations and exceptions within copyright), the two most dominant sites for mobilizing critical intellectual property advocacy remain the Creative Commons licensing project and the public domain (Hugenholtz and Okediji 2008; Lessig 2001, 2004).

While advocates for the public domain and Creative Commons have different ambitions and trajectories for action, there are similar precepts that link them together in important ways. Advocates for the public domain, including Jessica Litman, Jamie Boyle, Yochai Benkler and the Electronic Frontier Foundation, provide a much-needed counter-framework to understand the cultural and economic effects of the monopoly privileges upheld through conventional intellectual property rights regimes (Litman 1990; Boyle 2003; Benkler 1999). As Benkler notes, “Information is ‘in the public domain’ to the extent that no person has a right to exclude anyone else from using the specified information in a particular way. In other words, information is in the public domain if all users are equally privileged to use it” (1999:360). While it is increasingly thought that the public domain is only made possible by copyright—it is that space where works go when copyright has expired—Litman argues that in addition to this common understanding of the public domain, “The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect” (1990:975).

Creative Commons is a licensing framework that seeks to provide an alternative to the copyright regime, and the implied “all rights reserved” model that copyright upholds. As Lessig explained in one 2006 interview, “We’re trying to hack the copyright system, in the programmers sense of hack. Not to break it but make it function in ways it wasn’t intended to work. That’s not because we’re opposed to copyright, but because we’re opposed to copyright functioning in ways that don’t benefit either the author or the end user. Copyright is meant to be a tool to promote invention” (Steffen 2006). It is important to note that Creative Commons does not provide copyright, but instead offers a licensing model for the redistribution of additional rights under the framework of copyright. Creative Commons harnesses another area of law entirely—that of contract law, in an attempt to ameliorate against the automatically generated rights that copyright establishes. In this sense Creative Commons offers private law making—wherein private law,
contract law specifically, engages interactions between private citizens to make more nuanced decisions about the circulation and reuse of their creations/works. As copyright holders are able to enter into licensing arrangements regarding their creations, Creative Commons works precisely on this possibility of licensing works. Importantly, Creative Commons, like traditional copyright, rests on the pillars of individual authorship and original works—both of which are at odds with much Indigenous work that is either communal/variously attributed to specific kin groups and also does not meet the rigid standards of originality in a Western artistic and/or scientific sense (Sherman and Strowel 1994; Bowrey 1998; Sherman 1995; Christen 2005, 2012; Anderson 2009).

The development of Creative Commons licenses, and their success and transferability across multiple jurisdictions, speaks to the need for alternative frameworks for the uses of otherwise protected works. In creating conditions where specific needs (for example, attribution, acknowledgement, non-commercial use) can be incorporated and prioritized, (the contract/agreement/license on top of the automatic copyright rights), there is a fundamental reworking of the intellectual property paradigm. In this new paradigm, individual creators are given more refined options for how to make their work available. These choices, it is argued, tend to more closely reflect the intentions of the creator in terms of how they would like their work to be shared and circulated in the world. Rather than a one-size-fits-all approach, which is largely the current copyright model, Creative Commons provides additional options for creators to be more specific about how their works can be used. In empowering creators to make their works more freely available, users are also beneficiaries because it becomes much clearer what the intentions as well as the expectations of the creators vis-à-vis their works are. While not everyone sees Creative Commons through this lens, especially creators who require copyright to secure adequate remuneration to sustain their work, this is the dominant narrative advocated by these alternative IP advocates.

Creative Commons uses licenses to augment traditional copyright. Licenses are not copyright, but can be designed to resemble copyright, or to add to or pare back certain copyright entitlements. This is only possible because one of the central rights provided to any copyright holder is that they have the ability and option to transfer their rights, in full or in partial, through a license, to a third party. The copyright holder can authorize a new use of their work and this is done through the transfer of rights, most often achieved through an express license. One of the most common licenses that copyright holders grant is for the publication of their works. For example, as the copyright holders in this article, we will grant a license to the publisher to make this work available to the public. In many instances these licenses seek to transfer full copyright to the publisher and the author must then receive permission from the publisher to reuse or reprint their work. While this is not the case with the publisher of this article, the point is that as the copyright holders, we are the only ones that can authorize this transfer of rights. Through signing the agreement provided by the publisher, which sets out the terms of use, a license for the publisher to use this work is created.

Working through this legal terrain raises a question that should be clarified before we proceed: what is a license? A license is an agreement between two parties. It is an authorization from the owner of the material (the licensor) to the user of the material (the licensee) to use the licensed material in specific ways for select purposes. Licenses have been commonly used within all areas
of intellectual property to grant new conditions or permissions for use that are not normally permitted in the standard terms of use. In this way, they provide additional components not included within standard intellectual property protections and entitlements for owners to assert additional rights. In today’s digital ecosystem, licenses are about as prolific as copyright; we sign, click, and agree to terms of licenses—most often establishing the conditions for the use of proprietary software—all the time, perhaps without really realizing the extent of our consent. As such licenses are both commonplace and commonly misunderstood: they provide legal control, but we are often not fully aware of the precise details within those agreements. It is because licenses provide an opportunity to change or add to existing rights, and in doing so establish new relationships between creators and users of works, that they have the potential to answer some of the concerns about the access and use of their culturally important copyrighted works that Indigenous peoples have. Yet, to date they have not been leveraged for this purpose in any standardized way. We see an opportunity through the creation of this new set of licenses to create conditions of use that are more culturally appropriate and accord with local Indigenous community expectations for accessing and using valuable knowledge resources and cultural heritage materials.

As a result of our work we have been thinking about potential options and strategies for dealing with the legal issues confronting Indigenous material for a considerable amount of time. These options have ranged from specific exceptions and limitations that could be incorporated into copyright legislation itself that accommodates Indigenous rights, to new kinds of legal and non-legal strategies that could be employed to deal with critical questions of access, control, and ownership of material. Finding new possibilities is especially important in contexts where: (1) Indigenous peoples have no legal rights to the material because it is owned by a third party, (2) when the material is already in the public domain ostensibly for anyone to use at any time and in any way, and (3) for the increasing contemporary material being produced by Indigenous communities where they are, in fact, the legal owners (Anderson 2010). From their inception, it seemed the radical innovation of Creative Commons provided the possibility for a specific “Indigenous license” set. That is, it seemed possible to develop a set of new licenses that could accommodate a different order of concerns about copyright—ones that also had to deal with historical dispossession embedded within intellectual property.

While information is scant, in 2004 the Creative Commons team did create a “developing nations” license. While it was initially taken up by organizations like Architecture for Humanity, it was withdrawn in 2007. The difficulties with multiple jurisdictions, contested politics, and the diverse needs of a broad range of constituents made the license too difficult to sustain. Similarly, an Indigenous-specific license never came to fruition. This omission, in contrast to the developing nations license, was in part due to the differing logics of access, openness, and the public that underpin the Creative Commons endeavor and that in many instances, depart from core Indigenous expectations and needs. For instance, many Indigenous communities have complex systems for accessing knowledge, often with a range of different levels of access conditions depending upon age, gender, initiation, and the like. Common, “free,” or public knowledge can only be determined by the knowledge itself or the relationships surrounding the knowledge and the context of its use. This type of contextualized understanding shows how knowledge is always culturally specific and derives meaning and possibilities for use from the local contexts in which this knowledge is created and sustained (Christen 2012).
While we are not connected with Creative Commons we have admired their innovation and their attempt to turn to licensing as a mechanism for ameliorating against the all rights reserved copyright model: a model that clearly presents substantial problems to a specific portion of the population. Working with Indigenous communities globally and specifically with those trying to navigate the choppy waters of intellectual property law we developed the idea for entirely different model of licenses and labels, combining a legal (licenses) and non-legal (labels) strategy for the complexity of Indigenous needs in this area.

The new TK Licenses and Labels initiative grew out of our work with Indigenous communities as they sought to manage materials in both digital and analog form primarily outside their communities in multiple settings; from the clearly commercial to the dizzyingly popular reuses in social media. Importantly, we found that the need and desire for these new legal options were not for internal debate and discussion. That is, the TK Licenses and Labels are tools for use at the cultural interface between Indigenous individuals and communities on the one hand and non-Indigenous peoples and third parties on the other (Nakata 2007). This interface has always been one of both possibility and vulnerability—where desired exchange and sharing can productively occur, but where exploitation and appropriation also have historical roots. This interface is malleable and subject to power relationships, but it has never been moderated or tempered by legal regulation, however minimal. But it is precisely at this interface, with the sharing of cultural materials and works, that new legal and educative options were being requested. No individuals or groups that we worked with erased the very real dilemmas that face communities internally as groups compete for or disagree over the use and or exchange of some cultural materials. What was clear, however, was that the TK Licenses and Labels were not even to be developed for this purpose. Instead, internal and already existing mechanisms for decision-making and debate were favored. In fact, local cultural protocols for internally circulating and reproducing materials and knowledge were the inspiration for the eventual creation of the licenses and labels as modes of dealing with externally circulating materials. In this sense the TK Licenses and Labels work to extend sets of internal “best practices,” cultural norms and responsible behavior to those outside of the local group.

The first iteration of the TK Licenses and Labels was born within the Mukurtu CMS digital archive and content management software (www.mukurtu.org). First launched as free and open source software in August 2012, Mukurtu began as a standalone, browser-based digital archive for the Warumungu Aboriginal community in Tennant Creek, NT Australia (Christen 2008, 2012). Mukurtu CMS is first and foremost a social system—that is, Mukurtu aims not to just be a piece of software, but a tool that facilitates multiple types of relationships of trust; trust that is built around respecting the ethical and normative systems that already exist within Indigenous communities for the circulation and reuse of cultural materials and their associated sets of knowledge. Mukurtu means “dilly bag” in Warumungu. In the past, elders would keep sacred materials in dilly bags and when someone in the community wanted to access the materials they had to approach the elder and enter into a relationship—they needed to learn the appropriate knowledge surrounding the materials and be responsible enough to be trusted with the knowledge and the contents. Mukurtu was chosen by Warumungu elders as the name for the stand alone browser-based digital archive we built because, like the dilly bag, they wanted the
archive to be a “safe keeping place” that fostered relationships and kept knowledge circulating in proper ways (Christen 2008, 2009, 2011, 2012).

Mukurtu CMS was not about creating digital locks for materials, but instead, about respecting and representing the range and types of relationships people have with digital materials. Part of this work was to give Indigenous communities a way to circulate their materials using their pre-existing cultural and ethical systems both internally and externally. Internally—to the communities who use the software—the Mukurtu platform uses community-created and flexible “cultural protocols” to define the granular levels of access that determine the movement of material within the archive and between community members (http://www.youtube.com/user/mukurtu). Yet how to manage materials as they circulated externally was a much more difficult question to resolve.

Once material is “loose” online it becomes more difficult to control. Correspondingly it is also very difficult to advise people who encounter this material online how to use it properly and respectfully. A test set of 12 TK licenses were piloted in the first two instances of Mukurtu. Garnering feedback from communities around the world and in conversation with legal experts, we were able to redefine the distinct needs that both license and labels working together could address. Thus, the TK Licenses and Labels aim to answer the grassroots calls of individuals and communities who want to engage with a range of strategies to manage and maintain their cultural materials as they move out of their own communities, social systems, and cultural protocol-based ethical systems.

**TK Licenses and Labels: A Grassroots Effort**

Discussions about the problems that Indigenous peoples and communities have with traditional intellectual property law are not new. While the discussions have increased, and international negotiations have made significant headway, there have been limited practical interventions at an international or domestic level that provide meaningful alternatives or relief to specific problems that are being experienced by Indigenous peoples in relation to the protection of their knowledge systems. TK Licenses and Labels are a strategic solution to a very specific issue: the management of already existing and circulating digital and analog material such as photographs, sound-recordings, films and manuscripts that embody and/or represent traditional Indigenous knowledge, cultures and practices.

These TK Licenses and Labels offer a set of new options for addressing issues of ownership, access, and control of traditional cultural expressions documented and recorded by non-Indigenous peoples and researchers that now reside in numerous cultural institutions worldwide. This is a key point: the Licenses and Labels are only designed for knowledge that has either already been made into a tangible form through recording and documenting, or that will be recorded and documented in the future. This initiative does not intend to create a legal framework for knowledges that are unrecorded or not ever to be documented.

While cultural institutions house much documented Indigenous material as artifacts of colonial rule, many working in these institutions see their role shifting away from ownership to
stewardship (see Hennessy et al. and Rowley, both this volume) where Indigenous, local, and traditional communities share in the care and long-term preservation of their cultural materials. While the TK Licenses cannot be applied to materials in the public domain or materials already protected through copyright, the TK Labels are specifically designed for these kinds of materials—to help make institutions and future non-Indigenous users aware of the local values and appropriate uses that remain deeply embedded within these materials, even if they have been outside the communities for generations. For this is no “ordinary” material. It is material that continues to be shaped by, and understood within, the cultural and local contexts where people maintain the critical connection to these materials. Further, acknowledging the epistemic violence in the taking and the making of a significant amount of these materials, a violence that also resulted in the loss of Indigenous control over use and access, within the framework of the TK Licenses, institutions and/or individuals who continue to hold the copyright in this material can choose to abandon their copyright and transfer it to the source community (see Christen’s Warumungu example below). This is an option that acknowledges that for some institutions and individuals, they should never have been the “owners” and the decision-makers for this material in the first place.

One of the challenges for the TK Licenses and Labels has been to address the historical legacies of copyright exclusion alongside the increasing contemporary desires for legal possibilities that reflect current Indigenous realities. Certainly in the present moment, the cultural material with legacies like non-Indigenous copyright ownership, works with expired copyright, works in the public domain, and orphan works constitutes about 85-90 percent of Indigenous documented cultural material. It is within this complex of works that the TK Labels will be predominately in operation. But this initiative is also designed for the increasing context of Indigenous made, authored, and owned cultural materials. For instance, Indigenous activists, scholars and researchers, in collaboration with other scholars and technology experts, have been creating community-based documentation and recording projects. These projects deliberately position Indigenous communities themselves as the owners and custodians of the material that is being created and thus the central decision makers for controlling and disseminating cultural material and cultural knowledge (see also Hennesssey et al. this issue). The site-specific digital archives that are also necessarily being developed to store and manage this material are working to embody culturally specific forms of classifications and organization. Increasingly, important questions about how to provide regulated and culturally specific access to this material to persons from outside the community are being raised. Thus this initiative also offers options for the enhanced management of material increasingly being made by Indigenous peoples and communities for community-based archival projects, for cultural heritage preservation purposes, for artistic purposes, and for projects where Indigenous communities maintain a leading role in determining what cultural traditions and practices can be shared with multiple audiences outside the community. The TK Licenses are especially designed for these shifting practices.

For many Indigenous communities, materials (photographs, sound recordings, films, videos, and manuscripts in analog and digital form) that contain cultural information or representations of cultural practices need to be managed according to alternative sets of rules to those provided by copyright and Creative Commons license models. These alternate rules derive from the specificity of the contexts from which such materials derive and reflect cultural conditions of circulation and use particular to the materialized knowledge. For instance, in some societies,
some expressions are managed under rules regulating access according to gender, initiation and/or the secret nature of the material, others have limited duration for circulation and/or should only be seen or heard by specific clan groups—the sets of protocols embodied in local ways of life are endless and dynamic across cultures and specific types of material. The TK Licenses and Labels will provide legal license and non-legal educative label options for the appropriate management of Indigenous cultural knowledge and traditional cultural expressions. Under this framework, and provided through the Local Contexts website, an educational toolbox will be created to help both Indigenous and non-Indigenous people understand the legal and cultural parameters governing control, access, and use this kind of material. That is, we do not feel it will be enough for us to point people down a path of generating TK Licenses and Labels without key educational materials and a community dialogue concerning not just the legal issues, but also and importantly, the social implications and the possible or probable effects of such choices. The site provides legal information and at the same time, we hope it demystifies the process and precepts of much intellectual property law and discourse. Local Contexts provides a knowledge base for the diverse users of the site with the aim that it also empowers those using the site to add their own knowledge and experiences of the TK Licenses and Labels. As a result, this platform begins the important task of also creating a repository of best practices and community interactions in the management of valuable Indigenous knowledge resources.

As an informative web-based platform, Local Contexts fulfills the need for both legal and educational materials and pairings for Indigenous cultural heritage materials. Local Contexts acts as an umbrella site offering four new license options for Indigenous creators, custodians, and beneficiaries to manage their community-owned and generated cultural content with third-parties and external-community users. Unlike other current licensing models, the TK Licenses enable a community representative, a family, clan or language group or multiple communities who might share responsibility for material, to choose options in order to develop their specific license. Options include the acknowledgement or attribution of the source community or communities with the work; non-commercial-use of cultural materials; commercial-use of community owned material, and a specific option for outreach that would enable works to be used in educational and other learning and sharing contexts only. In general the TK Licenses incorporate several key concerns for Indigenous peoples that have been missing from copyright and Creative Commons models. These include attribution of the source community alongside that of the copyright owner; direct negotiation over the integrity of the work when used in a commercial context; and, the negotiation over reciprocal benefits from use within educational contexts. The site will allow users to generate licenses and labels from various combinable options and they will receive both a URL and the legal license once they have completed the workflow.

Similar to Creative Commons, Local Contexts provides these licenses that can only be used and applied by (or in agreement with) the original holder of the copyright. For instance, when a member of an Indigenous community takes photographs of a community event, he becomes the holder of the copyright in the images. He may decide to put these images on his community website and because he is automatically recognized as the copyright holder he may wish to transfer his individual copyright to the community itself since the photographs reflect community activities and knowledge. Working within the parameters for using the TK Licenses and Labels set by the appropriate community cultural authority, he may choose the TK License “Community Attribution” and “Commercial” (A+C). For an external user who can access the website and
finds that she would like to use those images in a commercial way, the commercial license enables this kind of use as long as the community itself continues to be attributed in the new commercial work and that the external user of the images directly negotiates and enters into an agreement about the intended use and benefit to be returned to the community. This negotiation is in order to ascertain that the commercial use will not involve derogatory or culturally offensive treatment.

In another example, an Indigenous individual, on behalf of her community, makes a new recording of a ceremony and places that recording in the public-access part of the community’s digital archive. As the material is uploaded, and based on a decision already made within the community, an Outreach license is selected and added to the work. A professor at a university accesses this public part of the archive where this recording is held and decides to use it in her undergraduate general education class of 200 students. Through the Outreach License (TK O), she is permitted to use this material but must also enter into a conversation with the community about what kind of reciprocal benefits she could provide—including access to relevant and interesting resources for the community, access to interns to help work in the community on specific projects and so forth. This license is not necessarily about generating revenue, but rather about facilitating the fair and equitable exchange of educational and personnel resources that can be so difficult for Indigenous communities to access. This license also recognizes the significant amount of Indigenous materials that are utilized in educational and other learning contexts often without permission or proper acknowledgement. The aim of the Outreach License is to help establish a means for sharing with reasonable and respectful expectations of exchange in knowledge and resources.

On the Local Contexts web pages for each license, there is information provided for both those who maintain the rights to materials and for those seeking to use the materials. For instance, using the Outreach License mentioned above, there is a clear explanation of the expectations for both those creating the License and those seeking to use material that has been licensed in this way:

**TK Holder:** This license should be used when you would only like your cultural material used in educational outreach contexts. Outreach contexts can include schools, universities, libraries, archives, museums, online forums and small learning groups. Depending on what kind of context and the possibilities for increased circulation of this material you may want to negotiate with the institution you are planning outreach within for fair and equitable reciprocal exchange. This exchange might include access to educational resources that your community has difficulty accessing under other circumstances.

**TK User:** Access to this work is designated as outreach. You may only use this work for outreach and learning purposes in contexts including schools, universities, libraries, archives, museums, online forums and small learning groups. Depending on what kind of context you are in and the possibilities for increased circulation of this material you are asked to negotiate with the Licensor to develop a means for fair and equitable reciprocal exchange for the use of this material. This exchange might include access to educational resources that are difficult to access under normal circumstances (Figure 1).
By describing and defining the rights and expectations of both the TK holders and users, we hope to highlight the reciprocal nature of any and all uses of these materials. That is, we are aiming to promote a conversation that extends beyond the creation of a license in order to help foster meaningful dialogue and negotiations between various stakeholders who have historically not been in dialogue. Where IP laws and regulations can be very complicated and confusing, we aim for the process of generating the TK Licenses and Labels to be both straightforward and sensible.

Putting the “Fair” Back in “Fair Use/Fair Dealing”

Importantly, for a large portion of materials that are already in the public domain or are owned by third parties, the TK Label option takes the notion of fair use (or fair dealing in common law jurisdictions) and extends it to illustrate culturally-specific conditions of access and use for certain kinds of cultural materials that contain gender-restrictions on access or contain sacred/secret content. Fair-use is embedded within copyright statutes as an exception/limitation to the otherwise exclusive rights bestowed upon a copyright holder. The fair-use doctrine permits certain uses of copyright works without the permission of the copyright holder. Like most exceptions and limitations within copyright, what constitutes “fair” has been developed over time and in response to very particular issues and demands. Commenting on early 19th-century developments of the term, Kathy Bowrey explains how:

In the nineteenth century the notion of fair-use had a much larger role to play,
leading to a relative consideration of the original efforts and corresponding markets of the plaintiff and defendant. Further..., consideration of the good served by our laws and, co-relatively, determining the wrong of “piracy,” involved an assessment of benefit to the community in conferring protection. [2008:3]

In early conceptualizations of this concept the benefit to the community was a key factor in determining what constituted fair, not only what the disadvantage or loss to the copyright holder was.

In the United States, there are several factors that have been developed to help determine fair-use. The development of these factors and the weight that either of them has in any given case speaks to the challenge for finding consistency within this concept. These factors include: the purpose of the copying, the nature of the copied work, the amount of copying, and the effect of the copying upon the value of the copyright work. In Reclaiming Fair Use, Patricia Aufderheide and Peter Jaszi explain how advocates for copyright reform initially constructed “fair use” as too vague and complicated a subject to be effectively mobilized for their purposes. In doing so they lost ground on a key area for strategic intervention in the copyright regime and one that could lead to an expansion of possible acceptable uses of copyright works. Aufderheide and Jaszi argue that fair use offers itself as an important component for ameliorating the harsh exclusions of copyright. It is precisely because of the flexibility within the concept that allows for multiple interpretations of what constitutes fair use to be developed. Further, they suggest that fair use must, by definition, retain this flexibility as social and cultural norms for what constitutes “fair” change over time and are often made in response to differently situated parties. It is up to communities themselves to determine what is fair and what is not (Aufderheide and Jaszi 2011).

The TK Labels expressly draw upon the possibilities that Aufderheide and Jaszi note within their analysis of fair use. The TK Labels situate community-determined interpretations of what constitutes “fair” and equitable use at their core. While they are not legally enforceable, they will go a long way in informing a misinformed public about what, for Indigenous peoples and communities, constitutes the fair and equitable use of their traditional cultural knowledge and cultural heritage materials. The TK Labels also target key types of work: the extensive collections of traditional cultural materials that are found in the public domain and in the special legal class known as orphan works. The TK Labels function to provide additional or missing information and in doing so help users make more informed decisions about the best and most appropriate way of using this material.

For instance, if a non-Indigenous musician comes across a public domain sound-recording at the Smithsonian Folkways website that has the Community Use Only Men-Restricted Label (TK CO+MR) explaining that the content has been identified as containing men’s secret ceremonial material, that musician is actually being given more information that will help her make a fair and equitable as well as ethical and culturally appropriate decision about the best way of using that material. With the TK Label, she is given more information about the cultural conditions governing use of the material and is therefore more likely to respect the conditions of access and use requested of her as a potential user. Thus the Label works to help prevent or limit misuse and derogatory treatment of Indigenous, traditional, and local cultural materials.
A TK Label can be generated and added to a work by Indigenous individuals, family, clans, and communities independently. There is also an option for institutions and researchers working closely with communities to add an appropriate Label (Figure 2). Involving institutions that are working with communities recognizes that much of this kind of public domain material actually resides in cultural institutions. When an institution or researcher is working to utilize a TK Label, they are asked to work in collaboration and dialogue with communities themselves to develop the most appropriate labeling for the works. Since the Labels seek to provide a space where missing information including the cultural conditions for use and access and this information can be added, and since Indigenous communities are traditionally the ones who have this missing information, the Labels are designed in such a way that discourages institutions only or researchers only adding them. Since so many institutions are beginning to work more closely with communities, the TK Labels also reflect the collaborative environments developing between institutions and communities as part of collaboration, repatriation, and digital return agendas. TK Labels, by definition and out of necessity, require mutual dialogue and conversation in order to develop the most appropriate labeling options.

Figure 2. An example of the TK Verified Label.

The TK Labels are not legally binding and therefore have no basis in any formal law. Instead, they serve a purposefully educative function making their designation as “fair use” more than an empty promise. As voluntary guidelines they are designed to facilitate a new set of social norms concerning the use of cultural knowledge and cultural materials. The TK Labels are able to convey what it is that is fair and equitable from an Indigenous or local community perspective, rather than assuming that this is generally known. In addition to the culturally specific TK Label choices, we added a Traditional Knowledge Verified Label (TK V) in order to signal and provide positive reinforcement of social norms. There is a need for non-Indigenous peoples to know when they have gotten respect and fairness (in relation to displaying and representing Indigenous
cultural materials) right. The TK V Label allows Indigenous peoples and/or communities to label something in use in the public domain or by a third party with the digital equivalent of a gold star: “This label affirms that appropriate conditions for access and use are in place and that whoever has made this material accessible has made accommodations for cultural protocols associated with the knowledge.” The TK V Label shows good practice and good faith and, if this changes, the TK V label can be revoked and removed from the work. Far from a litigious or adversarial stance, the TK Licenses and Labels promote an equitable, and necessarily proactive, dialogue for all uses of Indigenous cultural materials.

Local Contexts: Because the “s” Matters

We chose the name Local Contexts for the umbrella site that houses the TK Licenses and Labels because, in every instance, the creation of a TK License or Label is dependent on the local contexts that will drive the choices that communities make. The past, present, and future all influence how decisions to define and attribute cultural materials are made. Local Contexts provides a platform for dialogue as well as a set of educational tools to address the mismatch between Western intellectual property systems and the varied Indigenous concerns over the circulation of, access to, and control over their traditional knowledge in its many forms. The TK Licenses and Labels encourage the creation of dialogue between Indigenous peoples and external users of cultural knowledge and traditional cultural expressions. For this system to work, the onus is placed on the licensor to provide accurate information for correct attribution and acknowledgement details and to maintain current contact information for someone wishing to license the material. These conditions must be fulfilled before the license itself can be generated and attached to the copyright material as part of the processes of “generating a license” currently under development.

In the first development stage for the website, the initiative’s priorities include the ability for users to:

1. Access TK Licenses or Labels in human-readable and legal-readable text;
2. Access tutorials (video/audio) about the use of TK Licenses and Labels (what they do and don’t cover);
3. Access clear documentation about the use of TK Licenses and Labels for outreach purposes;
4. Share and exchange information about how TK Licenses and Labels have been used to generate a set of best practices and track how TK Licenses and Labels are being used internationally;
5. Access information about the potential interoperability of the licenses—specifically how the TK Licenses work with and in relation to standard copyright and Creative Commons licenses.

In keeping with the principles of self-determination embodied within the Declaration on the Rights of Indigenous Peoples (United Nations 2008) the platform leaves decisions about who can create the license up to the governing structure of each Indigenous and local community.
In addition, we recognize that historical contact situations, long-term national relations, and other factors create the necessity to deal with materials that has multiple stakeholders. We currently have options that enable multi-community licensing and labeling. This recognizes that there is some material where multiple communities have responsibilities of custodianship and/or ownership and that no singular community has explicit control over the material. It indicates that the rights and responsibilities for use are spread across multiple communities through already existing community protocols and ongoing cultural relationships.

To address varied ownership, the site will provide steps for non-Indigenous owners of content to reassign their copyright to Indigenous communities (variously and multiply defined). Importantly, the TK Labels can be generated by Indigenous users in collaboration with cultural institutions and/or specific researchers in order to clearly mark the proper uses for and circulation routes of the work in question. Christen’s collaborative research provides an example.

I am a researcher and I have worked with the Warumungu Aboriginal community in Central Australia for 15 years. Over that time I have accumulated: dozens of digital video tapes recording songs, dances, language, social gatherings, and the like; thousands of digital photos of dozens of community members including people who have since passed away; several VHS and cassette tapes that contain valuable language materials, oral histories and women’s songs and dances. These are not digitized; and finally, publications including a book and several scholarly articles that are in PDF form. I would like to host some of this material on my own website and also give back digital copies to the community for their own use. I have permissions from all of the individual community members I worked with for the recording of the original material, but do not or did not collect any specific consent for derivative uses of the materials. I have archived the originals of most of this material at the Australian Institute for Aboriginal and Torres Strait Islander Studies archive under a donor agreement that vests permission with the community members who are recorded on the tapes or appear in the photos and videos.

This is not a unique scenario. Mine is a quite common predicament for many anthropologists around the world, past, present, and future. Trying to ethically return digital materials requires more than just burning the materials to a CD or DVD or sending the community/ies in question a hard drive. Following the logic on the Local Contexts website to generate a license, I would first need to assign my copyright in the new digital materials to Warumungu community. That is, I consent to transfer my rights in the materials to the community, who is and really should be recognized as the legitimate authority.

This transfer of copyright is a key point in relation to the shifting terrain between scholars (or other outsiders) and the communities in which work has or is taking place. This step highlights the release of my copyright. This could be implemented by scholars whose materials are decades old or months old; in either case, by choosing to assign my copyright to the community (or to specific community members) with whom I have worked marks my resistance to ongoing colonial privileges that the current copyright system perpetuates when it automatically vests ownership with me as the primary rights holder. It also works to institute a set of best practices where scholars recognize that their collection or documentation of knowledge is made possible by a range of acts of generosity and sharing that should not culminate with the singular authorship/ownership of that material. At the very least, this step may incite dialogue and
discussion between community members and researchers about the on-going use of the materials they create and collect. In fact, many Indigenous communities already require researchers to sign agreements about the use and ownership of the materials they produce during their research. Thus, the TK License generator foregrounds the need to maintain on-going relations with communities and, at the same time, it gives researchers a way to meaningfully give back to the communities with whom they collaborate. Given the uneven and often uneasy past relationships between Indigenous communities and outsiders, we hope that this tool provides a reason for, and a framework towards, more dialogue and meaningful negotiation about the uses of materials for multiple audiences.

In order to facilitate the uptake of the TK Licenses and Labels, we are working directly with several ongoing projects as well as with each and every community currently using Mukurtu CMS for their content management needs. Mukurtu CMS provides direct access to the TK Licenses and Labels through the platform’s interface. This allows users to quickly and easily assign a license and/or labels to their content and both the item and collection level. Communities who have their own content management system in use for their digital archive materials will eventually be able to connect to the Local Contexts website, follow the workflow and determine what type of licenses or labels would be appropriate for their materials, generate the license/label, and attach it to the material in question.

The workflow for the site follows an easy to use set of questions and answers that guide users to make the most informed choice for their materials. Prior to choosing a TK License or Label users are given a set of preview materials answering basic questions including: “what is copyright?” and “what is the public domain?” as well as more site specific questions such as “what is a license?” “what is a label?,” and then also more leading questions to help define the use, “when might you want to use a label?” or “what kind of material is covered by a license?” These preview questions aim to help users understand the broader context and potential impact of their decisions with licensing or labeling their materials. Following these, the heart of the site is based on the choice of a license or label and the set of questions that directs users once again to define their explicit needs and make the best choice for their material. The site will eventually provide, through its community feedback forum, a way for institutions and Indigenous peoples and communities to interact and share different ideas: for example how to manage their jointly held or jointly stewarded materials or how to establish an IP decision making body or cultural authority to help make community-based decisions about the protection of materials and the use of the TK Licenses and Labels.

Digital Returns: Promises and Possibilities

This legal and educative intervention has developed out of our commitment to find innovative ways for altering a system that historically and contemporarily marginalizes Indigenous peoples and consequently a diverse range of knowledge management strategies. It is a deep irony that while the dominant narrative for intellectual property law is that it functions to foster innovation, there has been very limited innovation within this body of law—especially innovation that recognizes the limits of this concept and that really, cultural innovation takes multiple forms and is not solely or only related to capital accumulation. Having access to your own histories,
ceremonies, laws, and cultural practices contributes to the possibilities of cultural innovation, or cultural life, in a myriad of ways. When these materials are taken from communities, possessed by others, and used in contrary ways, cultural innovation and cultural life face serious challenges.

The digital return of Indigenous cultural material is a critical step, even if somewhat overdue, for maintaining and reinforcing cultural connections to place and identity through and with time. The technological changes and challenges over the last 15 years have brought with them legal, social, and cultural change on a global scale. With increased dialogue and a willingness to bend technology to the needs of others, partnerships across and between Indigenous peoples and institutions have culminated in a more sustained response to Indigenous requests for access to their cultural materials. But there is more thinking here that needs to be done. This relates directly to pushing beyond access to include measures of control over these materials. Where appropriate, Indigenous peoples should be recognized as the rightful authorities over their cultural materials, even though the laws of copyright have acted as an effective tool of dispossession. Moving between access and control in these ways requires a rethinking of this paradigm of colonial authority and its postcolonial legal and social forms and legacies. This is precisely what the TK Licenses and Labels are working to achieve. For the first time, Indigenous and traditional communities will have a range of legal and less-legal, more educative, options, that have been designed with Indigenous needs and histories at the forefront.

To move from the constraints of current legal thinking about ownership and authorship of digital cultural materials requires accounting for the past, as well as understanding the structural frameworks that work against the fair and equitable treatment of historically marginalized communities. The TK Licenses and Labels are but one intervention within a field that must include legal, non-legal, educational, and social points of relation for any long-term, meaningful shift in the co-curation, collection, preservation, and exchange of digital materials and knowledge to flourish in respectful and ethical ways. The pressing question of how Indigenous peoples can regain control of their past heritage in its current digital format must be answered not with blunt instruments and legal discourse, but through the shared commitments of multiple stakeholders, as we saw in the Digital Return workshop, where institutions, communities, scholars, activists, and technicians came together to work towards commonly held goals of ethical and respectful sharing and exchange.

Notes

1. Patricia Frank Narrurlu is our source for the suggestion to “chuck a copyright on it.” She shared this suggestion with Christen sometime in 2005. See Christen (2006).

2. Initial funding for the TK License and Label Platform comes from the Traditional Knowledge Division, World Intellectual Property Organization (WIPO) and the Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics (IPinCH) project, funded through the Canadian Major Collaborative Research Initiative (MCRI) program (Grant 412-2007-1007) by the Social Science and Humanities Research Council (SSHRC), Ottawa.
3. The educational website is live as of April 2, 2013. If you are, or your organization is, interested in testing the TK Licenses and Labels, please contact Jane Anderson or Kim Christen at info@localcontexts.org.

4. The platform—for now—addresses digital cultural materials only.

5. Photographs constitute a “literary and artistic work” and are automatically protected in every jurisdiction. The owner of the copyright is the creator/maker of the photograph. This is an international standard as per the two international copyright treaties: the Berne Convention 1886 [amended 1979] (with 167 contracting Member State parties) and the Universal Copyright Convention 1952 (with 100 contracting Member State parties).

6. In utilizing licenses as a prompt for dialogue and negotiation between various stakeholders we break from the logic of copyright and, to some extent, Creative Commons advocacy. In this sense we are not trying to streamline and "harmonize" the terms of access and use of traditional knowledge. Instead, we are seeking to introduce some productive “friction” into the system wherein non-local users of Indigenous knowledge and cultural heritage are asked to slow down, to dialogue, and to consider what fairness and equitable use from an Indigenous perspective constitutes. This is a significant contrast to open/free culture movements and intentionally encourages reflection upon these movements as outcomes of culturally specific knowledge production systems. The TK Licenses and Labels is a framework built to generate respectful and responsible knowledge-sharing practices that reinvigorates and prioritizes local contextual practices.

7. Local Contexts is not designed as a site to handle disputes. This is because disagreements or disputes are best dealt with at the level of the local community or from within the local project itself. We hope that best practices will be built out through dialogue at a community level, especially with respect to differing opinions of use and to acknowledging perspectives from diasporic communities. Each family, clan, or community will have different processes and frameworks for decision-making. Some communities are in the process of establishing cultural authorities to help make decisions about a range of IP issues facing their community. Depending on history and context, these decision-making processes will also accommodate perspectives from community members who reside in different regions. In order to help facilitate decision-making frameworks, we have included a decision-making forum on the Local Contexts site that offers a space where communities can share with each other the different kinds of cultural authorities and frameworks that are being developed to deal with new legal complexities such as intellectual property management of cultural resources.

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Protecting indigenous cultural property in the age of digital democracy: Institutional and communal responses to Canadian First Nations and Māori heritage concerns

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Abstract
This article presents a comparative study of how Canadian First Nations and New Zealand Māori peoples have employed digital technologies in the recording, reproduction, promotion and discussion of their cultural heritage. The authors explore a selection of First Nations and Māori initiatives that resist or creatively respond to the digitization and electronic dissemination of cultural ‘objects’, knowledges and landscapes as a continuation of social processes that have dynamically endured over more than two centuries. Their comparison also considers the limitations of conventional law in regard to the protection of indigenous cultural and intellectual property. Expressions of traditional knowledge and culture generally fall outside the protection of copyrights and patents, a situation that is often exacerbated when that heritage assumes digital forms.

Keywords
Canadian First Nations, cultural mapping, cultural property, digital databases, digital heritage, Māori

Technological advances have made digitization an increasingly popular and accessible way of preserving and disseminating the collective knowledge of humanity. As more and more digital objects are created, questions arise over their ownership and control. Checks
and balances such as copyrights and patents offer ways of legally asserting economic and creative control over, and benefits from, certain types of knowledge and intellectual property including music, film, art, and literature in digital as well as non-digital forms. However, recent influential applications of digital technology, including open access initiatives and projects to advance the freedom of information, are further challenging the hierarchical processes traditionally associated with knowledge access and communication, whereby organizations and/or governments typically assume a ‘gate-keeping’ role. This is in addition to shifting norms regarding, for example, how the public perceives the acquisition of music and film via the internet, in ways that sometimes cross legal bounds (see Gillespie, 2007; Vaidhyanathan, 2001). These events invite reflection on the acquisition and maintenance of cultural property, as communal and at times confidential knowledge, in the age of ‘digital democracy’.

In general, concerns about the need to limit access to digitized information are phrased in terms of economic interests. This is evident, for example, in responses from the publishing world to two initiatives that seek to promote access to the world’s literature. Project Gutenberg, begun in the 1970s, seeks to create, collect, store, and distribute eBooks for free, while the more ambitious Google Books, introduced in 2004, intends to scan all of the 130 million published books in the world (Jackson, 2010). Both projects have encountered substantial technological and legal challenges, especially Google Books, which is scanning and making available both in-print and public domain titles, and is thus having to contend with charges of copyright infringement and issues of fair use from both publishers and authors. There is considerable debate around the contestation and transformation of copyright in the digital and other realms (e.g. Lonetree, 2002; Moore and Hennessey, 2006), but these topics are beyond the bounds of our present article.

A different kind of challenge involves the increasing use of digital technologies for political activism. For example, the recent controversy surrounding the availability of politically sensitive information on the Wikileaks web archive has initiated a vigorous public debate about where the boundary should lie (if indeed there should be one) between freedom of information and political confidentiality in democratic societies. Attempts to restrict the accessibility of Wikileaks have been cast as a form of censorship by the site’s supporters. This is but one case of how the internet, and in particular internet-accessible databases containing restricted-access material, are becoming sites of contest about freedom of information. Further politicization of digital media has occurred with the use of social networking sites for large-scale communication in recent popular uprisings in the Middle East and North Africa as well as the 2011 London riots. Overt calls for mass mobilization and assembly to protest were made through mobile phone and PC devices on Twitter and Facebook, and also covertly through encoded message on dating websites, continuing a similar deployment of social networking to support anti-neoliberal protest in the West (Juris, 2005). It would be simplistic to suggest that the use of social media as an instrument of protest in Muslim countries represents a generational movement towards democratization, as has been suggested in the media, since the causes for unrest vary from country to country and, in each, are the result of many decades of discontent and activism. And, of course, a digital divide still affects accessibility to both devices and systems of
networking for those marginalized in any economic or political system.\textsuperscript{4} Despite this, there remains a growing association in many societies between digitization and democracy, where digital culture is seen as a vehicle for freedom of expression and information, not only operating within, but also enabling the development of, a transparent and accountable socio-political system.

Here we explore a further dimension of the (potential) quandaries imposed by, or linked to, the digitization of knowledge. Our concern is less with the economic or macro-political aspects of digitization than with the impact of ‘open access’ and ‘freedom of information’ upon the tangible and intangible cultural heritage of indigenous peoples in democratic societies such as Canada and New Zealand, both countries with a colonial legacy. The nature of knowledge within these indigenous communities may be fundamentally different from that of the majority of non-indigenous cultures, resulting in the need to limit harm to indigenous perspectives, values and identity when their culture is ‘digitized’ (Dyson et al., 2007; Graber and Burri-Nenova, 2008).

For many indigenous peoples, for example, there may be little or no difference between cultural property (i.e. things) and intellectual property (i.e. ideas or knowledge) and thus no separation between intangible and tangible aspects of cultural heritage, nor, indeed, between past and present. Indigenous peoples are concerned that culturally significant aspects of their heritage have often been appropriated or made into commodities, or used in inappropriate ways (Brown, 2004; Johnson, 1996; Nicholas and Bannister, 2004a, 2004b). The costs of appropriation and commodification of indigenous heritage may include loss of access to ancestral knowledge, loss of control over proper care of heritage, diminished respect for the sacred, commercialization of cultural distinctiveness, uses of special or sacred symbols that may be dangerous to the uninitiated, replacement of original tribally produced work with reproductions, threats to authenticity and loss of livelihood, among other things (Hollowell, 2004; Nicholas and Hollowell, 2006). This is exacerbated by aspects of indigenous heritage often being seen as part of the public domain, representing vanished or vanishing cultures (Nicholas, forthcoming). This is not to imply that open access is bad, but to point out that there are uses of other people’s heritage that may be inappropriate or unappreciated.

Few legal options are available, furthermore, to protect indigenous cultural heritage. In Western law, protection of intellectual property is based on property values and ‘rights’, and is concerned largely with ‘things’; ownership is vested in individuals; and infringement results in economic loss. Protection is through copyrights, patents and trademarks, which have very specific applications. ‘Indigenous intellectual property’, however, is situated in customary law and culture, and based on social relations and responsibilities. There may be no distinction between what others separate into cultural versus intellectual property; it is concerned largely with people; ownership may be communal; and infringement results in cultural, spiritual and economic loss. The stakes are thus higher for indigenous peoples when aspects of their culture are used in inappropriate or unwelcome ways, even when the desire is to honour, learn from, or celebrate their indigeneity. Furthermore, the intangibility of cyberspace, the possibility of infinite simulacra, and the rapid development of high-performing personal interfaces (such as computers and mobile devices), somewhat defeat the concept of digital ‘property’, making
the protection of digital intellectual property, never mind digital cultural property, difficult to police in law.

If the digital frontier continues to develop at its current rate and in its current form, we might consider how cultural heritage is being responsibly recorded and managed electronically by institutions as well as communities. In discussing these processes, we have identified some digitally based case studies in which indigenous people are beginning to assume their rightful place as producers and keepers of their own knowledge.

**Recording and reproducing indigenous heritage**

Among Māori and Canadian First Nations peoples, crafted objects and landscapes of memory have always been repositories and catalysts for generational information, linking people to each other and people to their land and religio-political contexts. In some ways, such complexes of artefacts and landscapes could be thought of as cultural databases in themselves that enable, and are enlivened by, interpersonal social networks. The arrival of new recording media, such as naturalistic drawing and painting, as well as writing, and (later) sound recording, photography and moving image capture, broadened the means by which cultural information could be recorded and used (see Brown, 2008; Nicholas, forthcoming). Technological reproducibility means that items and places (and the information they contain) can now be viewed without actually visiting them (Berger, 1972: 19). Problems in the availability and application of these recording processes, and the storage and dissemination of their products, have been well documented and widely discussed by communities and scholars. Such issues are compounded when indigenous objects, themselves made by customary processes and often with new media, are institutionalized and then managed and accessed by others. As museums and archives have moved away from being collectors to becoming preservers and interpreters of culture, new interfaces that allow greater public access to institutionally held indigenous treasures, stories, and pictures have been developed. The most recent of these are web-accessible databases, some examples of which we discuss below.

In Canada and New Zealand, it is increasingly common for organizations to seek to replicate in digital environments the protocols of access required to interact with culturally-sensitive material in order to facilitate indigenous interpretation of collections, a process Srinivasan and others have termed ‘inreach’ as opposed to the ‘outreach’ purposes of earlier institutional databases (Becvar and Srinivasan, 2009: 426–428; Srinivasan et al., 2009a: 176). In British Columbia, for example, the Reciprocal Research Network (RRN) is an innovative partnership between the Musqueam Indian Band, the Sto:lo Nation and Sto:lo Tribal Council, the U’mista Cultural Society, and the University of British Columbia’s Museum of Anthropology, which was developed ‘to facilitate reciprocal and collaborative research’.

Drawing together digitized collections of Northwest Coast material from museums internationally, into a single web portal:

The RRN restores, widens, and creates new knowledge surrounding indigenous cultural heritage by developing a new community-based approach to research. This model of research and community access will utilize technology to facilitate two-way, or reciprocal, exchange of knowledge among communities and institutions around the globe.
The result is not only a new notion of a research community (Rowley et al., 2010), but also an interactive virtual environment in which process—in decision making; in knowledge mobilization; and in benefit sharing—is emphasized. Access to this environment itself is considered with the submission of an online questionnaire that requires applicants to describe their background and interests relative to the site. Conditions of use include image and catalogue data reproduction restrictions based on copyright ownership, which might be institutionally invested if the object is no longer in the possession of its origin community (although this does not preclude institutions themselves requiring secondary users to contact origin communities for permission to reproduce).

In New Zealand, the open-source Anthropology Photographic Archive of the University of Auckland separates copyright from cultural sensitivity, putting the onus of cultural permission and description back on the photographer unless it receives correspondence to say otherwise. Access to its sister archive hosted by the Art History Department is restricted to university users, who are asked to click on an agreement button to confirm that they will be ‘mindful’ and respectful of the special significance of ancestor and taonga (cultural treasure) images. While acknowledging that sensitivities associated with objects and images are important, neither site advises precisely how they should be respected in terms of misuse at the desktop through misappropriation or proximity to food, which can undermine the special nature of the images (see discussion below), whereas copyright issues are explained in considerable detail.

In terms of copyright, institutions have for some time been under pressure to justify the intellectual property right they assert in relation to their indigenous digital collections, and not only from indigenous communities. The Open Source, Creative Commons and ‘free culture’ movements have challenged the concept of licensing images, while indigenous groups have questioned the ownership that institutions claim in their cultural treasures (Hess and Ostrom, 2003: 112). It is possibly only a matter of time until restrictions related to the cultural-sensitivity of digital collections might also be criticized for not being sufficiently ‘democratic’. Canadian archaeologist Barney Reeves, for instance, has recorded his experiences in attempting to access museum-held photographs of indigenous subjects (Reeves, 2004: 19). Seeking to examine photographs of Arapaho, Cheyenne, and Blackfoot shields in a prominent US museum, he was informed that he would have to obtain permission from each tribe to look at the photographs. In another situation, he was told by another museum that he would have to get permission from the Wind River Shoshone tribe to look at drawings of shields. Similar restrictions increasingly apply in New Zealand, where the National Museum, most municipal museums and art galleries, and some regional institutions, will not provide reproduction rights for provenanced Māori images or access to provenanced taonga Māori unless permission has been obtained first from the origin communities. The same conditions of use and access are not extended to other indigenous origin communities, however, most notably those from Pacific islands.

A further example of conflict in democratic and cultural values occurred in late 2010 when visitors to the Māori storeroom at the Museum of New Zealand Te Papa Tongarewa were given the choice not to enter if they were menstruating or pregnant. Te Papa claimed that the advisory was given to protect women from the tapu (sacredness; prohibition) of
the objects, although a number of commentators (both Māori and non-Māori and female and male) viewed the position as restrictive and not in keeping with the mandate of a publicly funded equal opportunity-oriented institution (TVNZ, 2010).

Despite such controversies, small gains are being made in the recognition of *tapu* as a restrictive condition within a democratic legal system. In its advice to the Commissioner for Trademarks, the Māori Trademarks Advisory Committee of the Intellectual Property Office of New Zealand tests whether trademark applications are offensive by assessing whether the *tapu* or *mana* (status; prestige) of a word or device (image) is in danger of violation. Although much of the discussion about the appropriation of Māori words and symbolism into commercial culture has revolved around the concept of ‘appropriateness’, the Trade Marks Act (2002) only prohibits the registration of marks that are ‘offensive’. The threshold of offensiveness is much higher than that of inappropriateness. As the *tapu* and associated *mana* of a Māori word or image increases so does the likelihood of offensiveness that might be caused by products bearing these words or images that are *noa* (elements free from *tapu* such as food or products related to, or from, the body, as well as alcohol or tobacco at the extreme end of this range) (Figure 1). A similar philosophical matrix informs the advisory for entry to the Te Papa storeroom and restrictions around access to culturally sensitive images and information. These restrictions are not abstract interpretations of ancient customs intended to impede the freedom of

**Figure 1.** *Kaupapa Māori* (Māori Values) assessment matrix for Māori trademarks. Diagram produced by Grant Bulley after an original sketch by Pare Keiha. © Pare Keiha and Grant Bulley. Reproduced with permission.
information through censorship; they instead provide protection from offensiveness, misappropriation and transgression in contemporary contexts, including the accessing of digital information.

While some institutional databases are more responsive to cultural property protocols than others, many are still inhibited by their association with organizational, cultural and political hegemonies that maintain their distance from communities (Becvar and Srinivasan, 2009: 428–429; Smith, 1997). In order to remedy this problem, some institutions have joined with communities to manage initiatives that enable indigenous people to organize and maintain digital collections of their treasures in relational databases (Srinivasan et al., 2009b: 667–668), as in the case of the RRN. By means of this particular project of virtual ‘reciprocation’ (as opposed to ‘repatriation’, which may never be possible in the virtual world; see Hogsden and Poulter, 2012, this issue), communities and researchers have access to over 247,000 items and more than 160,000 photographs, in addition to the physical collections at the participating museums.

Like the RRN, KIWA (which takes its name from the great Polynesian navigator) is a digital research environment, in this case based at the University of Cambridge, UK, and providing electronic access to institutionally held Polynesian objects (including taonga Māori) collected by European voyagers between 1765 and 1840. One of the aims of the database is to reinstate the original role of the cultural object as a generator, rather than an artefact, of cultural information and interpretation for the benefit of communities and research teams. In a pre-digital age, meeting such objectives would have been impossible given the number of islands, voyages, object types and institutions covered by the project, despite the close ancestral bonds between the populations represented by the objects. KIWA is accompanied by a partner project that involves the creation of a database called Te Rauata to archive taonga associated with the Te Aitanga a Hauiti tribe, some of which, collected by Captain James Cook and members of his crew in 1769, were among the first Māori objects to be obtained by Europeans. The database is for the tribe’s own use and content is managed by their Trust, which retains control over access to resources made through their portal and retains intellectual property rights over digital material created by their members, if not the original objects themselves (see Ngata et al. and Hogsden and Poulter, 2012, this issue). They select what material is released to the KIWA system, and what remains accessible to tribal members alone. The RRN, KIWA and Te Rauata are exciting ventures that attempt to balance both digital accessibility and cultural accountability with legal and cultural restrictions in order to harness the speed and relativity offered by digital databases. The global virtual research community of the RRN requires membership by application in order to access publicly restricted electronic material, whereas membership by ancestry determines the levels of access offered by community-based initiatives like Te Rauata. Both processes involve ‘gate-keeping’ as a way of overcoming the more problematic issues associated with unmediated access. Further examples of digital research environments include Kim Christen’s two community-based digital archiving and dissemination initiatives: Mukurtu An Indigenous Archive and Content Management Tool,9 developed with the Warumungu community of Australia, and the Plateau People’s Web-Portal,10 built with a number of Northwestern North American Tribes.

Many First Nations bands and Māori tribes manage digital databases of cultural objects that are in their own care, and these may be partially accessible through community websites. The Inuvialuit of northern Canada have developed a series of collaborative
projects with major museums to repatriate their intellectual property, including digital and 3-D visualizations of Thule whalebone-framed houses (Dawson et al., 2011). In Rēkohu (Chatham Islands, New Zealand), the Hokotehi Trust is digitally recording elder knowledge and heritage landscapes in an effort to protect Moriori intellectual property, values, and identity (see Solomon and Thorpe, 2012, this issue). The Ngai Tahu Māori Rock Art Trust’s website describes how the Trust manages, documents, preserves and interprets petroglyphs in the Ngai Tahu tribal region for the benefit of the tribe and the wider population. This website includes a selection of digitally-simplified rock art symbols that are accompanied by a statement indicating Ngai Tahu’s support for the Mataatua Declaration and the United Nations Draft Declaration on the Rights of Indigenous Peoples (both 1993), and acknowledgement of ‘the right of indigenous people worldwide to own and control their cultural and intellectual property’. The statement continues by warning against appropriation and interpretation without obtaining consent from the traditional owners (in this instance the appropriate Ngai Tahu regional Māori council), situating these concerns within a cultural benefit rather than a legal context. These tribal and band websites are generally not interactive (comments and questions are directed to email addresses and phone numbers), but perform important ‘front door’ access and reporting functions. Most are not able to provide comprehensive databases of culturally sensitive material for the use of their members due to their public accessibility and the expense of developing and maintaining multilayered platforms.

Community co-managed contextualizations of digitized cultural materials are never quite the same as having the objects within their context of origin. Time estranges people from the institutionalized objects that were once part of their communities, and the opportunity to reinstate the personal relationships between people and their cultural treasures diminishes as it passes. There also remains the issue of the digital divide as a manifestation of social, political, economic, educational and generational differences within indigenous communities (Niezen, 2005: 548). The concept of creating co-partnerships overseen by bicultural advisory boards that manage databases of objects located physically and digitally within institutions is perhaps out-of-step with both the fluidity of the technology and the way that indigenous peoples are communicating electronically with each other. As inviting and accessible as co-managed research platforms are, the number of community members who would have the academic, cultural and technical confidence to engage with them is still growing but varies considerably between communities and in different parts of the world.

To provide full public access to collections, however, exposes them to the threat of inappropriate, offensive or dangerously transgressive use. One complicating factor is that for some indigenous groups, such as Māori and the Zuni, no distinction is made between sacred objects, and the like, and copies (including photographs) of them. All are equally powerful, sacred, or otherwise instilled with vital values and thus require appropriate care and protection (Brown, 2008; Isaac, 2011), which presumably holds true for digital representations as well. Furthermore, commentary sections inviting interactive community feedback often remain very quiet (Srinivasan et al., 2009b: 676–677). In their study of how museum catalogue data concerning Native American material could be made more accessible and useful online, Srinivasan et al. (2009b: 677) identified a number of issues that need to be addressed in the construction of culturally responsive
databases. They include: the provision of high-quality digital images; the categorization and contextualization of indigenous objects using terminology that communities can understand; and participation of indigenous partners so they may promote their own understanding of the collections, and identify and challenge inappropriate use of them. However, the researchers also discovered that the most engaging conversations and contextualizations of cultural information have occurred in less hierarchical social media domains.

Whilst not overcoming the digital divide, social networking might offer another means by which communities could make manifest culturally relevant information and initiate discussions about their heritage. Institutional databases may indeed already have been superseded by social networking sites as digital repositories for cultural information. Some indigenous groups have social networking pages, in some instances set up by their organizational authorities and in others established by individuals, on which members can discuss topical issues, and paste links to relevant media stories and digital document banks. Indigenous people are also increasingly using genealogical websites that allow members to post names, and upload the stories and pictures of their ancestors in the hope that other family members may be able to supply missing or supplementary information, verify or correct ‘facts’ or simply make contact after years, even generations, of separation.

**Whakapapa and Facebook: A personal encounter with a digital ancestor**

Social networking is already enabling Māori people at whānau (extended family) and hapu (subtribal) levels to reconnect with each other, discuss heritage matters and reinforce the mana (standing) of their group (sometimes purposefully in contrast to how they are portrayed in the general media or by neighbouring groups). This is also true of the use of Facebook and similar media by indigenous North Americans to extend or strengthen social networks. The objects and narratives that they share come from stories handed down between generations, photograph albums and, occasionally, ‘pirated’ images ripped from institutional online databases or photographed directly from museum displays. Faced with the challenge of reassembling one’s identity, the intellectual property rights associated with archived images and institutionally held objects are no match for ancestral sanction or genealogical connections.

One of us (Brown) became aware of social media’s efficacy as a means to reconnect people and narratives with cultural objects when she recently googled the name of her great-great-grandmother’s mother, Peti Ngapapa, that she had found on a handwritten whakapapa (genealogical sequence; see explanation below) for which she was temporary kaitiaki (guardian). Peti Ngapapa was not a notable historical figure, but a woman who (she knew through oral narrative) was married to an early European settler, William Rogers, probably from New England. He went on to have relationships with at least two other Māori women, starting complementary lines of the family. To Brown’s surprise, given that her ancestor was born almost 200 years ago and does not figure in any written histories, she learned that Peti had a lively online presence from as early as 1999 that had been increasing in prominence over the past few years to include, among other sites,
Bebo and Facebook pages. Searching further, it became apparent that many Māori were using genealogical websites to make connections with family members that they had never met personally, in order to piece together fragmented genealogical information related to ancestral as well as more recent births, deaths, marriages and life stories, for the ultimate goal of (re)producing cultural knowledge. People were freely posting this information, as well as photographs, lithographs and paintings of long-deceased family members and associated taonga, some from family albums and others cut-and-pasted (most likely without permission) from institutional databases. Some of the most active members of these discussions live overseas.

The online discussions about taonga on these social networking sites were unselfconscious, being personal posts from family members, yet were regulated by the group without deference to any social or organizational hierarchy. The ‘collapsed’ space of the internet enabled family members living in diasporic contexts—specifically Australia and North America—to have an equivalent ‘talking status’ to those who live locally, which is not always the case when families living overseas visit their home marae (communal meeting place). With respect to Ngapapa’s pages, a conversation thread had developed on one site about the existence of a wedding photograph, the validity of which as an historical document was eventually undermined by later posts. As the discussion thread developed, the conversations became increasingly exclusive, despite it taking place in an ‘open’ web environment, as members of the complementary Rogers’ whakapapa or genealogical line (both North American and Māori descendants) realized they had little to add to the conversation and dropped out. Google enabled cross-referencing between sites and provided a form of relativity. The discussion among users was reminiscent of those that take place on marae, except that social networking also provides the ability to reconnect family branches that have become estranged over time, and a forum to share imagery, albeit in a context that is not regulated by the same socio-cultural protocols.

Furthermore, these connections are occurring at the sub-tribal levels of hapu and whānau, the ‘everyday’ kin groups associated with ancestral mana and social governance, rather than at the level of iwi, an ‘ethnic’ kin group recognized by government (Ballara, 1998: 161; Sissons, 2004: 23–24). In many ways, social networking is achieving the goals of knowledge sharing, retention (in terms of users generating and maintaining information for their exclusive needs) and discussion that institutional databases are still struggling to achieve, partly because the sharing is mediated neither by intellectual property rights nor by organizational hierarchies.

Nevertheless, there are still important cultural and cultural property issues to be considered, since such social networks are not regulated by cultural custom, let alone copyright. Within each generation in a whakapapa there is a hierarchy of power, associated with knowledge retention, the possession of taonga, and land rights. Whakapapa is more than a family tree. It is regarded as a taonga. All inanimate and animate entities have a whakapapa, most beginning with either Te Kore (a universal void) and the deities that evolved from that state, or a supreme being known as Io, with each subsequent generation recounted as a sequence of papa or layers. Mana is attributed to senior lines or layers associated with birth order, gender, personal achievement and continued presence on ancestral landscapes. These power relationships are negotiated through direct conversation and observed action, and the people who inherit this mana are expected to respect
the access conditions to knowledge, objects and land laid down by the previous generation. Social media cut across these hierarchies, and therefore may undermine the choices made by ancestors. The reasons why ancestors chose to suspend communication with members of their immediate family may have been lost to time, but their legacy is the disconnection of certain branches. This might lead us to ask: would the benefits of ‘reconnection’ be outweighed by the problems associated with reigniting old disputes? Under the scrutiny that comes with being treated as ‘historical’ documents, rather than treasures passed down, are the mana and tapu of certain taonga (like the wedding photograph) at risk? Can cultural knowledge be acquired in a social networking context, or is it merely a new road back to the marae and face-to-face encounters (Iseke-Barnes, 2002: 193)? And what of the mana of elders who may not be able to participate in these discussions, or whose mana is not recognized in the ‘democracy’ and anonymity of digital space? When Brown informed an elderly uncle, who is a kaumatua (elder) of her whānau, of an impending reunion announced on the websites but of which he had no knowledge, he commented ‘I used to think that I knew everything about our family, until now’.

Therefore, in time, and given the self-regulation that is already evident, users might create culturally responsive social networking sites that respect the mana of people and the tapu of information through self-policing or a new type of digital cultural etiquette (Coombe and Herman, 2004: 571). Institutions may even consider releasing digital information related to their collections back into the hands of these subtribal discussion groups to build new, or recover old, narratives around community treasures.

**Digital cultural mapping**

While social networking allows indigenous people to initiate their own discussions, collate records and share information about genealogies and ancestral heritage, the landscape itself is continuing to generate cultural information in the digital domain through cultural mapping projects like the Aboriginal Mapping Network (AMN) and Māori Maps. Cultural mapping is a process that occurs in all cultures as a means to transmit knowledge embedded in physical and metaphysical landscapes through oratory, performance, writing, architecture and art. This type of mapping is different to cartography, which is more product-orientated in that users acquire ‘maps’ as tools to achieve other ends, and are not usually involved in the map making process (Wickens Pearce and Pualani Louis, 2008: 110). As the geographer Robert Rundstrom (1990: 156) notes, all maps ‘reflect and reinforce [the] cultural values and beliefs of the people who make them’, and in Canada and New Zealand cartography was certainly an important legal tool in the colonial annexation and alienation of indigenous land. Although cartography is in many ways inconsistent with indigenous understandings of landscape, there are some notable examples of early Māori and Inuit people unaccustomed to drawing making highly detailed maps of large areas for Europeans. Furthermore, since the early 1970s, indigenous groups in both countries have co-opted conventional cartography to reclaim territory and negotiate or defend access rights to resources, in a process called ‘tenure mapping’ (Poole, 2003: 12–13). Contemporary cultural mapping, however, is concerned more with revitalization than legal restoration and is most often deployed by communities to define and negotiate boundaries and resources, for talking between cultures and,
like the AMN and Māori Maps, for the transmission of local knowledge outside of, or in addition to, narrative storytelling.

Collectively, many community and institutionally sponsored cultural mapping projects associated with Canadian First Nations groups can be viewed online as part of the Aboriginal Mapping Network.\(^\text{18}\) Founded in 1998 by the Gitxsan and Ahousaht First Nations and Ecotrust Canada as a forum for sharing cultural mapping information and processes, the AMN has since grown to support a global network of indigenous groups engaged in map making as part of land claim, treaty negotiation and resource development initiatives. Among the many online services provided on its website, users can find information about training opportunities, the application of GIS (Geographic Information Systems), best practice guidelines, and funding, as well as a gallery of member organizations’ maps and a virtual space for sharing experiences. From a digital perspective, the AMN is more than just a service provider, since it promotes the practice of ‘decolonizing’ Western mapping processes, in particular those related to GIS, through the online dissemination of conventional and alternative information made by and for indigenous people.

Māori Maps is a non-institutionally aligned initiative that enables Māori who are internet-savvy but may not be culturally connected, to initiate and maintain relationships with their marae. Currently governed by Te Potiki National Trust, the Māori Maps project uses GPS to record the location of all marae in New Zealand and includes the capacity to electronically store data—including whakapapa, narratives and images of places, people and other taonga—related to those cultural sites, at the request of marae authorities. The project was initiated when one of its directors, Paul Tapsell (a descendant of the Ngati Whakaue and Ngati Raukawa tribes) realized that many marae were at risk of generational estrangement, exacerbated by language loss and urbanization. Since these meeting places are the repository of communal whakapapa, taonga, stories and images, as well as active fora for debate and cultural development initiatives, the consequences of marae alienation are dire. In acknowledgement of Māori cultural property concerns and in accordance with the custom of revealing information to those who have demonstrated cultural responsibility and understanding, three tiers of accessibility to the Māori Maps database are offered: open access, providing location, general background and contact information; password-initiated access, with permission of designated elders, to community archives for descendants wishing to learn more about their heritage; and a cache of sensitive information maintained as a back-up record for the use of designated community elders (Tapsell, 2009).

The integrity of the information provided by these cultural maps is not determined by its completeness, in an academic sense, but by its ability to undergo further development under appropriate cultural property protections. The techniques employed to record and transmit the information are critical to achieving a culturally responsive and responsible map. A variety of participatory processes employing digital and non-digital technologies are used: making maps from narratives on the ground or on paper; mind-mapping; annotating topographical maps; making physical or computer-generated three-dimensional site models; and moving away from longitude and latitude by training community members in the use of GPS to record the presence of special objects, sites or animals (Poole, 2003: 14–16). The increasing use of digital GIS has enabled additional layers of and
opportunities for interactivity and electronic storage, and has provided for the recording and illustration of accessible and confidential multi-layered communal knowledge.

Although cultural mapping has been an empowering tool for indigenous communities and others who work with them, cartography and GIS standard systems of representation remain the dominant methods of expression to the cost of the complexity and nuances of customary knowledge. Being digitally interactive or multi-layered does not in itself offer a closer correspondence to customary forms of cultural mapping. With poor management, the result can be a digital map of superficial understanding, where land-based cultural knowledge could be potentially ‘distorted, suppressed, and assimilated’ and underlying cultural understandings of space (particularly human, animal and supernatural scale) and time (cyclical and sequential) are lost (Wickens Pearce and Pualani Louis, 2008: 109). Visually, the outcomes of many cultural maps are generally not much of a departure from conventional cartographic maps except for the provision of map legends, although exceptions to this rule are those cultural maps made by digitally and/or visually literate people who are not geographers or cartographers.19

As part of the 2006 project Naming and Claiming: A Visual History of the Bella Coola Estuary, for example, a group of architecture staff and graduate students from the University of British Columbia collaborated with local elders to culturally map the ‘contested nature of the needs potentially fulfilled by, and desires projected onto, the estuary by its community’ (Bass, 2006: 4). The research and production methodologies involved listening to local stories, studying the environment, and then making drawings using a mixture of Western and First Nations visual conventions that had been specifically adapted to reflect the unique processes and information of the project. Their work is successful because it uses innovative or culturally responsive representational techniques, and demonstrates sensitivity and self-reflexivity by illustrating doubt where there is uncertainty about what it is that is being mapped. Like social media, cultural mapping can potentially use digital media in a subjective way that invites further expression and queries, rather than ‘locking down’ concepts as objects.

Conclusion

In an age of digital democracy, there remain elements of culture that can be shared and others that cannot be so easily shared, or even shared at all. While intellectual property rights afford some protection of cultural heritage (Brown and Nicholas, 2010), such ‘top down’ policing is difficult in the electronic domain. In highlighting some important as well as everyday instances of the promotion, management and protection of Canadian First Nations and Māori objects and knowledges in digital media formats, it has become clear that communities are increasingly assuming a ‘grass roots and up’ approach in these processes.

A key concern related to museum databases is that the historical, organizational, social and cultural processes that have kept indigenous people at a distance from institutional collections of their treasures should not replicated by online institutional, community or co-managed databases. At its best, the Internet is a fluid and interactive medium that invites multivocal participation. Within this system it should be possible to accommodate specific cultural needs in terms of access, control, interpretation and,
potentially, repatriation. A handful of the many institutional databases that deal with cultural material have developed meaningful partnerships with origin communities, but the majority still seem to be repeating the architecture of their institutional hierarchy within the architecture of their websites. Less hierarchical discussion threads that can be user-initiated, like those provided by social media, have been more inviting platforms for cultural discussions, debates, documentation and the promotion of group identity, occasionally (and ironically) illustrated by images taken from institutional databases.

Like databases, cultural mapping is undergoing significant conceptual transformations due to the involvement of indigenous people and the development of innovative digital representational systems. Like their ancestors before them, contemporary indigenous people are exploring ways in which new tools like GIS can be turned to specific cultural needs, and are finding that access to these tools and interpretation of their products present as many problems as opportunities. As indigenous peoples have come to learn from previous encounters with maps, the drawn line is a divisive mark that is difficult to contest when the maker’s ‘hand’ or the ‘eye of God’ deployed are not one’s own. The challenge is for communities themselves to develop forms of visual cultural representation that are more permeable, nuanced, balanced and potentially multi-sensory to depict tangible and intangible elements, sites of dispute or reconciliation, competing foregrounds and backgrounds, memories and intergenerational memories, and non-linear understandings of time and space.

In this article, we have touched on some of the many concerns and challenges confronting indigenous peoples as they seek to maintain control over, and benefit from, the digitization of their cultural heritage. Although our focus has been on Māori and Canadian First Nations, these issues are playing out across the world and are having the most effect on those descendant communities who were disenfranchised and otherwise affected by colonialism. Digital databases coupled with indigenous information networks provide powerful and effective tools for protecting and promoting cultural identity and heritage, even in (or perhaps partly because of) the absence of effective conventional legal provisions to monitor and control their dissemination.

Our focus here has been less on an in-depth analysis of the many differences between Māori and Canadian First Nations responses to the challenges of digitization and more on the similarities between the potential and actual impacts of unwelcome or inappropriate use of their heritage by others, and on new initiatives that enable sharing of traditional knowledge. It should be evident that the situation in both New Zealand and Canada (and elsewhere) is complex and constantly changing, and transcends the familiar ‘indigenous’ vs. ‘Western’ dialectic. Indeed, acknowledging that tangible and intangible knowledge are indivisible, as is the case for many indigenous peoples, requires new modes of protection, especially in the digital age. The digitization of cultural heritage introduces new ways in which social and economic harm can be done to indigenous peoples through new forms of appropriation and commodification. And yet those same technologies are facilitating new initiatives, both proactive and reactive, that promote more collaborative research practices and knowledge sharing, as well as models for more satisfying political, economic, and legal solutions grounded in indigenous sensibilities and world views.
Acknowledgements

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Notes

1. Examples of these include iCommons and Creative Commons, and the A2K (Access to Knowledge) movement, all of which seek to adjudicate ownership and control of digital objects (Boyle, 2008; Lessig, 2004).
2. eBooks are electronic or digital publications. For Project Gutenberg Mission Statement see URL: http://www.gutenberg.org/wiki/Gutenberg:Project_Gutenberg_Mission_Statement_by_Michael_Hart; see also URL: http://www.gutenberg.org/wiki/Gutenberg:About
3. http://copyright.columbia.edu/copyright/2011/03/22/google-books-copyright-settlement-rejected/ Notable too is that increasing access doesn’t always lead to democratized access; for example, scholars accessing Google books via a North American IP address can often download the full text of a book, whereas those accessing via UK or New Zealand normally only have partial access to an exclusively online version. For a discussion on this, see URL: http://www.fas.harvard.edu/~histecon/research/digitization/copyright_law.html
4. ‘Digital Democracy’ (URL: http://digital-democracy.org/), for example, is an organization that provides digital technologies to support humanitarian organizations working in ‘post-disaster, transitioning states and repressive regimes’ but not to indigenous people living in former colonies.
5. http://www.rnpilot.org/pages/about
6. URL: http://www.moa.ubc.ca/RRN/about_overview.html Researchers can apply for an RRN account, and can develop projects on the RRN, as well as participate in various working groups.
8. http://digitool.auckland.ac.nz/exlibris/dtl/u3_1/dtlc/www_r_eng/icon/collections/ahid/content/copyright.htm
11. URL: http://www.sfu.ca/ipinch/node/506
12. URL: http://www.sfu.ca/ipinch/node/508 This and the Inuvialuit example are part of the Intellectual Property Issues in Cultural Heritage (IPinCH) project (URL: http://www.sfu.ca/ipinch), which fully funds the Moriori project, and partially funds the Inuvialuit initiative.
13. URL: http://www.ngaitahu.co.nz/RockArt/profile.htm
14. For example, as of April 2011, the ‘Lindauer Online’ website of Māori portraits run by Auckland Art Gallery had only received two comments in two years (URL: http://www.lindaueronline.co.nz/).
15. For example, see URL: https://www.facebook.com/pages/Te-Aitanga-a-Hauiti/147185551958818. This Facebook page includes images of taonga taken in museums, family photographs, documents supporting their identity as a small tribe (rather than a subtribe of the neighbouring Ngati Porou), and critical commentary on current media stories related to their group and turangawaewae (land/seascapes of belonging).
16. The marriage took place in 1829, predating the arrival of photography in New Zealand. However, the ‘wedding’ photograph is regarded as an important taonga that legitimizes the union, and validates the seniority of the Rogers-Ngapapa descendants, in contrast to the
relationships and associated family lines that followed. The internet discussion about the photograph, however, once and possibly for all undermined the legitimacy of the photograph as documentation of an ancestral marriage.

17. See, for example, Tuki Tahua’s 1793 map of Aotearoa New Zealand, Public Record Office, London, MPG/532; and Powon’s 1894 map of the Caribou Inuit Keewatin District (Rundstrom, 1990: 160).

18. URL: http://nativemaps.org/taxonomy/term/32?page=74

19. For example, see the Zuni MapArt project. URL: http://www.ashiwi-museum.org/mapart.html

20. URL: http://www.ashiwi-museum.org/mapart.html

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Opening Archives: Respectful Repatriation

Kimberly Christen

Abstract

In the last twenty years, many collecting institutions have heeded the calls by indigenous activists to integrate indigenous models and knowledge into mainstream practices. The digital terrain poses both possibilities and problems for indigenous peoples as they seek to manage, revive, circulate, and create new cultural heritage within overlapping colonial/postcolonial histories and oftentimes-binary public debates about access in a digital age. While digital technologies allow for items to be repatriated quickly, circulated widely, and annotated endlessly, these same technologies pose challenges to some indigenous communities who wish to add their expert voices to public collections and also maintain some traditional cultural protocols for the viewing, circulation, and reproduction of some materials. This case study examines one collaborative archival project aimed at digitally repatriating and reciprocally curating cultural heritage materials of the Plateau tribes in the Pacific Northwest.

I'm an accidental archivist. As a cultural anthropologist and ethnographer working with the Warumungu Aboriginal community in Central Australia and several Native American nations in the Pacific Northwest of the United States, my work has nonetheless increasingly focused on integrating newly repatriated objects—in their digital form—into existing community practices, traditions, and contemporary cultural production through the creation of digital archives. For example, after an influx of digital materials from researchers, teachers, and missionaries to the Nyinkka Nyunyu Art and Culture Centre, I worked with Warumungu staff to identify processes for managing these new digital materials. Specifically, after testing several other commercial

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off-the-shelf products, we discovered a blind spot in most content management systems: They do not provide granular levels of access for various types of users, nor a way to customize protocols for access based on cultural parameters. Community leaders at Nyinkka Nyunyu wanted a digital archive that provided them with a content management system based on their own dynamic cultural protocols for the viewing, circulation, and reproduction of cultural materials and knowledge. Working in collaboration with software designers, in 2007, after two years of production, we launched the Mukurtu Wumpurrarni-kari Archive. The Archive allows Warumungu people to define the terms of access to and distribution of their cultural materials through an interface that links each community member to each piece of content via an extensive user profile and a rich content-tagging upload process. For example, a piece of content uploaded by an individual may be designated for women only. Or, an image of a male initiation ceremony returned from a national museum may be eligible for viewing by elder men only. The permutations of types of access are unlimited, dynamic, and in constant negotiation, just as they are offline.

Within the archive, the process of defining item-level sharing protocols results in a unique “mini-archive” for each individual member of the community. Records from national archives, local community documents, and individual family photos make up the eclectic and dynamic mixture of materials in the Mukurtu Wumpurrarni-kari Archive available to community members at the Nyinkka Nyunyu Art and Culture Centre, but not online to the general public. Projects like the Mukurtu Wumpurrarni-kari Archive proliferate globally as indigenous communities play active roles in repatriation projects, merging digital repatriation with the physical return of objects. Varied indigenous needs, specific historic and contemporary situations, intersecting technical and cultural needs of individual communities, and the distinctiveness of the collections all combine to produce projects with foci including language preservation and revitalization, the creation of new curatorial models, the production of contemporary commercial and noncommercial products, and

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the revitalization and circulation of traditional practices and performances. These diverse projects, needs, and outcomes present scholars with a rich landscape to explore digital repatriation as the intersection of archival interests, indigenous information management systems, archival standards, and divergent notions of access and privacy.

Digital Repatriation: Access and Accountability

Digital technologies alter repatriation practices by allowing low-cost surrogates of cultural heritage materials to be returned to source communities. While scholars across many disciplines have focused on the ethical, legal, and political ramifications of physical repatriation, other forms of repatriation have been largely viewed as an extension of physical repatriation, or ignored altogether. However, the specificity of digital resources—the ease with which they can be copied, distributed, and revised; their ability to exist in multiple locations at once; and their ephemeral nature—makes them distinct cultural objects that provide scholars with a rich platform for engaging with varied processes of cultural production and multiple routes for the circulation of knowledge. Digital repatriation can be a contentious term if one makes too-quick assumptions about the relationship between the digital and material forms of cultural heritage materials. While some may assume on first glance that the digital object—as a surrogate—is meant to replace the physical object, no one, standard definition, nor agreed-upon terminology, characterizes the multiple practices of collecting institutions, individuals, or local community groups surrounding the return of cultural and historical materials to indigenous communities in their digital form. Digital surrogates are not intended to be replacements for, or synonymous with, the physical materials they may represent. Instead, digital (or digitized) cultural materials provide an alternative form of and dynamic life for many physical objects. These newly digitized and repatriated materials may stimulate linguistic or cultural revivals, spur contention and disagreement, prompt new cultural forms or popular products, incite new collaborations, and/or forge new types of performances or artistic creations. In every case, however, these materials are inserted into overlapping understandings of access and preservation.

Archivists are especially attuned to the nuances of archival materials as they seek to make resources available to multiple publics whose interests often diverge. Issues of access are paramount to archivists as they seek to make collections available in both physical and digital forms. While access has generally been a central concern to the field, over the last five years, American archivists have explicitly grappled with the “Protocols for Native American Archival Materials,” a multi-authored document expressly asking collecting institutions and their institutional representative organizations to engage with the particular concerns of Native American peoples as they relate to the collection, reproduction, and curation of and access to their cultural materials held by private and public institutions. The protocols reflect a set of guidelines—not specific rules or regulations—that, if adopted by archivists, could alter their relationships with both Native communities and the materials in their possession as the protocols invite a rethinking of some basic parameters of and foundations for the field.

Archivists are in the thick of discussions about providing access to materials within their repositories to diverse publics generally and through digital repatriation projects more specifically. Within these debates, archivists have proven to be thoughtful and open in their engagement with indigenous communities concerning issues of access to intangible cultural heritage. Archivists have engaged with individual communities on specific, one-time digital repatriation projects that provide layered access or prompt cocuration. However, tacit assumptions about professional standards concerning the extent and limitations of access within the “public domain,” the parameters of “open access” in public settings, and the value of, and conditions for, “expert knowledge” in defining collections often hamstring efforts at changes.


A commonly held understanding of the public good as being equivalent to unabridged access to public domain materials often blinds collecting institutions to non-Western systems of information management and circulation that work from and mobilize different understandings of “public,” “private,” and the like. For example, in the case of the Warumungu community’s Mukurtu Wumpurrarni-kari Archive, access to certain cultural materials (and the knowledge that animates these materials) is decided based on a dynamic system of accountability where one’s age, gender, ritual status, family, and place-based relationships all combine (and recombine as affiliations shift over a lifetime) to produce a continuum of access to materials within the community. This dynamic system tacks back and forth between a fixed—but not static—set of criteria for the distribution, reproduction, and creation of knowledge in both its tangible and intangible forms. Within this system, groups of people continually define access based on a social system and set of cultural protocols that demand responsibility and recognition within the community. The Warumungu system is just one such indigenous system that provides a basis for critiquing and enriching our notion of the public and access. Paying attention to these systems makes it more difficult to maintain a generic sense of the “public”—as a category for information distribution—or “open access”—as a universal goal. Instead, emphasizing these systems highlights how relational networks position and obligate people to interact with and maintain cultural materials and knowledge within their community kin base. Indigenous systems of knowledge production, circulation, and access do not resonate with liberal notions of autonomous subjects acting to attain universal knowledge within a generic public domain of ideas; to the contrary, they stretch the definition of “public” and how it can be imagined.  

In fact, the public domain has never been accommodating to indigenous models of knowledge production and circulation. In an overview detailing competing views of the public domain, legal scholar Pamela Samuelson argues for an enriched understanding of the concept of the public domain. She suggests that “The principal advantage of recognizing multiple public domains is that it illuminates a range of important social values served by these domains and a plethora of ...
of strategies for preserving them and the values they serve." Specifically, she identifies indigenous knowledge systems as one of the sets of values left out or marginalized in most views of the public domain. Indigenous traditional knowledge systems and associated modes of knowledge circulation and access call into question standard notions of the public domain that overwrite histories of exclusion and injustice. Yet, because variations of the public domain are either poorly understood or romantically imagined, indigenous knowledge systems are usually discounted as viable alternatives to, or additions within, a conception of the public domain that allows for a continuum of access strategies.

Indeed, even archivists, librarians, and museum specialists who agree in principle that indigenous knowledge systems and culture-specific protocols undo the logic of the public as an undifferentiated mass often see no way around their professional obligations to make their collections “open” to the “public.” That is, collecting institutions’ core commitment to access predicated upon openness to the public severely limits the possibility of seeing indigenous claims as alternative types of openness (access differently conceived). Oftentimes in these situations, indigenous systems of information management are defined as “cultural values” or “tradition.” In either case, while collecting institutions may be sympathetic to these “concerns,” they do not see them in the same semantic light as the assumed universal claims on which their assertions of a uniform typology for access are based. Paul Dourish and Johanna Brewer suggest that viewing information as a “natural category” rather than as a “cultural category” limits one’s ability to see the processes and relationships that ground information systems within larger cultural logics and historic events. A tacit naturalization of information as a universal category, then, works against recognizing indigenous systems as on par with accepted Western institutional models. At the same time, popular notions of censorship and information lockdown delay imaginative responses to other modes of circulation. When access as openness


is taken for granted as a *de facto* public good, then information management systems based on limiting access often get defined as oppressive. When the contours of access have information freedom at one end and abusive regulatory or political systems at the other, then limiting access can be defined negatively as “censorship.” As Alex Byrne suggests: “Appropriate handling does not mean censorship. It means sensitivity to the contexts in which information agencies operate, the scope of their services and the nature of the communities they serve.” In other words, reminding ourselves that censorship itself is practiced within specific political boundaries might help us understand that not every instance of “not seeing” is an abuse of power, but instead a practical implementation of cultural protocols aimed at maintaining specific types of knowledge in a world characterized by human differences. For example, in the Mukurtu Wumpurrarni-kari Archive, access parameters tied to individual items both limit and allow certain types of viewing practices based on gender, ritual status, place-based relations, and so on. However, this is not a discriminatory system in an oppressive sense. Within the Warumungu cultural system, knowledge about places, ancestors, and rituals are dispersed throughout the community, but no one person or group holds all the knowledge. Instead, this is a complementary system in which multiple kin groups must come together to exchange, share, and circulate knowledge lest it fall into disuse and die (not be accessible any longer to contemporary generations).

Many archivists have collaborated with indigenous communities and their institutions on a case-by-case basis, productively sidestepping any need to make or implement a one-size-fits-all set of standards. In fact, one of the most promising and dynamic sites for collaboration with indigenous communities has been in the process and practice of digital repatriation. In the last twenty years, collecting institutions—museums, libraries, and archives—have heeded the calls by indigenous peoples to integrate indigenous curatorial models and knowledge into mainstream museum and archival practices—from cataloging

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descriptions to display modes. With the growth of new digital technologies, archivists, museum professionals, and indigenous communities have collaborated to produce new models for the creation, circulation, and reproduction of knowledge and cultural materials. The recent development of Web 2.0 technologies grounded in user-generated content and bottom-up exhibition and display modes has produced a dynamic platform for sharing materials. Web-based photo-sharing platforms like Flickr, and, more recently, online publishing tools like Omeka, allow people to take advantage of low-cost or no-cost technologies to create exhibits and circulate physical objects in their digital form.

This newly animated digital terrain poses both possibilities and problems for indigenous peoples as they seek to manage, revive, circulate, and create new cultural heritage materials and self-representations. While digital technologies allow for materials to be repatriated quickly, circulated widely, and annotated endlessly, these same technologies pose challenges to indigenous communities who wish to maintain traditional cultural protocols for the viewing, circulation, and reproduction of these newly animated and annotated cultural materials. Many indigenous communities wish to maintain control over the circulation of certain types of knowledge and cultural materials based on their own cultural systems and at the same time add their expert voices and histories to the public record. Working with both their own collections and those of public and private institutions, many indigenous peoples want to enhance the archival and collections records with their own metadata and descriptive narratives. As Peter Toner argues:


15 Flickr (http://www.flickr.com, accessed 20 September 2010) is a photo-sharing site that allows users to upload, annotate, comment on, and provide access to their personal photos. Omeka (http://www.omeka.org, accessed 20 September 2010) is an exhibition platform tool that allows individuals or institutions to use template-based sets to produce their own online exhibitions.

It is obvious that the fundamental categories of metadata schemes like Dublin Core are based on Western systems of knowledge management. As archives work increasingly with indigenous communities on the repatriation of digitized cultural heritage materials, with a clear aim of local knowledge management, we must expand the categories of metadata to include culturally-significant styles and types of knowledge.17

Toner’s work pushes collecting institutions to both re-evaluate and open their standards to the claims, histories, and knowledge systems of others. This suggestion does not argue against standards, or the necessity of them within the field and for all user groups, but more carefully calls for an expanded—or perhaps, adaptable—set of categories that would account for various information models.

Digital technologies and the Internet have combined to produce both the possibility of greater indigenous access to collections, as well as a new set of tensions for communities who wish to gain some control over the classification of, access to, and cultural protocols for the circulation of those materials. In what follows, I examine the collaborative effort to leverage the Mukurtu archive software for the production of the Plateau Peoples’ Web Portal, an interactive, online archive and content management tool designed to allow Plateau peoples not only access to their cultural heritage collections at Washington State University in Pullman, Washington, and beyond, but also to facilitate the reciprocal curation of these materials.18 That is, this project defines a new process and set of standards to expand and extend the knowledge sets associated with the Plateau collections by affording tribal knowledge the same categorical weight as the institutional Dublin Core metadata. Reciprocal curation, then, is a set of practices through which both tribes and scholars annotate item-level records within specific collections with the aim of producing a rich, layered, dynamic set of knowledge. By focusing on both the collaborative relationships that we forged and the curation and content management models that we built, I aim to highlight the emergent curatorial possibilities for both collecting institutions and the many communities they serve as new digital opportunities become available for the curation, display, and reproduction of cultural heritage materials.

17 Peter Toner, “History, Memory and Music: The Repatriation of Digital Audio to Yolngu Communities, or, Memory as Metadata,” in Researchers, Communities, Institutions, Sound Recordings, ed. Linda Barwick, Allan Marett, Jane Simpson, and Amanda Harris (Sydney, Aus.: University of Sydney, 2003), 14.

Held “in Trust”: Structures for Collaborative Archive Building

In 2005, the same year I began working on the Mukurtu Wumpurrarni-kari Archive, I took a position at Washington State University (WSU). As a member of an interdisciplinary ethnic studies department, I worked to create a collaborative relationship with the Plateau Center for American Indian Studies on campus. As a relatively new unit, the Plateau Center held discussions with the tribes it served to determine both long- and short-term agendas for its work. The tribes wanted to make WSU’s library collections accessible—particularly to tribal members who lived on reservation lands—and at the same time to include their own discussions of, and knowledge pertaining to, these materials. It was not simply access to (being able to view) Plateau materials that tribal nations wanted, but also a voice in the curation, narration, and annotation of their materials. In this way, the tribes echoed an expanded notion of access within archival debates as well. In their archival literature review, Majia Krause and Elizabeth Yakel find that “the concept of accessibility goes beyond physical access to archival materials and involves making meaningful use of those materials through descriptive aids that enhance access.” In fact, many digital archive projects seek to involve diverse user groups. However, what the Portal project prioritized were the specific needs of tribal nations due to their 1) histories of exclusion and oppression, 2) status as nations with government-to-government relations with the United States, and 3) alternative worldviews. Discussions of access and circulation made clear that, like many indigenous peoples worldwide, the tribes working with WSU wanted to see their political sovereignty put into cultural practice.

Sovereignty is a multivalent political term. Within indigenous communities, diverse colonial and postcolonial histories and contemporary situations make a homogenous understanding of sovereignty untenable. In fact, Joanne Barker argues that sovereignty gained particular resonance within international indigenous politics after World War II, when it “emerged not as a new but particularly valued term within Indigenous discourse to signify a multiplicity of

19 In 1997, WSU signed a memorandum of understanding (MOU) with several tribal nations to "strengthen the relationship between the University and the Signatory Tribes at the highest levels, to increase access to and Native American achievement at WSU." A copy of the MOU is available online at http://www.washington.edu/diversity/summit/2008/wsu_MOU.pdf, accessed 20 September 2010.


legal and social rights to political, economic, and cultural self-determination.”22 Similarly, Tressa Berman argues that, “sovereignty, as both a political and philosophical dimension of cultural rights, is tied to claims of Native title, whether that title is to land, cultural property or art forms.”23 Assertions of sovereignty in settler states like Canada and the United States are usually aimed at upholding or legitimizing legal political powers within the nation-state. In the American case, formalized, government-to-government relationships of “trust” between Native American nations and the United States government have historically provided little security to tribes as treaties were continually broken and communities displaced and marginalized. As global indigenous movements took shape in the 1970s, sovereignty was a common goal, and the term came to stand for a general politics of self-determination forged through land-rights, claims to community rights within nation-states, and legal recourse to reclaim cultural heritage materials.24

With this backdrop, the Plateau tribes who gathered for these meetings wanted to clearly state their views, histories, and knowledge in ways that would not be dismissed or marginalized in the archival record or within the curation processes. We aimed to create a project to facilitate such cultural and political underpinnings. Our methodology meshed with some of the guidelines put forth by the “Protocols for Native American Archival Materials.” Three of the key suggestions of this group are to

1) Strive to develop institutional holdings that are comprehensive, inclusive, and reflect all key perspectives on Native American issues. Make an effort to collect resources created by, rather than just about, Native Americans.

2) Respect and act on both Native American as well as “Western” approaches to caring for archival collections. Traditional knowledge systems possess equal integrity and validity. Actions and policies for preservation, access, and use based on Native American approaches will in some cases be priorities, as a result of consultations with a tribal community.


3) Consult with culturally affiliated community representatives to identify those materials that are culturally sensitive and develop procedures for access to and use of those materials.

In concert with the spirit and suggested guidelines in the document, the various stages of the Portal project included primary outreach to the Plateau tribes; significant and sustained consultation in design, content selection, and upgrades; respect for cultural protocols concerning sensitive materials and constant feedback; and inclusion in all aspects of decision making. Beginning with a grant in 2008, I collaborated with the Plateau Center for American Indian Studies; the Yakama Indian Nation; the Confederated Tribes of the Umatilla Reservation; the Coeur d’Alene Tribe; Washington State University Library’s Manuscripts, Archives, and Special Collections; and regional and national...
collecting institutions (including the Smithsonian Institution) to produce the Plateau Peoples’ Web Portal to fulfill this mandate (see Figure 1).25

At one of the first meetings about the Portal, we discussed issues of access to the materials at WSU in relation to varying types of intellectual property rights as well as the WSU library’s mandate to make its collections public. The discussion by the tribal representatives made distinctions between access to, and control over, external versus internal materials—they all understood that the system WSU used (affirmed by U.S. law) made the collections public and thus open to anyone who wanted to take the time to come to the archives and do the research necessary to find the items. We also understood the historic setting that allowed this type of division of materials. As Resta et al. suggest:

Many cultural and historical artifacts of indigenous life are spread across the collections of museums and private holdings. Such holdings may be viewed on site or, increasingly, electronically through virtual museums and online collections databases. Still, many indigenous people have limited access to their own cultural heritage and may be excluded also from interpreting these objects even when publicly displayed.26

The Plateau tribal representatives wanted a way both to add to the record and to access and use the materials for their own projects. Much of the discussion focused on one of the enduring tensions that surrounds discussions of access to and the cataloging of Native American materials: The collections are often public (understood through various definitions of the public domain and conceptions of “the general public” characteristic of Western democracies/capitalist markets), although much of the content could very well be seen as private (subject to group protocols for viewing) to many Native Americans. The people and communities represented in the photos, films, and documents have few—if any—legal rights over how the materials are disseminated, and they could even be denied access through some types of donor agreements. Institutional standards also often make the violent or dubious histories of collections invisible by suggesting that some materials belong to the “heritage of humankind” (and are

25 The Plateau Peoples’ Web Portal received funding from a Northwest Academic Computing Consortium “proof of concept grant” (2008–2009) and an American Council of Learned Societies Digital Innovation Fellowship (2009–2010). The tribal representatives working on the project include Malissa Minthorn Winks, Randall Melton, and Dallas Dick from the Tamastslikt Cultural Institute Confederated Tribes of the Umatilla Indian Reservation; Vivian Adams and Jolena Tillequots from the Yakama Nation library; Kim Matheson, Coeur d’Alene Language Department, Coeur d’Alene Tribe; Gena Peone and Marsha Wynecoop, Spokane Tribe of Indians; and Camille Pleasants, Guy Moura, and Amelia McClung from the Confederated Tribes of the Colville Reservation. In July 2010, the Spokane Tribe of Indians and the Confederated Tribes of the Colville Reservation joined the Portal project.

thus not protected by international intellectual property rights). The tribal representatives made clear that, while scholars may have already had their say, they wanted their knowledge to be recorded in a way that neither marginalized their histories and narratives nor downplayed their multiple interests and stakes in the collections.

Archivists and museum scholars have likewise challenged this segregation of Native and expert voices. Elizabeth Edwards argues that “...photographs and their archiving have been produced and controlled through sites of authority of the collecting society—archives, museums and universities. Their interests have been privileged in the way in which photographs have been curated, displayed and published, creating specific regimes of truth to the exclusion of others.” Our goal with the Plateau Peoples’ Web Portal project was to undo these privileging practices and, in their place, to establish a set of standards that allows for multiple voices, layered context, diverse forms of metadata, and the expansion of the archival record. Peter Toner echoes this need in his work with Aboriginal people in Australia:

> From my perspective, Yolngu memories are essential data for the complete documentation of the recordings, not only for the standard Dublin Core-style kinds of metadata, but also for an expanded notion of metadata which includes a whole range of layered commentaries by traditional owners about the significance of the recordings in the present cultural context.

Both Edwards and Toner point to a shift in archival and collection practices where authority and the expert voice are challenged, but not completely displaced.

**Reciprocal Design: The Plateau Peoples’ Web Portal**

In the Portal project, all of the tribal representatives, as well as the librarians and archivists, agreed that our goal was not to erase the scholarly voice, but instead to add to it in a way that set Native knowledge on equal footing with the scholarly record. Recent advances in digital technologies allowed us the flexibility of realizing this goal, whereas even ten years ago creating such a dynamic system would not have been feasible.

Legacies of first-generation digital collections management systems often hamstring institutions in their efforts to accommodate Native management systems.


30 Legacies of first-generation digital collections management systems often hamstring institutions in their efforts to accommodate Native management systems.
database structure and permissions system already in place, technical staff built a second layer, providing for a more dynamic and interactive back-end administrative tool set for tribal administrators, a more robust security layer since the Portal would be online, and dual import/export systems for the ingestion of both WSU content and tribal content into the Portal. As an online “one-stop” digital archive for Plateau materials, the Portal is designed to include both institutional content, tribal content, and metadata with the potential for divergent management by tribes and/or institutional affiliates. Although the portal has one public “face,” it has multiple access points depending on one’s relation to the site. Tribes, affiliated scholars, and institutional affiliates can upload content, add metadata, map content, and add narratives. Each can choose then how to manage that material. At WSU, because we are a public institution, we cannot and do not restrict access to the materials within the Portal. Tribes or affiliated scholars who upload their private collections (or those for which they possess copyright) may choose from a combinable set of “sharing protocols” that define access to the materials. In the upload process, step four allows them to define access based on tribal affiliation (or gradations within), sacred status, and/or gender (see Figure 2).

The server software is a custom-built digital asset management package based on the LAMP or WAMP stack. The current production and development environments utilize a CentOS 5.x Linux Server Operating System, Apache Web server, MySQL as the database, and PHP as the core development language. More recent improvements to the interface have been added using jQuery.
maintains intellectual property rights over the materials and controls the ingestion of metadata and the terms of access. The administrative tool suite built into the software allows individual institutions, tribes, and/or scholars basic control over their materials and metadata. No one group can access the materials or metadata of another group—however, one can view multiple records (if they exist) on the page for an individual item or collection. For example, when viewing a record, one might find a WSU catalogue record, tribal knowledge, and/or an audio comment uploaded by a tribe. The Portal, then, allows for multiple levels of narration at the item level, allowing several “expert” voices space. To add some continuity to the site, we decided to construct a layer of basic categories for browsing and classifying the materials beyond (and in addition to) Library of Congress subject headings.

The work of determining the basic categories by which others would browse the archive and also through which the tribes would classify their materials was an exercise in cross-cultural taxonomy building. In fact, deciding on the main categories occupied several months of the project’s work. The tribal representatives as well as the library and archives project staff were well aware of the tension between using Western words, ideas, and terms as the basis for tribal classification systems and the need to make the system understandable, usable, and acceptable to a wide range of tribal, nontribal, academic, and public user groups. Over a period of several months, the tribal administrators, the library staff, and I met in person and corresponded via email narrowing down and refining the category labels to best reflect the needs of the tribes. An added constraint on the group was that although only three tribes were involved in this initial proof-of-concept phase of the project, we needed to be able to create categories that would be meaningful and transportable to all MOU tribes if they chose to participate in the project.

Our approach to defining the categories began with legal pads and lists. At one of the first meetings we simply listed all the ways in which the tribes could conceive of categorizing the content. I asked them to think of all the terms they could for the content we had and any they could anticipate including in the Portal. We then grouped our lists by larger headings and subheadings trying to narrow large themes into manageable categories. We grappled openly with the linguistic tension involved in using English terms to represent Native themes, and yet, with a multiracial portal, we could find no eloquent solution to this conundrum. We all agreed that the “best of the worst” was to thoughtfully choose English terms that each tribe individually could then define. So the category of “lands” would be defined uniquely—and in whatever language they chose—by each individual tribe. 32 In addition, we added a feature to the Portal whereby

32 At the time of this writing, the tribal administrators were still drafting their unique descriptions of each category. Once they complete this task, the descriptions will be on the Portal’s secondary browse page for each tribe.
tribes would be able to add their own granular distinctions by adding subcategories at an item-level basis.

As we worked through the design and architecture of the database, we were not content to simply have a Native “comments” section, as some projects we viewed had implemented. Instead, we wanted an integrated metadata scheme that allowed for Native knowledge to be viewed side-by-side with the academic voice. Rather than follow the “crowd sourcing” approach to social tagging that presumes all knowledge to be equal, the Portal highlights the unique knowledge sets of Native peoples of the Plateau alongside scholars who have contributed to these collections. In the Portal, standard Dublin Core metadata is described under the “catalogue record” heading for each piece of content. Each collecting institution provides metadata for the content that they contribute to the Portal. Directly below the catalogue record tab is a “tribal catalogue record” tab. This tab evolved over the first six months of the project as the tribes interacted with the institutional metadata. At first, we thought that the tribal catalogue record would be exclusively for materials the tribe owned and uploaded into the Portal. That is, if the tribes decided that they wanted to include an image of a woven basket in the Portal, the tribal catalogue record would include all the same Dublin Core metadata fields as the institutional catalogue record. While this proved useful as a way to recognize ownership of materials, it did not provide a clear avenue for tribes to update and/or correct the catalogue record of an institutional item. If, for example, the name in a WSU record was misspelled or inaccurate, how would tribal administrators (who cannot edit the WSU catalogue record) make additions, comments, or suggestions? Our workaround was to make the tribal catalogue record serve two functions: For tribal materials, it provides a standard record—tribal administrators enter metadata for each field—but, for institutional materials (whether from WSU or elsewhere), the tribal catalogue record allows tribes to append—without erasing—the institutional record. If there is an error or point of contention in one of the fields in the catalogue record, then tribes enter their updated metadata in the same fields in the tribal catalogue record. This means that users of the Portal can view the institutional catalogue record and the tribal catalogue record noting the differences, seeing the additions and or corrections as part of a history of evolving knowledge. It was, in fact, several of the tribal representatives who suggested this layered approach. No one wanted to expunge records. We all understood the multiple benefits to tribes, scholars, and public users of the site, of seeing that history is indeed made, unmade, and negotiated over time; whereas “records” often seem official and irrefutable, they are malleable and susceptible to change over time. The current system highlights the dynamism of all knowledge, including metadata.
Beyond the standard Dublin Core metadata, the tribes wanted an avenue for expressing their own significant knowledge sets. Therefore, an expanded set of metadata derived from the tribes called “tribal knowledge” can be entered by tribal administrators (see Figure 3). As with the process of defining the categories, we met as a large group to decide on the labels for the tribal knowledge fields. Each category has associated tribal knowledge. For example, under the category of “lands,” tribal representatives decided on seven headings for tribal knowledge: original territory, aboriginal territory, ceded lands, treaty, reservations, allotment, lost places, and ceremony (see Figure 4). Tribal administrators may be several tribal administrators for each tribe. As an institution, WSU and/or the Plateau Center do not control how tribes decide who is a tribal administrator on the project. As sovereign nations, tribes have their own government structures and mechanisms for defining project representatives. We began the project with representatives from the tribes designated to work with the Plateau Center. From that point, each tribe decided on their own process for choosing materials, designating resources and representatives, defining tribal knowledge, and so on.
administrators decide which headings are relevant to the item they are working with and enter as much or as little in the way of tribal knowledge as they see fit. They can continue to add headings for tribal knowledge to the list through the “system administration” tab viewable only to institutional and tribal administrators of the system. We were committed to making tribal knowledge and categorization schemes primary without also severing our ties with institutional standards. By linking content to specific and multiple categories, we maintained the integrity of archival metadata and also add to that metadata with tribally generated and tribe-specific knowledge. Thus, the Portal’s architecture makes two fields primary: category and tribe. That is, no piece of content can be uploaded to the Portal without being linked to one or more categories and tribes. The multiplicity of this categorization system was key: No one category could (or should be expected to) capture the complexity of these materials, or contain their full and changing meaning over time. In addition, while some database structures and content management systems allow a collection item to be attributed to only one source community, the Portal’s system acknowledges the historical overlap of tribes and tribal materials. This structure allows us to privilege tribal categories and recognize that content is not devoid of personal relations—that is, content is embedded within social relations and complex histories, therefore no piece of content could be “tribe-less,” but it could be, and often is, multtribal.

**FIGURE 4.** This administration page is accessible only to system administrators and tribal administrators who can add and edit fields to expand the set of subcategories for tribal knowledge fields.
Once we had agreed on the database structure, we focused on creating a manageable work process. The workflow system we created is designed to allow for maximum flexibility for both tribes and institutions while also avoiding duplication and maintaining quality control. Ingestion of WSU materials into the Portal works as follows:

1) Select items chosen by tribal administrators from the master pass list of all materials at WSU.
2) Retrieve items from their WSU locations.
3) Make Portal category designations from tribal input recorded on the master pass spreadsheet.
4) Check intellectual property rights status.
5) Scan items using BCR standards and guidelines.\textsuperscript{34}
6) Create file name using naming conventions for the Portal. These filenames consist of twelve characters.

Example of filename: 3wsumasc0010

First character: indicates tribal association

0 is used for material that pertains to more than one tribe.
1 is Coeur d’Alene.
2 is Umatilla.
3 is Yakama.

The next seven characters indicate the item source:

- wsunasc (WSU, Manuscripts, Archives, and Special Collections)
- wusanth (WSU Museum of Anthropology)
- umatppp (Confederated Tribes of the Umatilla Indian Reservation)
- yakappp (Yakama Nation)
- cdaapppp (Coeur d’Alene Tribe)
- nwmacpp (Northwest Museum of Arts and Culture)
- naapppp (Smithsonian Institution, National Anthropological Archives)
- nmaippp (National Museum of the American Indian, Smithsonian Institution)

\textsuperscript{34} The system uses international standards including Dublin Core metadata (http://www.dublincore.org) and the Open Archives Initiative, Protocol for Metadata Harvesting (http://www.openarchives.org) to ensure interoperability and dissemination. The current system incorporates metadata utilizing the standards from WSU’s MASC department. Images from WSU MASC collections were digitized at 400 dpi 16-bit grayscale resulting in the master TIFF images; the access copy and thumbnails were auto-generated once they were uploaded into the Portal. All digital collections files are housed on hard drive arrays that are configured at RAID 5 and recorded to data tape weekly. The data tape recorder is housed off site at the central WSU Information Technology server farm. Three copies of backup tapes are kept at all times with at least one of rolling backups stored off site. The WSU Libraries has committed to maintaining in perpetuity the digital tool and digital collections in consultation with the Plateau Center for American Indian Studies and our tribal partners.
*(additional source codes to be assigned as needed)*

Sequential suffix: The suffix is a four-digit numeral from 0001 to 9999 reflecting the sequence in which items are added to the Portal. (Example: 3WSUMASC0010 is the tenth item entered from MASC for the Yakama Nation).

7) Upload JPEGs to the Portal—individual or batch.
   a. Enter tribal affiliations.
   b. Assign categories.
   c. Enter file info. This has three elements: name, media type, date.
   d. Enter ALL catalogue record metadata.
   e. Enter only a short, one-line description in the “add narrative” box.
   f. Make the item “public.”
   g. Click “add to archive.”
   h. Create documentation, Add item to Portal log.

Tribal administrators are encouraged to follow the same process, substituting steps under number 7 with tribal knowledge and tribal catalog record entries, and step 7f gives tribes the choice to make their materials open or “choose sharing protocols” (see Figure 5).

The process for each tribe follows the same basic format when dealing with WSU materials. Tribal representatives chosen by the tribe after initial contact by

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**Plateau Peoples’ Web Portal**

<table>
<thead>
<tr>
<th>Home</th>
<th>Browse</th>
<th>Tribal Paths</th>
<th>Public Collections</th>
<th>My Collections</th>
</tr>
</thead>
</table>

**Editing — Sharing Protocols:** (step 4 of 5)

- Choose protocols
  - Is this item open or do you wish to set restrictions for it?
    - Set as Open
    - Set Restrictions
  - What are Restrictions?
  - Deceased restrictions
    - Deceased restrictions are set during Step 3 — Add Information ("People" section)
    - Go back to Step 3?

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**Figure 5.** Sharing protocols allow the tribes to maintain cultural limitations on the circulation of the images they own and upload to the Portal. At this time less than 2% of tribally uploaded materials in the Portal have restrictions.
the Plateau Center come to the WSU campus in Pullman (in 2009–2010 we were able to use grant funds to support tribal travel) to the Manuscripts, Archives, and Special Collections offices in the libraries. Prior to the group meeting, the Portal team creates a “master pass” list of all the materials within the WSU collections—across campus. Once at the libraries, the tribes are able to view both photocopies of the materials on the master pass as well as the originals from within the special collections materials. During this process, we also work closely with the tribes to identify other possible sources for possible inclusion of which we may not have been aware. The individual tribes make decisions about what they want digitized for inclusion in a variety of ways. One of the tribes takes all possible content to their tribal elders’ meeting every other Tuesday for approval. Some tribes take the materials through their “culture committees.” The process varies with each individual tribe. After the materials they have chosen from WSU are digitized, WSU Portal staff log in, upload the materials, and add the existing catalog record and metadata. Once the materials are uploaded, tribal administrators can then access them through a tab labeled “tribal admin content.” The tribal administrators have access to the uploaded content, but cannot alter the institutional record and metadata. Instead, tribal administrators access the tribal catalogue record and tribal knowledge tabs and add in their own tribal metadata, narratives, and audio or video comments. This system allows the integrity of institutional materials to remain while simultaneously expanding the record through the entry of tribal metadata, narratives, and new content—either as individual items, collections, or as audio/video comments.

The design of the Portal highlights the layered history for each piece of content, linking histories of collection and colonization with those of survival and adaptation and thus expanding both the historical record and the range of expert voices online. For example, the Chalcraft-Pickering lantern slide collection digitized as part of the first phase of the project contains images from the Chemawa Indian School in Salem, Oregon. This collection spans tribal affiliations showing the connection of Plateau peoples’ histories and colonial encounters in the American Northwest. One image in particular, of the bakery, spawned a lengthy textual entry in the narrative section by a Yakama tribal member and two audio links by Umatilla tribal members. Accessing the image, users can read about the boarding school and its history, see the site on the map, listen to con-

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36 The tribal knowledge categories and subcategories can be edited and added to by tribal administrators on-the-fly in real time.

37 Any audio or video comment that is added to an existing record (whether it be a tribal record or an institutional record) is also added into the database as a piece of content.
temporary Umatilla elders remember the food served at the school, and read the catalog record. Thus, one image digitally repatriated gave way to multiple new sets of cultural materials—digital audio files, text files, and tribal metadata. Similarly, an item for the Yakama from the McWhorter Collection at WSU, “Dancehouse of the Yakamas,” has both a brief narrative from a tribal administrator and several paragraphs of tribal knowledge entered under the lifeways category. As more material is added to the site, the potential for growth is exponential. The Portal is not only a place for materials that have already been collected, it is also a springboard for new materials. In this way, the Portal is a generative tool, providing a platform for new knowledge, new materials, and extended sets of dialogue among and between many publics.

Tribal members, scholars, students, and general Internet users may see the same materials on the site, but interact with them and define them based on different knowledge sets. Tribes, affiliated scholars, and institutional affiliates can upload content and add metadata, map content, and narratives. Visitors to the site can add comments and tags, and create individual “myCollections” areas for future research. Whereas in many museum and archive settings, experts give knowledge, and tags or comments are seen as anecdotal. In the Portal, we created a space to open dialogue and allow Native views and academic information equal space. The Portal aims to expand the archival knowledge base to highlight the range of historical and contemporary narratives and knowledge surrounding existing cultural materials and produce a platform for the production of new materials and knowledge.

Archival Imagination

Standards are more than buzzwords for archivists: they are the foundation of the profession. As an anthropologist trained to view systems as culturally constructed and politically implemented, it is oftentimes difficult to be sympathetic to pleas for maintaining standards and systems with little regard to historical and political changes, especially in light of the fact that archivists continually alter their professional practices and redefine standards to reflect emerging situations and changing contexts.38 Is it too much to imagine that archivists

38 For example, increased attention to the archival representation of minorities and other underrepresented groups; increased attention to ethical dilemmas brought on by genocide and/or ethnocide in maintaining and circulating individual records; changes in records management strategies in the wake of increased electronic recordkeeping, including such notions as “precustodial intervention” (see Adrian Cunningham, “Waiting for the Ghost Train: Strategies for Managing Electronic Personal Records before It Is Too Late,” Archival Issues: Journal of the Midwest Archives Conference 24, no. 1 (1999): 55–64, http://www.mybestdocs.com/cunningham-waiting2.htm, accessed 30 September 2010, and the need for, and acceptance of, personal archiving in light of social media and Web 2.0 technologies. In relation to indigenous-specific concerns, some archives in Australia limit viewing of field notes and images if they are culturally sensitive—as determined by in-depth consultation with the communities represented.
might also shift their views on privacy, open access, and what constitutes the public good in light of the changing contours of indigenous politics? Legal scholars and technical enthusiasts have taken advantage of changing public attitudes to file sharing and digital circulation of documents to try to swing the pendulum of access in their favor—either for more access, for “balanced” access, or for more control over access. Archivists could do the same in relation to the expressed concerns and histories of indigenous peoples and their collections. The relatively recent call by indigenous peoples to claim a place within archives (and other collecting institutions) is part of this expanded popular discussion about the public domain as well as part of global self-determination movements and the assertions of sovereignty by marginalized indigenous communities. Archivists could be at the forefront of this shifting terrain, foregrounding not just ethical considerations, but redressing historical injustices and continued marginalization as well.

Archives are already powerful places of reconciliation for many indigenous peoples in settler nations like the United States, Canada, and Australia. National archives are often the key to land claims cases, family genealogies, and community histories. Although they may induce ambivalent feelings among indigenous peoples as they remind them of oppressive systems that tore families apart, at the same time they provide comfort to those seeking historical answers and redress from the state. Archives have always been part of nation-making practices, and, as such, have often elided the needs of underrepresented groups. The historical record may, in fact, never be as transparent as some would like it to be. However, this should not stop archivists (and other collecting institution professionals) from addressing the systems of privilege that exist and that are perpetuated by rote collections management structures; inflexible (not neutral) international metadata standards; and liberal notions of privacy, access, and the public that discount histories of exclusion. Since the mid-1990s, museums, archives, libraries, and especially land grant universities (such as Washington State University) in the United States and worldwide have recognized the need to direct their energies toward outreach to and inclusion of indigenous communities in the curation process. Many archives and museums have signed MOUs with indigenous communities promising access and support in retrieving materials. Digital technologies can provide innovative ways to harness the collaborative potential between collecting institutions and indigenous


communities. Dyson, Hendricks, and Grant suggest that “The multimedia capabilities, storage capacity and communication tools offered by information technology provide new opportunities to preserve and revitalize indigenous cultures and languages, and to repatriate material back to communities from national cultural institutions.” Using digital technologies to unite layers of knowledge surrounding archival and museum collections foregrounds the shift to the digital repatriation of objects, images, and documents. The technology alone, however, is only one aspect of the process. While new technologies allow for ease of reproduction and dissemination, they cannot ensure that respectful and reciprocal curation processes follow; that must happen face-to-face through sustained dialogue and a commitment to collaborative archival practice.

Scholars across disciplines have noted the significance of indigenous curation of collections within museums and archival institutions. There is neither a singular call, nor a one-size-fits-all answer to the archival questions indigenous peoples bring to bear on the institutions that hold much of their cultural heritage. Instead, we must recognize a diverse landscape of needs, histories, cultural politics, and local and intranational agendas. The archival imagination brings to this diverse terrain flexible guidelines, community-specific programs, expanded metadata, diverse databases, a range of expert voices, and a willingness to integrate various sets of stakeholder needs into the structure of archival collection and preservation itself. This need not be seen as a threat to the field, or an attack on the need for interoperable standards. It does mean that archivists must use their considerable training, insights, and imaginations to rectify the erasure of crucial archival knowledge one project at a time.

Archivists, technologists, scholars, and a range of indigenous stakeholders have already come together in local, regional, national, and international settings to produce unique archival responses to historical injustices and continuing marginalization. The solution is not more—the number of projects is not as paramount as the willingness of archivists to incorporate this already existing creativity and imaginative response into the fabric of everyday archival work. Once we set aside the need to dictate specific strategies or rigid standards, we can begin to see that the future of the living archive depends on the type of

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41 Laurel Evelyn Dyson, Max Hendriks, and Stephen Grant, Information Technology and Indigenous People (New Jersey: IGI Global Press, 2007), xvi.
innovation in which archivists are well trained and historically predisposed to implementing. Opening the collective archival imagination to the diverse needs and heterogeneous hopes of indigenous peoples has the potential to result in a more dynamic and expansive archive; not a diminished one. Training our eyes on what falls outside the margins, on what has been written over, is the work of archivists and sympathetic scholars alike. Adding indigenous knowledge systems and collections management styles only brightens this palette.

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The Expanding Purview of Cultural Properties and Their Politics

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Key Words

cultural heritage, cultural expression, cultural rights, indigenous rights

Abstract

Cultural property is a field of law and politics that has expanded dramatically in the past two decades. The review explores the international legal, political, economic, and technological terrain in which possessive relations to cultural forms have been articulated and incited, as well as the revitalization of human rights claims premised upon cultural grounds. Changing practices, behaviors, attitudes, and protocols regarding cultural heritage both index and reflect transformations in social relationships that are indicative of larger patterns of late modernity and decolonization. This premise is illustrated through considerations of changing practices in cultural heritage preservation, archaeological and curatorial relationships to indigenous heritage properties, development institutions and programs, uses of intellectual property, and the treatment of traditional knowledge and traditional cultural expression. A new body of negotiated proprieties is emerging in a space of unprecedented legal pluralism that constitutes a significant area for sociolegal inquiry.
INTRODUCTION: LEGAL, ECONOMIC, AND POLITICAL CONTEXT

The topics that might be addressed in a survey of law and social science literature pertaining to cultural property have multiplied exponentially in the past decade. In international law, it was once possible to consider cultural property and cultural heritage as two discrete categories, but even then, commentators bemoaned the fact that the terms in different languages they referred to were seldom translations of the same concepts. *Biens culturels*, *beni culturali*, *bienes culturales*, *Kulturgut*, and *bens culturais*, for example, do not have the same legal meanings (Frigo 2004, p. 370). Such interpretive difficulties now seem provincial. In any case, these promise only to proliferate as these categories expand, their distinction implode, and their subject matter and fields of reference proliferate.

No longer an esoteric area of law devoted to the protection of antiquities and their proper provenance, the concept of cultural property today is used to refer to intangibles as well as tangibles from folklore to foodstuffs as well as the lifeways and landscapes from which they spring. From seeds to seascapes, the world of things bearing cultural significance and the struggle over ownership rights apportioned to and appropriate to their significance have increased dramatically in scope and complexity.

Understanding the causes and consequences of the proliferation of cultural properties and of the even greater range of cultural rights claims is a natural area of inquiry for law and social science scholars and the field of sociolegal studies. Arguably, however, very little of the available scholarship is as interdisciplinary in scope as the politics of this dynamic field ideally demands. Few scholars fully understand the international legal frameworks and transnational policy initiatives that are driving governments, nongovernmental organizations (NGOs), development agencies, multilateral institutions, indigenous peoples, and communities, at various scales, to treat “culture as a resource” (Yudice 2003). Slightly more work has been done to relate this movement to new patterns of capital accumulation in a global political economy in which informational capital (Castells 1996–1998) has achieved new prominence (Verdery & Humphrey 2004, Watts 2006), but scholars are only beginning to consider the empirical specificities of informational capitalism in the emergence of culture as a resource (Harvey 2001, Parry 2004, Whatmore 2002).

Culture considered as a resource encompasses a wider range of values than the purely economic emphasis that culture conceived of as an asset tends to project. These values include social cohesion, community autonomy, political recognition, and concerns about inappropriate forms of cultural appropriation, misrepresentation, and loss of languages and local knowledge. These latter anxieties are integrally related to the spread of new communications technologies that have enabled cultural forms to be reproduced and publicized at a speed and velocity never before experienced (Burri-Nenova 2008). If digitalization has accelerated processes of social decontextualization, however, it has also heightened awareness of the exploitation of cultural heritage resources and enhanced political consciousness about the injuries they may affect (Coleman & Coombe 2009) while spurring new initiatives for managing and sharing cultural heritage resources in a politically sensitive manner (Christen 2005, 2009; Kansa et al. 2005).

More scholarship is needed to link the assertion of cultural properties to the political climate in which indigenous people have secured unprecedented new rights (Filbo & DeSouza 2007; Gow 2008; Hirtz 2003; Sylvain 2002, 2005) and to relate the revitalization of indigenous rights and identities to neoliberalism (Clark 2005, Coffey 2003, Hale 2002, Hristov 2005, Jung 2003, Perreault 2005, Speed 2007) and the rights-based practices (Goodale 2007) increasingly engaged to resist neoliberal development agendas (Coombe 2007, Weismantel 2006). Cultural claims are central to the collective struggles of many marginalized people for whom culture is a concept used reflexively...
to engage with wider state or nongovernmental institutions for purposes of identity assertion, greater inclusion in political life, the defense of local autonomy, and new forms of engagement with global markets (as well as resistances thereto). Academic recognition of this new politics of cultural properties and cultural rights has renewed scholarly concern with the conditions of cultural consciousness and relations of objectification, reification, authenticity, and decontextualization (Clifford 2004, Handler 2003, Harrison 2000, Kaneff & King 2004, Kirsch 2004).

Cultural rights in international law include intellectual property rights (or more generally, rights pertaining to moral and material interests in the works of which one is an author), rights of minorities to maintain and to develop cultural heritage, rights to participate in cultural life, rights to benefit from the arts and scientific achievement, and rights to international cultural cooperation (Heller 2007, Macmillan 2008, Symonides 1998, Yu 2007). These are augmented by the cultural heritage provisions of the 2007 UN Declaration on the Rights of Indigenous Peoples, which even in draft form was an important part of the international customary law used to interpret other rights (Ahmed et al. 2008). Regional human rights instruments also assert the cultural rights of collectivities (Jovanovic 2005). More recent UNESCO conventions have put new emphasis on intangible cultural heritage and cultural diversity, leading to greater state scrutiny of cultural assets and an enhanced reification of cultural traditions (Allbro 2005a,b; 2007). Whether the objective is rural development, environmental sustainability, or rights-based development, an emphasis on maintaining (and in some cases profiting from) cultural distinction has assumed new significance in international arenas (Coombe 2005a; Ensor 2005; Radcliffe & Laurie 2006a,b). Certainly not all cultural rights struggles involve claims to cultural property. However, to the extent that assertions of cultural rights tend to assume a possessive rhetorical form and neoliberal ideological domination of government and institutional reform agendas tend to emphasize market-based solutions, cultural properties always figure on the policy horizons of these discourses, practices, and controversies.

New forms of cultural or ethnodevelopment, for instance, which may include ecotourism and the cultivation of culturally distinctive export goods, have been implemented as a means for realizing rural economic revitalization, social cohesion, human security, and political autonomy (Andolino et al. 2005; Aylwin & Coombe 2010; Laurie et al. 2005; Perreault 2003a,b; Radcliffe 2006b; Rhoades 2006). This is a distinctive area of neoliberal governmentality, involving both multilateral institutions and NGOs that seek to empower local communities, recognize traditions as sources of social capital (Bebbington 2004b, Dervyttere 2004, Perreault 2003c), and otherwise encourage people to adopt a possessive and entrepreneurial attitude toward their culture and the social relations of reproduction that have traditionally sustained them (Elyachar 2005, Greene 2004, Lowrey 2008). These representations have their sources in diverse international legal instruments and their interpretation, in the institutional policies (Kingsbury 1999) that respond to them, and in the discourse of human and indigenous rights that shape local, NGO, and transnational responses to these policies. The latter provide normative resources for alternative articulations of culture as a source of moral economy, social meaning, and dignified livelihood (Edelman 2005, Gow 2008, Perreault 2005b, Saugestad 2001, Stewart-Harawira 2005).

Implementation of several international agreements and new programs of legal negotiation illustrate a recent acceleration of global policymaking with respect to culture. The Trade-Related Aspects of Intellectual Property (TRIPs) Agreement; the Convention on Biological Diversity (CBD) Working Group on Article 8(j) activities; the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Traditional Knowledge, Traditional Cultural Expression, and Genetic Resources negotiation of draft
provisions protecting traditional knowledge and traditional cultural expressions and state proposals for an international legal instrument to bind member states; the World Bank’s Indigenous Knowledge for Development program; and the passage of UNESCO treaties on the Protection and Promotion of the Diversity of Cultural Expressions and the Protection of Intangible Cultural Heritage are all arguably reshaping local social relations while linking places into transnational networks of activity.

Although the role of NGOs and multilateral institutions in world policymaking and the political importance of indigenism as a global people’s movement have received increased scholarly attention in the last decade, there is as yet little academic recognition of these institutions’ significant role in the practices through which proprietary relationships to culture are evoked. They bring new notions of modernity and tradition to bear on local practices (Bebbington 2004a), reworking local understandings of relations between nature and culture, emphasizing the significance of social attachments to place, and encouraging local people to express territorial relationships in cultural and proprietary terms (Escobar 2001, 2003, 2008). Environmental and indigenous NGOs play an important role in the processes by which people come to understand themselves as indigenous, as constituting, in the words of the CBD, “local communities embodying traditional lifestyles” or as possessing traditional environmental knowledge (Li 2000a, b; Tsing 1999). NGOs may exercise new forms of governmentality under neoliberal regimes (Bebbington 2005; Bryant 2002a, b), such as those that attempt to protect biological and cultural diversity, locate traditional knowledge and traditional cultural expressions, create inventories of intangible cultural heritage, and bring culturally distinct goods to market (Coombe 2010a, b). This is an area that has received scant sociological attention.

It is impossible to canvass the scholarly literature in all these areas relevant to cultural property. Instead, I focus on areas of particularly strong concentrations of scholarship, arguing that the proliferation of claims to cultural property might be more significant as an indicator of and impetus toward transformations in political relationships than as an area requiring domestic or international property law reform, although such reforms seem imminent at different scales in various jurisdictions. The production, exchange, and consumption of cultural property involves the construction, recognition, and acceptance of social groups and group identities in global public spheres as much as it concerns control over objects per se. Changing practices, behaviors, attitudes, and protocols regarding cultural heritage both index and reflect transformations in social relationships that are indicative of larger patterns of late modernity and decolonization.

RETHINKING CULTURAL HERITAGE

As geographer David Harvey (2001) suggests, a concern with the past and with the proper treatment of material objects from that past has a long history reflective of a more general human concern with individual and group identities. Although the use of material culture to bolster national ideologies is well known, he argues that an undue emphasis on this modern phenomenon may work to preclude engagement with more central questions about the use of heritage in producing identities and legitimating power (Harvey 2001, pp. 320–33). Nonetheless, the particular discourse of heritage that emerged in nineteenth-century Europe continues to dominate theory and practice throughout the world by representing its values as universal ones. Its origins are linked to the development of nineteenth-century nationalism and liberal modernity, and although competing discourses do occur, “the dominant discourse is intrinsically embedded with a sense of the pastoral care of the material past” (Smith 2006, p. 17).

A concern with cultural heritage emerged from modern state anxieties around national social cohesion and identity and the need to inculcate national sentiment and civic responsibility.
A preoccupation with monuments as witnesses to history and as works of art, reflected in the French idea of patrimoine and the Romantically derived English conservation movement, became internationally naturalized in the twentieth century. Critical scholars show how it reinforces the power of national elites, upholds the stature of rarefied bodies of expertise, denies social diversities of experience, and ignores and obscures non-national community identities while constituting the public as passive and uncritical consumers of heritage, rather than as active creators and interpreters of it.

In the past two decades, heritage scholars have shifted attention from concrete sites, objects, and localities to consider the pervasive intangibility and contingency of heritage (Munjeri 2004). What makes things, monuments, and places “heritage” are not inherent cultural values or innate significance, but rather are “the present-day cultural processes and activities that are undertaken at and around them” (Smith 2006, p. 3) through which they are given value and meaning. Such processes as the management, conservation, and governance of places, sites, and objects are thus constitutive of their cultural valuation. In short, “heritage is a multi-layered performance—be this a performance of visiting, managing, interpretation or conservation—that embodies acts of remembrance and commemoration while negotiating and constructing a sense of place, belonging and understanding in the present” (Smith 2006, p. 3). The cultural process of identity formation that is basic to and constitutive of heritage, however, has been obscured by an ideological emphasis on things or objects and their provenance—linked and defined by concepts of monumentality and aesthetics (p. 4). This “authorized heritage discourse” serves to erase subaltern and popular practices through which received values are challenged, the meanings of the past are negotiated and reworked, and community and group identities are socially projected, perceived, and challenged. New understandings of heritage have emerged both from a backlash against the professionalization of the field of cultural heritage management and from the challenges of minorities and indigenous peoples to monologic narratives of national history and identity that negatively affect their representation and self-understandings.

One instance of a practice through which archaeology and heritage studies have become engaged in identity politics involves cultural resource management (CRM), the policy and procedures used to protect, preserve, and/or conserve cultural heritage items, sites, places, and monuments, which is also the process through which the archaeological database is preserved and maintained (Smith 2004, p. 1). Those things that are managed by archaeologists as having universal cultural value (but often claimed by the state as national patrimony) are often crucial to the identities of others, as the proliferation of conflicts between archaeologists and indigenous peoples in the Americas and Australia clearly demonstrates. Through CRM, heritage scholar Laurajane Smith (2004, pp. 2–3) argues, archaeological knowledge and expertise are mobilized by public policy makers to help govern or regulate permissible expressions of social and cultural identity:

The way in which any heritage item, site or place is managed, interpreted and understood has a direct impact on how those people who associated with, or who associate themselves with, that heritage, are themselves understood and perceived. The past, and the material culture that symbolizes that past, plays an important part in creating, recreating and underpinning a sense of identity. . . . Various groups or organizations and interests may use the past to give historical and cultural legitimacy to a range of claims about themselves and their experiences in the present (Smith 2004, p. 2).

As a form of expertise and an intellectual discipline that is privileged in Western societies in debates about the past, archaeology is a form of knowledge that functions as a technology of government. Its knowledge, techniques, and procedures become mobilized in the regulation of populations and the governance of social problems that interact with claims about the
meaning of the past and its heritage. These are utilized by governments and policy makers who, through CRM, clarify and arbitrate competing demands and claims about the past from various interests. Moreover, archaeological knowledge is used to help define the interests and populations linked with social problems that intersect with particular understandings of the past. Thus, the discipline plays a role in legitimating or delegitimating interests, particularly in postcolonial contexts in which people seek to establish claims to land, sovereignty, and nationhood; “archaeological knowledge, and the discourse that frames that knowledge, can and does have a direct impact on people’s sense of cultural identity, and thus becomes a legitimate target and point of contention for a range of interests” (Smith 2004, p. 3).

The subject of cultural heritage, scholars now widely recognize, is not a group of tangible things from the past—sites, places, and objects—with inherent historical values that can be properly owned, controlled, and managed. Rather, it is a set of values and meanings that are contested and negotiated in a wider field of social practices. Such things have value not because of their inherent significance, but because of their role in the transmission of identities and values (Smith 2006). A growing movement identifies and justifies desires to engage local communities more fully in heritage management, for example (Buggey & Mitchell 2008), and, as I discuss below, archaeological practice has evolved to incorporate indigenous criticism into theory and research (Meskell 2002, Nicholas & Bannister 2004).

The valuation of cultural heritage is certainly a revitalized arena of cultural property politics. Cultural heritage is now understood by critical practitioners in the field as “culture and landscape cared for by communities” to be passed on to the future to serve people’s need for a sense of identity and belonging, while at the same time serving as the basis for new industry (Loulanski 2006, p. 209). Heritage bridges the gaps between culture and the economy (and, increasingly, the environment). No longer focused primarily on the preservation of monuments, conservation is oriented toward future usages for social purposes. It embraces distinctive styles of living in unique areas and is no longer wholly encompassed by exhibits, archives, or tourist sites; there has been a shift in emphasis from preservation to sustainable use (Loulanski 2006, p. 211). State-led projects of institutionalized storage of objects are increasingly rejected in favor of community-based research and development focusing on improvements in local life and livelihoods (p. 211).

Combining natural and cultural environments, cultural heritage protection is now linked to sustainable development, and cultural heritage politics is now oriented toward maintaining the unity between the tangible (objects) and the intangible (lived experience and practice).

As anthropologist Lisa Breglia (2006) explores, neoliberal policies have heightened controversies over the proper custodians of cultural heritage. The divestiture of state-owned enterprises and the decentralization of control over cultural institutions have simultaneously led to new forms of commodification and to new forms of identity politics. Heritage sites and objects are increasingly turned over to market forces and literally expected to earn their keep; their incorporation into new forms of tourist enterprise provokes intense responses from those who regard these as their own cultural patrimony. Breglia is particularly concerned with monuments, but similar politics can be discerned with respect to properties of cultural significance worldwide.

Although cultural property is often perceived either as the common heritage of humankind or as the inalienable property of a nation, the agencies involved in its protection, preservation, promotion, and development are actually far more diverse. In many parts of the world, for instance, particular families have assumed the role of caretakers for archaeological and religious sites for several generations, and other institutions that have supported their maintenance, excavation, and research may also have their own interests. To the extent that these sites are found on ancestral territories, descendant groups may have distinct claims.
Arguably, none of this diversity of interest is new. Numerous parties with competing and sometimes conflicting proprietary attachments to cultural patrimony and the proprieties of its treatment may, however, become more evident as the state either withdraws its protective agencies, delegates its authority, or, alternatively, becomes more aggressively involved in developing these resources for financial gain. Contemporary theoretical work on heritage has responded by moving away from studying heritage as material culture to understanding it as a political practice of social relationship (Breglia 2006, p. 14).

The international legal field of intangible cultural heritage has recently received an infusion of political energy, resulting in the 2007 Convention for the Safeguarding of Intangible Cultural Heritage, which has shifted emphasis from recognition of national masterpieces to preserving lived heritage at the borders between nature and culture, as maintained by the active participation of communities pursuant to human rights and sustainable development principles (Aikawa-Faure 2009). Another arena of cultural politics promises to be animated by the citations of cultural significance and celebrations of cultural difference that the legal and regulatory implementation of this convention promises to incite (Bendix 2009).

**INDIGENOUS CULTURAL HERITAGE POLITICS**

Perhaps the most remarkable transformation of social practices around the politics of cultural heritage involves rights to the material artifacts and intellectual property associated with sites of cultural significance to indigenous peoples. Intense debates about who controls the past, who regulates access to sites, material, and information, and whose interpretations of the past should have authority have characterized archaeological, anthropological, and museum research involving material of significance to aboriginal peoples in Australia, First Nations groups in Canada, and Native American groups in particular. Early debates focused upon repatriation, turning around charges of cultural appropriation and the propriety of possessing cultural goods, echoing older claims with respect to artistic artifacts (Glass 2004). However, responses to charges of appropriation have become progressively less exclusive and more inclusive in nature.

Archaeologists conventionally treated their materials as empirical records of a universally defined cultural past that enriched scientific understanding of a common cultural heritage; no living group was accepted as having any justifiable right to restrict the research mandate of scientific experts (Nicholas & Wylie 2009, p. 15). Such beliefs have come under enhanced scrutiny; it is now acknowledged that very few archaeologists do purely disinterested scholarly work, and local and descendant communities have challenged these premises (Nicholas 2005). Archaeologists are increasingly accountable to a wider group of stakeholders who do not accept the privileging of their allegedly wholly scientific interests. The passage of the Native American Grave Protection and Repatriation Act in the United States in 1990 was but one of many acknowledgments of the rights of descendant communities that practitioners have come to recognize. Requests for the return of artifacts, historic photographs, and ethnographic information have become common. Ethical issues of accountability and professional responsibility now go beyond issues of stewardship of the archaeological record to encompass responsibilities for the welfare and empowerment of those descendant communities whose cultural properties (not only objects of cultural significance to them but those properties that are deemed representative of their culture) are involved in archaeological research.

Although some communities, including some nation-states, have adopted exclusive property models—refusing access to researchers interested in their cultural heritage, claiming all resulting intellectual property rights in any research, and/or insisting upon compensation and royalties—more innovative
models of benefit sharing have also emerged. Some professional archaeologists and anthropologists still assume a proprietary interest in their discoveries and discount the necessity of considering descendant community interests, but others have become more sensitive to the colonial power dynamics that historically enabled the cultural records of some peoples to become the scientific records of others. Indigenous peoples may have significantly different attachments to what we consider history—ancient artifacts, human remains, and culturally significant places may retain a distinctive currency and/or spiritual properties in their unique moral economies. Acknowledging this respectfully has involved new processes of consultation, reciprocation, and collaborative practice:

Some of the most creative of these initiatives are predicated on a commitment to involve Indigenous peoples directly in the process of archaeology, a process that often significantly reframes and enriches archaeological practice. Descendant Indigenous communities often raise questions that archaeologists had never addressed, and their traditional knowledge is vital for understanding the material traces of antecedent land-use patterns, resource-harvesting practices, and a range of other more social aspects of past lifeways (Nicholas & Wylie 2009, p. 18).

The archeological embrace of ideals of collaborative practice has resulted in a broadening of academic discourse and a disciplinary practice that is not only more ethically responsible, but also more theoretically robust (pp. 18–19). Indigenous communities may now assume direction of research projects that involve their territories, material history, or cultural heritage; develop elaborate protocols for consultation; restrict some forms of publication likely to cause social harm; and/or craft access and use guidelines designed to further community objectives (Nicholas 2008). Creative uses of intellectual property laws have enabled some indigenous peoples to limit inappropriate uses of cultural heritage. Potential laws promise to provide further proprietary forms of protection and redress, such as those proposed to protect indigenous cultural heritage, traditional knowledge, and traditional cultural expressions (Coombe 2008). Where researchers and local people achieve relations of goodwill, their joint interests may combine to address contemporary community needs for employment, resource management, language preservation, education, and sustainable forms of local development or to support territorial claims. Whether or not we consider these a result of the recognition of indigenous cultural property or simply a creative way to avoid proprietary solutions, there is little doubt that such benefit-sharing activities evince an increased ethical sensitivity to cultural rights.

These dynamic new forms of social relationship, moreover, also characterize other fields of contention more conventionally considered issues of cultural property, particularly in museum contexts. Contemporary source communities are recognized as having interests in properties of cultural significance that neither internationalist commitments to maintaining world heritage, state interests in controlling national cultural patrimony, nor commitments to market forces for distribution properly encompass (Busse 2008, Geismar 2008). Throughout the Pacific, for example, museums have played a significant role in negotiating among competing interests in cultural property to ensure that public interests are not ignored nor source communities alienated. For example, Te Papa Tongarewa, the Museum of New Zealand, was completely rebuilt and reorganized to recognize the bicultural nature of the state and the equality of its founding societies. Maori taonga, or cultural treasures, are held by the museum through an institution of guardianship. This may involve relinquishing items or exhibiting them in a culturally sensitive way but most significantly engages Maori representatives and leaders in decision-making processes. As anthropologist Heidi Geismar (2008, p. 115) explains:

Rather than a condition of ownership, this notion of guardianship develops relationships of
consultation and collaboration. The acknowledgment that property is a relationship rather than an object (so evident to property theorists, yet so obfuscated [in cultural property debates]... suggests an alternative view of cultural property, which acknowledges the political and social relations that objects are enmeshed within as vital to their identities... Ownership does not only imply the right to freely do what one wants to with an object; it is far expanded beyond this commodity logic and also implies a state of responsibility. The two are not mutually incompatible. The notion of property (and cultural property) implies entitlement, use, placement, and circulation as well as commoditization.

The idea of museum guardianship has spread throughout the indigenous world and among diasporic communities. Although repatriation of objects is one course of action, recognizing guardianship may actually facilitate the keeping of cultural properties in public museums and enhance their use and display. The participation of artists, researchers, and elders from source communities in the work of the museum may be a productive source of new ideas, shifting emphasis from fixed objects owned by individuals, groups, or institutions “to a more relational understanding of the dynamic links between people and things” (Geismar 2008, p. 116). Indeed, recognition of the specificity of indigenous curatorial practices has emerged in concert with the understanding that museums play an active role in the preservation of intangible cultural heritage and require new partnerships with communities to do so. These efforts are shifting “museological thinking and practice from a focus on objects and material culture to a focus on people and the sociocultural practices, processes, and interactions associated with their cultural expressions” (Kreps 2009, p. 194).

In many instances involving indigenous peoples, new museum principles regarding access, use, and interpretation have reconnected communities with their cultural heritage and reinforced recognition of the role of the past in the present, thus revitalizing cultural pride. Such principles are based on relationships of respect and recognize that Western notions of private property do not necessarily do justice to the relationship between cultural properties and identity in indigenous communities (Bell et al. 2008). As anthropologist Brian Noble (2008, p. 465) suggests, “owning as property” emphasizes exclusivity with respect to possession and alienability for purposes of exchange and wealth maximization, whereas “owning as belonging” puts emphasis on transactions that strengthen relations of respect and responsibility among and between peoples. For example, strong attachments and obligations to items of significant cultural value to indigenous communities may be accompanied by distinctive forms of inalienability:

Transfer and other forms of exchange of cultural property tend to strengthen, deepen and extend social and emotional connections among people, their histories, their material productions, their knowledge, their lands, their kin groups, and the Creator, rather than effect a separation, as would be expected of the predominantly Western understanding of property as a commodity... To reduce this connection to a simple relation between property and identity is to be too narrow. Modes of exchange, and relationships and obligations created through exchange, are also crucial to social and political formation (Noble 2008, p. 474).

To recognize other practices of ownership besides those of Western legality is to practice a form of mutual respect and recognition that arguably continues to elude most theorists of both property and culture. Effectively, it is to acknowledge that cultural property is just one dimension of cultural rights—a category of human rights that puts enhanced emphasis on moral rights, collective cultural identity, cultural integrity, cultural cooperation, cross cultural communications, and intercultural exchange.
CULTURE AND DEVELOPMENT

“[C]ulture has recently acquired a new visibility and salience in development thinking and practice” (Radcliffe 2006b, p. 1). Culture has been a core feature of development practice since the late 1990s; it indexes concerns about maintaining cultural diversity, respecting local value systems that ensure social cohesion, and ending discrimination against the socially marginalized (Radcliffe 2006b, pp. 1–8). Whether the objective is rural development or environmental sustainability, an emphasis on maintaining and in some cases profiting from cultural distinction has assumed new significance (Clarke 2008; Coombe 2005a; Coombe et al. 2007; Radcliffe & Laurie 2006a,b).

We have witnessed a growing possessiveness in relationship to cultural forms at exactly the same time that culture is being revalued, not only by indigenous peoples (Brown 2003, 2005) but also by communities, regions, and national governments. These latter stakeholders see cultural expressions, cultural distinctions, and cultural diversity as sources of meaning and value that promote social cohesion, prevent rural-to-urban migration, offer new livelihood opportunities, and, of course, have the potential to provide new sources of income. Intellectual property is central to these initiatives, and new forms of sui generis rights are being considered in a number of forums where traditions and cultural preservation have assumed new urgency. These deliberations involve a range of actors, including newly vocal indigenous peoples, diasporic religious communities, farmers, healers, artisans, and a growing array of NGOs.

Development’s cultural turn has occurred in the context of both neoliberal policies and resistances thereto. Culture is embraced as a value that can be ascribed to a place, a group, an institution, a resource management strategy, or a site of material production (Radcliffe 2006c, pp. 229–31). If culture is increasingly seen as a new basis for capital accumulation, however, it may also be deployed in strategic interventions in the accumulation of mutual respect, recognition, and dignity. A recognition of cultural property, in other words, may engender consciousness of the need for cultural rights. As geographer Sarah Radcliffe (2006c) elaborates, development institutions’ proclivity to address culture as a product treats culture as a set of material objects and distinctive behaviors, promoting the search for culturally distinct products and services for global markets. Alternatively, treating culture as an institution puts development emphasis on distinctive forms of organization, regulation, and governance (Radcliffe 2006c, pp. 235–36). Much more rarely, however, do development endeavors recognize cultural traditions as sources of innovation and political aspiration in which people attempt to express and forge a distinctive sense of who they are and the economic and political futures they desire (Appadurai 2004, Bebbington 2005).

To illustrate, appellations of origin and geographical indications—geographical names that designate the origin of a good where “the quality and characteristics exhibited by the product are essentially attributable to the geographical environment, including natural and human factors” (Höppnerger 2007, p. 3)—are forms of intellectual property protection used to maintain local conditions of production and to recognize and value traditional methods and practices. Historically, they served to protect the rural traditions of European elites; in some areas, they have come to signify the very existence of local cultural distinction (Fillippucci 2004). Increasingly, they are considered means to promote the development of others whose traditions may thereby assume new value. These market-based vehicles may be abused, particularly by states more anxious to secure new sources of export revenue than to support community traditions (Chan 2008). To the extent that such marks reify local culture, there is a risk that they may fix or freeze local practices rather than enable their ongoing generativity. Moreover, they are costly to administer and require technical expertise and major investments in marketing to provide benefits. Major public investments and/or international and NGO support will be necessary to
prevent the most powerful private actors in a community from monopolizing these opportunities. These challenges are not insurmountable, however, and these vehicles have been embraced by many states, NGOs, and development agencies as holding potential for both environmental sustainability (Larson 2007) and economic development by creating markets for culturally distinctive goods (Bramley & Kirsten 2007, Aylwin & Coombe 2010, Coombe et al. 2007).

Minority and indigenous communities have also asserted affirmative intellectual property rights, insisting that their specific traditions are important sources of symbolic value. They seek to capitalize on the symbolic resource that authenticity holds in a global market, where some consumers value the heterogeneous in a field of homogeneity and seek out difference in a sea of sameness (e.g., Maori Trademarks in New Zealand and First Nations’ certification marks in Canada). They are encouraged by international bodies such as UNESCO that stress the complementarity of cultural and economic aspects of development and encourage intercultural exchange as a political and social good. For better or worse, marks indicating conditions of origin (which also include collective and certification marks) have assumed a new popularity as vehicles to protect and project culturally distinctive forms of production and tradition-based goods while meeting sustainable development objectives (Aylwin & Coombe 2010). The possibility of their collective ownership and management makes them especially attractive vehicles for sustaining traditional relations of production and social relations of reproduction, rather than exacerbating local relations of inequality. The public nature of the rights that flow from their use raises hopes for the sustainability of localized production strategies that draw on historical memories while building local cultural pride.

These vehicles for protecting and projecting cultural properties may be attractive to a wide range of social actors precisely because they combine development orientations toward treating culture as a product with recognitions of culture as an institution, while also holding out promise for communities seeking both recognition of their cultural rights and improvements in their livelihoods. The properties of culture are deployed for diverse ends. As legal scholar Madhavi Sunder (2007, p. 106) suggests, historically, indigenous peoples and so-called traditional communities were understood to be contributors to or guardians of the public domain; recognizing their traditional contributions as innovations has either been rejected as an oxymoron or demonized as a form of neoliberal false consciousness that extends intellectual property rights into forms of stewardship that go beyond the appropriate realm of cultivation. Nonetheless, the creative use of geographical indications is one example through which culture and commerce are conjoined and tradition potentially preserved through its commercialization: “[T]hird-world artisans recognize that ‘[e]xcept in a museum setting, no traditional craft skill can be sustained unless it has a viable market’” (Sunder 2007, p. 111). Sunder finds this consonant with the human capability approach to development that understands development as any action that expands the human capabilities that allow people to achieve central freedoms, including the freedom to participate and be remunerated in the market (p. 121). Recognition of indigenous and/or traditional peoples as authors and innovators enhances their access to essential goods, furthers development objectives, and improves intercultural relations (p. 121).

One might well argue that the enormous intensity of interest in traditional knowledge and its preservation in international policymaking circles has more to do with identifying and tapping into reservoirs of insight, technique, and systemic knowledge that hold promise for future developments in science and technology than it does with the maintenance of local people’s livelihoods, the alleviation of their poverty, or the promotion of their political autonomy. Nonetheless, to the extent that the discourse provides grounds for recognition and valorization of cultural differences, it also thereby provides a means of making linkages to other
human rights associated with cultural distinction and thus a covert ground for pressing more political claims.

Global efforts to respect, preserve, and value traditional knowledge arguably depoliticize positions of impoverishment by throwing the more acceptable mantle of culture over conditions of social marginalization. But to recognize the importance of cultural diversity in maintaining biological diversity, I have argued, is not to recognize cultural diversity in abstract, reified, or museological terms, but to recognize an emerging international human right that affirms the interrelationship of rights to food sovereignty, territorial security, and collective heritage (Coombe 2005b). At least part of the ideological work of culture in these new claims is related in a fundamental way to transformations in capital accumulation that create increasingly greater pressures to harness information so that it can be aggregated and transformed into works of intellectual property.

The drive to represent local people’s knowledge and practices as innovative works—forms of intangible or intellectual property—integally related to an indigenous identity or a traditional lifestyle emerges from within this political economy. It is in this context that we must situate efforts to culturalize or indigenize knowledge so that it might cease to be mere information and pass, instead, in the more valuable form of a work (Coombe 2003). Only then may claims be made to possess, control, preserve, and maintain it; only then will people be respected. Over the course of its interpretation during the last decade, the CBD has become the focus of many Third World governments’, indigenous peoples’, and nongovernmental or civil society organizations’ energies because it appears to represent the only major international, legally binding treaty that has some potential to counter the neoliberal imperatives of the TRIPs Agreement (McAfee 1999). As indigenous peoples have become more active and sophisticated participants in this policymaking sphere and brought to it expertise honed in other United Nations venues, they have put issues of cultural integrity, democratic decision making, accountability, and self-determination squarely on the bargaining table. Their capacities to do so are greatly assisted by the rhetorical leverage provided by international human rights norms and the central, if ambiguous, place of culture within these.

Many indigenous peoples (and many of those who may be deemed to have traditional lifestyles) are resident in or enclosed by the jurisdictions of states with which they have long historical relationships of distrust, betrayal, and violence. Rather than trust state delegates to the CBD to represent their interests, they have used the CBD agenda, forums, funding, and publicity opportunities to further establish legitimacy and support for the Declaration on the Rights of Indigenous Peoples, the draft of which was negotiated almost simultaneously with debates about the implementation of the CBD. Negotiations over the draft, which in 2007 became a declaration to which most states are now signatories, created a distinctive vocabulary of representations and claims that have been reiterated in so many legal contexts that they may eventually be considered a form of international customary law.

According to international legal principles, only peoples may claim self-determination, and all peoples have cultures. Indigenous peoples’ rights to their lands, territories, and resources are recognized as deriving from their cultures and spiritual traditions. Peoples are entitled to pursue their cultural development and to revitalize and protect cultural traditions. Indigenous peoples are also recognized as having the right to control their intellectual and cultural properties, and these include rights to special measures to control, develop, and protect their sciences, technologies, and cultural manifestations (including knowledge of local genetic resources). Principles for protection of indigenous heritage define it to include knowledge transmitted intergenerationally and pertaining to a particular person or its territory. Emphasis is placed on the dynamic and innovative nature of traditional knowledge. Moreover, the creation of the legal and political category of traditional knowledge has in turn created the
political conditions through which traditional cultural expressions have also, for better or worse, become understood as cultural property to be managed.

TRADITIONAL CULTURAL EXPRESSIONS

Many of the practices referred to in this article presuppose that some level or kind of protection may or should be asserted with respect to traditional cultural goods. The protection of traditional cultural expressions from illicit appropriation, misrepresentation, and unauthorized commercialization, however, is an area fragmented by modern Western law into intellectual property, cultural human rights, common law tort liability, and, more recently, indigenous rights claims (Girsberger 2008, Graber 2008, Macmillan 2008). Despite years of international negotiations and transnational advocacy, no consensus has been reached on the advisability of either a global regime or the use of customary law as a viable means of protection (Wendland 2008). Protection itself is a concept with multiple and conflicting meanings that range from enabling commercialization to preventing it, depending on the subject matter and its social significance. Digital communications have amplified concerns in this area, increasing the risks of misappropriation and decontextualization while also offering new opportunities for communities to benefit from promoting new uses for traditional cultural expressions that promote sustainable development (Antons 2008a, b; Burri-Nenova 2008; Sahlfeld 2008).

The growing interest in protecting traditional cultural expression, however, is at least as indicative of state interests in locating and cultivating new investments, cultural export products, and tourism opportunities as it is evidence of concern with the livelihoods and well-being of those indigenous peoples and minority communities most likely to harbor distinctive cultural resources. Modern states have long histories of absorbing minority cultural traditions into nationalized cultural patrimony; indeed, even the concept of tradition has its origins in modernity and the constitution of an uncivilized, premodern, or non-Western other in need of redemption by civilizing processes.

In an excellent survey of the history of the category, historian Monika Dommann (2008) shows how folklore was defined as “knowledge of the people” untouched by modernity. It was also considered evidence of a human past that would inevitably disappear with the advent of progress unless it was salvaged for posterity by modern national science. Central to nineteenth-century European nation-building projects and colonial governance projects, the construction of distinctive cultural traditions in the making of national and colonial imagined communities often involved the reification of the distinctive customs of rural and/or tribal peoples. National archives were created to house cultural materials; property in these physical materials was usually held by the state, but the cultural content was deemed to be in the public domain, making the value in such material easy to exploit and sequester. With respect to traditional music, for example, any intellectual property rights were held only in original recordings and in new arrangements based on prior compositions.

This fragmentation of legal rights, enabled by the historical conditions under which these cultural materials were valued, collected, and exploited, has given rise to new cultural property controversies (Coleman & Coombe 2009). Postcolonial states have long disputed the universality of the nineteenth-century laws that enabled the dispossession of their cultural heritage as a continuation of injuries effected by colonialism that preclude their full social development. The one–member state, one-vote system at work in WIPO has enabled so-called developing countries to keep the issue on the table for global negotiations; some states, for example, have incorporated folklore into copyright legislation, creating lively national public domains under which new forms of creativity and cultural revitalization have thrived (Goodman 2002, 2005). UNESCO took up the issue in 1989, incorporating folklore into the “universal heritage of humanity,” which
attracted new forms of censure as both indigenous peoples and so-called traditional communities emerged as potential stakeholders. WIPO has reassumed leadership over international policy negotiations that recognize this new field of rights-holders. It has also added the denomination “traditional cultural expressions” to replace folklore for those who regard the latter term as anachronistic reference to a frozen cultural archive that they consider, instead, to be a field of dynamic resources for continuing innovation.

Issues of jurisdiction and self-determination promise to further complicate this terrain of emerging rights and responsibilities, especially given the multiple meanings that attend to the concept of customary law, so often preferred as a means to recognize traditional systems of cultural management and further the political self-determination of indigenous and minority peoples. The so-called protection of traditional cultural expressions (like the protection of traditional knowledge) is arguably the questionable political work of centralized modern legal systems attempting to incorporate the cultural systems of peripheral societies, which they tend to do with peculiar cases of tunnel vision (Teubner & Fischer-Lescano 2008).

Aggressive global expansions of the Western intellectual property system driven by new strategies of capital accumulation and national policy objectives of preserving cultural and biological diversity often result in instrumental approaches to traditional cultural expression at odds with the needs, values, and rationalities of local communities. Anthropological studies of national efforts to protect traditional cultural resources ironically illustrate the vulnerability of minority social systems to state deployments of colonial regimes of customary law—ignoring the specificity of the social processes through which knowledge and cultural expressions are generated in the process of harnessing tradition for modern markets (e.g., Aragon 2008, Aragon & Leach 2008, Balliger 2007, Green 2007, Scher 2002).

As a consequence, those who seek to maintain the vitality of locally or regionally specific forms of knowledge and cultural expression must defend themselves against the incursions of modern global science, universalizing aesthetics, new forms of capital accumulation, and national elites hungry for new forms of exploitable resources. To do so, it appears that they often articulate their own specific aspirations through the rhetoric of human rights to culture, a term increasingly animated by community investments in maintaining and supporting identities, social systems, livelihoods, and alternative systems of value. As Fiona Macmillan (2008, p. 62) wonders:

[Perhaps, however, there is still enough vitality in the more specific concept of cultural rights to offer a political and legal counterbalance to the power of the WTO system. The UNESCO Conventions concluded this century might be thought to demonstrate this proposition. Nevertheless, the question of how we make cultural rights strong enough and specific enough to confer proper legal protection remains.

CONCLUSION

Many scholars remain skeptical about the value and consequences of marrying the anthropological idea of culture with the legal concept of property, particularly to the extent that critical theorists now understand culture as having its locus in symbolic processes that are continually recreated in social practices imbricated in relations of power. Such an understanding sits uneasily with a vision of culture “as a bounded entity, the properties of which can be ‘inventoried’” (Handler 2003, p. 356). To the extent that heritage preservation and cultural property initiatives tend to assume an objectifying approach, they may fundamentally transform the symbolic processes they seek to protect by focusing too narrowly on objects, sites, and traditions to the detriment of the semiotic dimensions of culture (pp. 361–63).

To address the issue of cultural property is necessarily to consider the positing and positioning of social identities; collective identities...
are never objectively given, and groups have no objectively bounded existence: “Power is fundamentally engaged within claims of cultural appropriation and claims to ‘culture’—both in attempts to address historical imbalances, such as past histories of dispossession and colonisation and also in the renegotiation of contemporary positions within societies” (Anderson 2009, p. 192). The rhetoric of cultural ownership may give rise to absurd claims (Comaroff & Comaroff 2009), particularly when contemporary social categories are deployed to make possessive assertions with respect to historical objects that long predate the identities of those claiming them (Appiah 2006). Still, we fundamentally misunderstand the very concept of property if we focus primarily upon a Western model of exclusive individual or corporate ownership, as so many critics of cultural and intellectual property implicitly do. As legal scholars Carpenter et al. (2009) suggest, critics of cultural property wrongly conflate it with a narrow and fundamentalist paradigm of property that emphasizes alienation, exclusivity, and commodification. It would seem prudent, however, to avoid fetishizing a particular concept of property simply in order to counter certain fetishizations of culture. Property plays many roles in societies; it makes itself manifest in ideologies, multiple legal systems, social relationships, social practices, and in the interrelationships between these (von Benda-Beckmann et al. 2006). The very topic of cultural property demands greater critical reflexivity with respect to property’s diverse forms as well as enhanced scrutiny of Western proprietary prejudices.

The illustrative survey of interdisciplinary scholarly literature with respect to cultural property presented here suggests that proprietary and possessive claims based on cultural attachments to things—material and immaterial, tangible and intangible—are proliferating under conditions of neoliberalism, informational capitalism, and the establishment of new regimes of human rights. New subjects, institutions, laws, and fields of transnational politics are concurrently emergent. Nevertheless, attempts to construct new regimes of state-based property rights lag far behind traditional customs, contemporary mores, and, particularly, the new practices, protocols, ethics, and relationships of mutual respect and recognition that have been provoked by cultural property claims. Over the past two decades, then, we have witnessed a new and vital field of cultural rights norms and practices emerging in the shadows of cultural properties yet to be validated by formal systems of Western law. Arguably, this new field of negotiated proprieties holds as much if not greater promise for pluricultural ethics and intercultural futures than legislated cultural properties may afford. Interrelated concepts of property and culture are at work in the world in a diversity of ways that demand greater critical attention from social scientists of law.

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Handbook of Research on Technologies and Cultural Heritage: Applications and Environments

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Chapter 10

Representing Culture via Agile Collaboration

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ABSTRACT

Creating software that supports cultural knowledge management brings developers face to face with issues they may not encounter when dealing with more general-purpose applications. Many times cultural specialists will have a unique understanding of the data, relationships, and special sensitivities that should be reflected in the interface and structure of software intended for use in a specific field. When general-purpose software is not able to accurately capture these subtleties of culture, experts and developers can work together to create small, focused solutions. This chapter discusses the special issues presented when developing software for cultural or creative organizations, the development philosophy behind targeted applications, and methods to design ecosystems of small applications that can be combined to meet a wide variety of needs.

INTRODUCTION

Freely available Web-based publishing tools such as WordPress have made mid-level Web development considerably easier than previous write-your-own methods. Certainly, WordPress’s well-advertised “5 minute install” (WordPress.org, 2009) makes one wonder why all computer-related projects couldn’t be so easy. Yet the smallest changes to existing systems such as WordPress create complex challenges. Adapting HTML, re-arranging categories, or customizing publishing templates are changes that can be made superficially. Adding logic based on cultural parameters such as family affiliation, sacred status, or other requests require re-engineering. Culturally-sensitive software projects need not only a plan to manage content but also a complex set of protocols to represent culture. These complexities require technical innovation beyond what is possible with many general-purpose tools.
Representing Culture via Agile Collaboration

The challenge faced by developers is that cultural protocols are rarely fully definable. Asking a programming or design team to create an application based on a bullet-point feature list or occasional conversation with experts is not likely to result in an application that reflects the culture’s nuances. Developers are trained to build software that is generalized and reusable because it is efficient, but what is often lost is the flexibility to incorporate new or outside-the-mainstream concepts. When a cultural specialist requires specialized software, other methods may be sought out to meet both the developer’s goals for efficiency and the expert’s need of flexibility. One possible method of reconciling these superficially contrary goals is to build loosely interconnected specialized tools.

ISSUES OF REPRESENTING CULTURE

Ready-to-use content management systems such as WordPress feature user-friendly sets of administration pages and publishing templates for quickly deploying blogs. While WordPress includes widgets and plug-ins to extend its functionality, collectively they serve to annotate blog posts, not cultural paradigms. A blog is a serialization of linear thought: today I have an idea, tomorrow another. The structure imposed by the software turns life into a sequence of events: drove to work, met some deadlines, saw something interesting, and came home. If this oversimplification of daily routine does not sit well (certainly, life is more complicated than a series of events) then publishing tools might need to push their paradigms further to capture the breadth of human experience.

Many developers of large-scale software do not interact sufficiently with the groups that use their products and therefore misjudge the needs of culturally-sensitive projects. When users have needs that require new functionality, they send feature requests to the off-site development team. Some teams see this separation as an advantageous business concept, allowing conformity and parallel development of features within the same project. For this reason, it is a model used by many industries, including retail where large chain stores stock standardized inventories of products manufactured in industrial centers. Bottlenecking goods and profits is great for efficiency but marginalizes those that might be seeking to use systems for purposes outside the mainstream. When representing culture, it’s a society’s practices—not profits—that risk being bottlenecked.

Though business analysts might appreciate the efficiency of bottlenecks, for creators of culturally-sensitive software bottlenecks threaten to squeeze out the same nuances they are hoping to represent. Many Indigenous communities, for example, see gender, sacred status, and family affiliation as important protocols to be included in digital archives. (Christen, 2008) Unfortunately, there are few existing archive systems that include these protocols in their sorting and access algorithms.

In the face of oppressive digital rights management (DRM) imposed by media corporations (Fisher, 2007)—often seen as burdensome by consumers (Pepper, 2008)—further restricting access to content based on gender, sacred status, or family affiliation may seem like something to argue against. This issue was recently debated on technology hub Slashdot.org after the site posted a description of the Mukurtu Archive. The archive was built in collaboration with the Indigenous Warrumungu community in Western Australia and embeds the community’s protocols and restrictions directly into the interface. A Slashdot commenter argues, “The users actually want the rules to be enforced on them. It’s more to protect them against accidentally viewing stuff that they’re not supposed to while searching for other documents” (ArsenneLupin, 2008). While useful for the members of the archive’s own community, there are also implications for cross-cultural communication described by another Slashdot commenter:
... the restrictions also allows [sic] you the visitor to better understand the culture. Why? You might think that the best way to experience that culture is to be shown all of it at once, but you should consider that men who live in this culture never get to see certain things. Think of it as a simulation of a culture. Use it to reflect on the assumptions you make about who is entitled to what information. (qaramazov, 2008)

DRM tries to keep people out; culturally sensitive publishing tools try to bring people in— but only on terms that respect the material’s source.

Content in the Mukurtu Archive maintains its context because the software was custom built to support cultural protocols. In turn, the archive is educating others about the community’s cultural practices. Future teams could avoid the additional costs of developing custom software by re-purposing and remixing the algorithms that drive the Mukurtu Archive, but in doing so they would inherit the cultural protocols embedded in the archive’s code. Not surprisingly, systems that decouple code from their intended purposes are often difficult to implement, and therefore, like the Mukurtu Archive, are not prevalent.

Re-usability is hindered by systems that form rigid bonds between elements. In many applications, code is tasked with transforming database data into meaningful objects, access restrictions, and ultimately user interfaces. Code is needed to perform this transformation because data in a database table has little inherent logic or context. If data structures could be transformed to convey contextual information then the application code could be more easily re-used in places where data has other meaning. Fortunately, technology is emerging to make this process more accessible. Principal among the technologies achieving this goal are those that make up the Semantic Web.

The movement towards a Semantic Web can be viewed as an argument between relational database models, where data is normalized into table structures, and new semantic systems where data are sets of expressions mapped to local ontologies. Relational databases are tables of rows and columns linked by indexes. They hold large amounts of repeating data, tend to be comfortably similar to other relational databases for the developers who work with them, and can be nicely packaged and exported. Technologists working in the humanities often are forced to circumvent this inherent normalization with creative and sometimes bizarre schemas to support cross-connecting nuances.

Alternatively, semantic stores already support open-ended yet structured links between data. In the Resource Description Framework (RDF)—a prominent technology of the Semantic Web—objects are created out of individual statements such as “Bob is male” and “Bob was born in Ogden, Utah.” Without normalization, anyone willing to put forth a claim can contribute diverse statements about Bob resulting in interdisciplinary connections between resources, objects, and archives.

As Semantic Web expert Shelley Powers points out, the data is also re-usable:

Rather than generating one XML file in a specific XML vocabulary for all of these different applications’ needs, one RDF file can contain all of this information, and each application can pick and choose what it needs. Better yet, new applications will find that everything they need is already provided, as the information we record about each resource gets richer and more comprehensive. (Powers, 2003, p. 16)

If culture is a body of events organized by interaction rather than simple linear progression, then RDF, which maps diverse contributions, is an example of a successful technological representation of culture. In RDF, relationships between information, their origins and semantic meaning can be kept in the data model, not squeezed into a rigid database schema or integrated software layers.

When agility is built into the structure of online tools, it leads to agility in their use. Users often
find ways to adapt tools outside of their intended parameters. Social networking site Twitter, for example, is being used at conferences for “back channel” conversation during conference presentations. Commentpress, a plugin for WordPress, has been leveraged for academic peer review (Wardrip-Fruin, 2008). Many seemingly single-purpose tools have become platforms for diverse applications on the strength of the simplicity of their design.

Combining such tools can allow complex functionality. If the connections between tools are kept to a minimum then any tool in the system can be modified, upgraded, or completely swapped out for a more effective piece of software without adverse or unintended consequences. Archives such as the Variable Media Questionnaire and The Pool, described below, were designed by interdisciplinary collaborations working to solve their identified needs. Interestingly, they are linked by a team at the University of Maine (USA) to form part of a comprehensive system for managing several aspects of art and humanities production. The linkage system they developed, dubbed the Metaserver, facilitates the creation of links between archives that have a variety of foci. It provides a small plugin that integrates into each archive’s front-end user interface. Since the local archives themselves do not store relationships to other archives, Metaserver functionality can be added with only minimal changes to existing applications. The Metaserver, described in more detail below, is agnostic to the underlying architectures of the archives and can consequently support a range of databases schemas and even propriety systems such as FileMaker Pro.

Small, spontaneous collaborations that build projects based on specific parameters are well suited to develop cultural tools. They involve individuals with diverse skills working together to focus on specific cultural needs. Their innovations—small and compartmentalized—can be incorporated into other groups’ projects.

**AGILE COLLABORATION**

When producing *Spiral Jetty* (1970), Robert Smithson asked a local Utah construction worker to grab his dump truck and tractor for the project. Bob Phillips used his machinery to move six tons of rock needed to create the work in Salt Lake, Utah. Looking around, one can find reference to Phillips but credit for the idea to build the obtuse lake intrusion is provided to Smithson (Pagel, 2008). Less important in art history is the means of execution by the more ambiguous skill of operating a tractor.

Leaping forward to the twenty-first century, digital art-making often requires team members with diverse proficiencies. As technological complexities in digital production grow, the specific knowledge needed to craft a pioneering artwork also increases. Server operations, web services, mobile device syndication, programming languages and paradigms, and design all fit under the “programmer” umbrella. With unique technical innovation required to reach completion in the digital humanities, collaborations between humanists and technologists have become commonplace.

More importantly, creators are realizing that formally including the Bob Phillips’ of the world in the creative process leads to unexpected and new results in art and humanities. Collaborations between technicians, cultural specialists, and artists are valuable to all aspects of cultural planning, production, and preservation: software paradigms provide new insights for humanities researchers, and vice-versa; conservationists working closely with technicians open doors to combat degradation caused by changing video, audio, software, or hardware standards; involve performance artists in documentation, and ephemeral, experiential, and performance-based content can be re-produced in ways that preserve their original intent. The networks built through these collaborations promote re-use and combat degradation.

Consider software-based humanities projects featuring less of the “programmer for hire” model
where cultural specialists send requests to off-site developers and more situations where developers and specialists are working as equal collaborators. The deflation of the creator-technician hierarchy is similar to organizations that have emerged in the software industry; some of California’s Silicon Valley dot-com companies place engineers at the top of the corporate food chain. Technical innovation is in the hands of software engineers, and the companies understand that they too can make company policy and predictions. In the humanities, this notion seems alien: centuries of crediting the single artist makes collaborations difficult to document. But groups are working to change perceptions, including the Variable Media Network, whose members are rethinking broad strategies for citation, preservation, and interpretation.

In Semantic Web technologies, such as RDF, individual contributions are given equal protection. Contributions in RDF are claims that are no more or less important than other claims. Given that humanities projects are often representing cultural semantics (and indeed, starting to incorporate semantic technology), it makes sense that the collaborations themselves operate semantically. Balancing the knowledge of scientists, humanists, artists, and technologists is an important first step towards finding common ground between their specialized sets of knowledge. In RDF this is part of the process by which ontologies are created and is conceptually similar to the process of finding common ground between collaborators.

Imagine a set of tools built using RDF concepts and technology. Each tool contributes to a knowledge base in a unique way: one tool annotates videos and images with text, another tool organizes annotations into sequences, and a third visualizes the data in a map. The tools are crafted and used by different collaborations: video artists work to create and annotate video, scholars and archivists organize the annotations, programmers and anthropologists create visualizations of the data. Parts may be sliced, remixed, and exported in other forms, but the results could also be formed into a final published project. A team at the University of Southern California’s Vectors Journal is doing just this, developing a semantic rich media framework named Scalar, where authoring widgets add up to flexible published front-ends.

In the semantic model, contributors add their input into a knowledge base. As RDF expert Shelley Powers describes, the resource “gets richer and more comprehensive” as new knowledge is added (Powers, 2003, p. 16). Because the knowledge is separate from the project’s structure, the processes that create a final work may also be reconstituted into other works. Using the online publishing system WordPress, authors are able to add content based on features laid out by the WordPress community. However, with a semantic system new content changes the nature of the underlying knowledge, creating a dynamic new model that might accomplish a different task. The system of creation—not simply the system of publication—is therefore democratized.

Linus Torvalds points out that a focus on small contributions has further advantages, including uptake:

Nobody should start to undertake a large project. You start with a small trivial project, and you should never expect it to get large. If you do, you’ll just overdesign and generally think it is more important than it likely is at that stage. Or worse, you might be scared away by the sheer size of the work you envision. (St. Pierre, 2005)

Torvalds should know: he created Linux, the UNIX-like open-source operating system that has been adapted for desktop computers, servers, and a range of mobile devices and scientific applications. The notion of bottom-up, de-centralized production is at the core of Linux and other open-source projects. He continues, “And if there is anything I’ve learnt from Linux, it’s that projects have a life of their own, and you should not try to enforce your ‘vision’ too strongly on them.
Most often you’re wrong anyway, and if you’re not flexible and willing to take input from others (and willing to change direction when it turned out your vision was flawed), you’ll never get anything good done.” Indeed, especially in the face of recent tightening of funding for arts and humanities, flexibility opens doors to finding uses outside the intended set of results.

Linux, like much of open-source, is built with contributions in the form of individual components. Over the years Linux has grown into a complete operating system comparable to Microsoft Windows and Apple’s OS X. An important distinction is that, due to the compartmentalized nature of Linux, certain parts may be readily pulled out and used for other applications. Mobile devices—which have smaller storage capacities and a need for more streamlined architectures—can use a chunk of Linux and leave the rest out. Digital video recorders for television run on Linux (Turner, 2005). Someday soon Android, an operating system based on Linux, might drive our washing machines (Hansell, 2009). This ease of modification leads to much different results than trying to shrink large top-down systems, such as Microsoft’s efforts to scale its operating system into Windows Mobile, described as a “half-hearted rehash of an OS we’ve seen all too much of” (Topolsky, 2009).

While open source may not be able to provide a single set of tools to support all work in the humanities, the models for creative collaboration that have flourished in the open source community serve as inspiration. Along with Linux, other examples include the variety of open source tools designed to manage community contributions to a single project. Part archive, part message board, and part management tool, sites like SourceForge.net meld project development with open access and documentation. Version control software like git and subversion facilitates asynchronous collaborations between contributors by standardizing how their work integrates. If the creative community documents their work in as structured a manner as coders have, and with the same eye toward future integration with the work of others, it will be a boon to those trying to preserve and build upon the cultural artifacts created today.

In the same way new production techniques change the requirements for tools supporting cultural production, new network-based tools lead to changes in the way artifacts they describe are perceived. A system that acknowledges the importance of both conceptual and technical creators de-emphasizes the idea of the single author “genius,” re-integrating all types of contributions to the creative process. The tools described below accept these principles in both concept and execution: they are designed to harvest the perspectives of many different sources as a way of better accomplishing their individual goals, and they are also intended to work together to synthesize an expansive view of the work they document.

The Pool: Project Generation

The Pool is a database system intended to document and assist the distributed production of creative work. Users who register their projects in The Pool gain access to a community of fellow creators who give constant feedback about every stage of the project development process. Designed to take the ethos of the Open Source Software movement and translate it to a broader range of creative output that includes art and text, The Pool’s community of users often form impromptu collaborations based on the skill sets needed to complete a given project.

Information systems are often described in such broad mission statements as the quote above, only to find themselves eternally languishing in development as feature-creep sets in and programmers try to address every aspect and interpretation of their mandate. The key to the successful development of The Pool (Still Water, 2009) is that it has one primary mechanism that defines what it should do, and any new expansions or feature additions must always be in support of
that single idea upon which the entire system is built. For *The Pool*, that mechanism is iterative community feedback.

Of course, many development systems integrate feedback or discussion mechanisms into their feature set. In most cases though, they are added to the system as a stock component: a message board, blog comments, or perhaps even just an email link. *The Pool*’s developers treat feedback as the central idea for the entire system, creating an interface, data schema, and community rules all with the goal of enhancing its ability to communicate feedback from viewers to creators. It is based in the philosophy that constant feedback from a community will lead to better projects.

Feedback alone is not enough, however; the goal of *The Pool* is to give useful feedback to project contributors, which demands more in-depth thinking and investment. To make giving useful feedback easier *The Pool* imposes a structure upon the projects that are developed within it. Each project is broken down into three stages: intent, approach, and release. An intent is just a general idea, and can even be nothing more than a paragraph of text. Approaches begin to define the means and methods of implementation, and a release is literally a public release of the project. Project contributors can describe or link to the intents, approaches, and releases of their work during any phase of creation and receive feedback that can be folded into their continuing development. (Ippolito, *The Pool* | FAQ, 2009)

Even within those stages, though, *The Pool* continues to try to guide users toward providing better feedback. Instead of just asking for general comments, reviews in *The Pool* are divided into ontological prompts, asking for feedback in categories like technological, conceptual, or perceptual merit. It asks for both numerical ratings and textual comments in each category so creators can see both quantitative and qualitative evaluations of the different aspects of their work. (Ippolito, *The Pool* | FAQ, 2009) The software then takes these piecemeal ratings and reintegrates them using trust metrics to provide an overall impression of the project.

Deconstructing the work into stages and aspects was not a primary goal of *The Pool* developers; it was a data structure that was designed to solve the problem of enhancing viewer feedback. Similarly, the interface of *The Pool* was designed to make understanding that feedback simpler and more transparent (see figure 1). Breaking with the traditional page layout models of other web-based applications, *The Pool* is centered around a graphing system that lays out projects based on their feedback and ratings. By default projects that have been rated highest and most often appear at the upper right hand corner of the graph, while lower or fewer ratings move a project to the bottom left. The axes can be controlled individually so a user who, for instance, wants to see examples of projects that are highly rated conceptually and technically can adjust the base interface to see that data graphically. Individual projects are presented in panels that divide them up into stages and aspects so review information can be browsed easily.

Any user in *The Pool* can review any other, and the voices of experts will be heard alongside the voices of amateurs. Since credibility is an important concern in any such open system, *The Pool* includes measures to help distinguish between the two. Numerical reviews are balanced using metrics that take into account the aspect-specific ratings of the reviewer; for example, someone the community has determined is technically weak will have their technical ratings of others weighted less in the overall calculations. (Berkman Center for Internet & Society, 2008) The rules of the community, as defined in its software, are again set up to help make feedback more useful for creators.

As important as the features that made it in to *The Pool* are the features that were left out. The traditional tools of project management—Gantt charts, to-do lists, file and document archives—are not included in *The Pool*. Though they could
easily fall under the aegis of assisting the distributed production of creative work, they have little to do with getting project feedback from the community and including them would only take away resources from the development of more mission-centric features. The Pool’s interface and structure, highly optimized to expose review data, would not be appropriate for other types of project development tools. Such a specialized tool is only possible because its creators acknowledge that it is just one piece of software in an entire ecology of project development tools. The freedom granted by that acknowledgement means The Pool can choose one thing to be very good at and let other aspects of project development be handled by other, similarly focused programs.

**Metaserver: Distributed Implementation**

_The Metaserver (Forging the Future, 2009) is a type of connective tissue for distributed applications that want to deal with art. It is a database that holds almost no data of its own, only a few basic relationships. What it does store are pointers and links to information stored in other databases. Like a specialized version of early editions of Yahoo!, the Metaserver’s only purpose is to wait for users to tell it where information is stored and generate an index of those locations. Unlike Yahoo!, the Metaserver deals with discrete database records instead of web pages, and makes them available through a public interface that allows automated systems to easily share data with one another._

Within the model of using many targeted applications the most critical aspect of the overall system is the layer of standardized data exchange protocols that binds the individual pieces together. The most basic protocols are almost completely content-agnostic, like the TCP/IP protocols that are the basis of the Internet. Slightly more complex are protocols that give structure to data and allow it to be used programmatically, like XML. But when sharing complex data, structure alone is often not enough; there needs to be a protocol for standardizing the data itself that allows each system to create meaningful relationships with other systems. Semantic Web technologies such as RDF and particularly OWL, have been created to add meaning to data and connect resources but require each system to follow certain protocols and are linked using complex ontologies. The Metaserver
has been developed to avoid the complexity of redesigning systems to conform to the Semantic Web model, allowing existing database systems and architectures to attain a similar functionality without being completely rebuilt.

The Metaserver was designed to be a storehouse for relationships between databases. Like the common ISBN identifier for books (International ISBN Agency, 2009), the Metaserver creates a unique identifier for artworks; stakeholders like artists, estates, and cultural institutions; and the vocabulary terms used in critical analysis of art. Though the Metaserver ends up containing an index of the art that it identifies, the data it stores is of little use on its own. A user browsing just the data in the Metaserver will learn little more than which artist created which artwork.

In creating a common, unique identifier, the Metaserver allows other databases to correlate their data across systems. It goes further than just providing an ISBN-like identifier, though; it also allows other databases to store references about each identifier on the Metaserver, essentially turning every system that connects to it into a single giant relational database. If ISBN had a similar structure attached to its identification system a user would be able to find the information stored about a given book at every bookseller, library, or review site that references it.

Since different bookstores are likely to all have the same basic information about a book, connecting to every bookstore is likely of little use. But connecting a bookstore database to a review site database could be a powerful relationship to create because, even though both are discussing the same book, the type of data that they store on each book is very different. Similarly, the Metaserver’s biggest potential is to connect applications that store different types of data about the same work together, with each node in the system providing context for all the other nodes (see figure 2). Efficiency is achieved by sharing data between small peers instead of forcing data to conform to a reusable, monolithic standard.

The Metaserver uses a simple web service model, so reading a record or adding a new data link requires nothing more than sending an HTTP query. An easily accessible interface is critical to allowing as many clients as possible to connect to the system. Simplicity of data is important as well: a search on the Metaserver returns only what is necessary to unambiguously identify a work or artist. This is data that is also necessary for client systems to have, no matter what their area of

Figure 2. The Metaserver was designed to connect the Franklin Furnace Database, the Digital Asset Management Database, and the Variable Media Questionnaire in the Forging the Future project, allowing each system to focus on its own strengths. (© 2009, Forging the Future. Used with Permission)
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specialty, and thus makes as few assumptions about the client database as possible.

The Pool and Variable Media Questionnaire are both systems that implement the Metaserver interface and provide a good demonstration of how it works. When a new artwork is added to the VMQ, it runs a search on the Metaserver to see if the work already has an ID; if it does not, the Metaserver creates a new one and returns it to the VMQ. When that artwork is saved in the VMQ, a link to the work’s variable media record is saved back to the Metaserver. In The Pool, the same work may later be entered as an art reference to be reviewed. When it is, The Pool will search the Metaserver and find not only the work’s ID but also the link to the VMQ, which the user writing the review can read for additional information on the piece.

Data links stored in the Metaserver are provided on a best-effort basis, and it therefore depends on its client systems to ensure that the links are valid. As in the RDF model, anyone can make a claim; the philosophy behind the Metaserver is that it is better to have too much information indexed than none at all, and determining the quality of that information is left to the client systems and users. The fact that the Metaserver does not attempt more validation is not a claim that it is unnecessary, just that it is not the Metaserver’s job to do that validation. Like the systems that it connects together, the Metaserver is of intentionally limited scope and is designed to do nothing more than its core mission.

The Variable Media Questionnaire: Cultural Preservation

The Variable Media Questionnaire (VMQ) is a system designed to generate interviews that provide guidance for those trying to preserve art that requires more than just storing a box on a climate-controlled shelf. Ephemeral, technologically obsolete, or physically degraded works benefit from clear documentation of exactly what aspects of the work are most critical to maintain and what aspects can be modified or recreated in the spirit of the original if it becomes necessary to save the overall piece. The third version of the VMQ asks everybody connected with a work—from the artists and assistants, to conservators, to people who have just seen the work on display in the past—the same set of questions in an attempt to understand how to recreate an experience rather than just maintain an artifact.

Any artwork, whether a painting hung in a climate-controlled museum or an ephemeral happening in a New York City apartment, will eventually degrade until it loses its original vibrancy and power—the only variable is time. With a rising number of digital works and pieces based on technology that is subject to failure or obsolescence the half-life of artwork is rapidly shrinking. The Variable Media Questionnaire (VMQ) (Forging the Future, 2008) is an online database designed to help understand how an artwork may be best preserved when its initial form decays or expires. The VMQ interviews a variety of stakeholders in an artwork to discover whether the artwork itself is gone when its materials fail, or if only the medium is dead and the art can live on in another form. (Ippolito, Accommodating the Unpredictable: The Variable Media Questionnaire, 2003)

These interviews are the core data that the VMQ gathers for preservation. Using this tool, an archivist or cultural institution is able to add statements by creators on how they want their work to be preserved. The statements are intended to be forward looking thoughts, accepting the pragmatic view that the materials of their work will someday fail and prescribing acceptable remedies for when they do. Though it allows external links to supporting information like photographs or descriptive texts, the focus of the VMQ is on the interviews themselves. Each set of questions attempts to get interviewees to characterize the experience of the artwork that they wish to preserve (see figure 3).

Asking how to preserve art that can be based in any number of different physical materials is
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Figure 3. Interview questions in the Variable Media Questionnaire are organized by the functional components of an artwork and can have multiple answers with varying weights. (© 2009, Forging the Future. Used with Permission)

a large enough question in itself; adding works based on performance, interaction, or idea makes the task monumental. The solution used in the VMQ is to sidestep the details of each tiny piece of an artwork and ask bigger questions that can be answered holistically. For example, rather than record the dimensions of a CRT in centimeters, the VMQ might prompt an interviewee to think about what the work would look like on a differently sized monitor or on a completely different display technology once CRTs are no longer produced. (Bell, Opening the Source of Art, 2009)

Working at the conceptual level bypasses details that are not only unpredictable at the time when the VMQ itself is made but may in fact be obsolete by the time an artwork in the VMQ needs to be preserved.

The third version of the VMQ introduced an epistemological shift from the previous two versions by viewing the functional components that go into an artwork’s construction as its most fundamental units. Each component is treated as a paradigmatic set of possibilities, with the answers given in the interviews defining the boundaries of the set. (Bell, VMQ Schema Descriptions, 2007)

Making this change allowed the VMQ to ask specific questions about how these components interact, and those interactions form the structure of the work that the VMQ attempts to maintain.

In an attempt to capture as many impressions of the work as possible, questions are posed to not just the artist whose name is on the wall next to the piece but also the curators, conservators, assistants, and even viewers who have experienced the work. But the modern reality of art is that it is not enough to treat an artwork as just a collection of physical parts, and so the VMQ also recognizes environments, user interactions, motivating ideas, and external references as aspects to be surveyed and considered when preserving or recreating the piece. Expanding the scope of the data collected by the questionnaire moves it beyond the realm of a collections management tool and begins to provide the sort of information required to legiti-
mately update or reinterpret part of an artwork if it should become necessary.

With all of these changes in data scope and structure, the VMQ is not effective as a traditional collections management program that tracks the physical property of a museum. It was never intended to fulfill that role. The VMQ was designed as one part of a set of tools bound together by the Metaserver. Other tools created by the same coalition of cultural heritage institutions, dubbed Forging the Future, focus on physical, digital, and archival management, leaving the VMQ to specialize in creating and recording variable media interviews.

**FUTURE RESEARCH DIRECTIONS**

Earlier in this chapter we contend that generalized tools conform knowledge rather than adapt to meet specific cultural needs. In the case of WordPress, content is placed into a temporal series of blog posts annotated by supporting plugins. We then elaborate that this process bottlenecks culture’s nuances similar to how chain retail stores bottleneck goods and profits.

Of course a primary difference between WordPress and chain retail stores is that WordPress is open source. Backed by progressive notions of ownership including the Creative Commons license, teams can re-purpose, update, and re-model the code of open source software. But when the majority of users don’t write code themselves, open source can equate to holding a few shares of corporate stock. Nevertheless, when systems are agile, even users without advanced technical skills are more able to adapt them or tinker with their operations.

An intriguing direction that has emerged in digital technologies is the release of network-based APIs. Popular in social networking applications like Facebook and Twitter, these APIs go a step beyond sharing data and begin to share logic and processes. Twitter in particular has been successful largely because its simple, open API allows other people to reuse the base Twitter network for their own purposes with a minimum of programming hassle. Projects like the Metaserver have begun to take these principles and apply them to more specialized tasks. The projects are not full cloud applications, though; instead, they seek to create a network of cloud functions that can be accessed by other programs.

Billed as the future of the Internet, a true Semantic Web is still a largely theoretical concept. Many systems are using the two major technologies that enable it—XML and RDF— more as a flexible data syndication medium than a full semantic framework. The Vectors Journal, a unit at University of Southern California’s Institute for Multimedia Literacy, is doing a little of both. Working with the Alliance for Networking Visual Culture, they are leveraging the syndication properties of RDF to merge metadata from external video archives while also applying ontological principles into the front-end interface. In their soon-to-be-released academic publishing platform named Scalar, classifications of content (immeasurably expansive in academia) can be added to the RDF model without requiring a programmer to update database tables to represent them. The class data is then available to new interface widgets made by their development community.

Influencing Scalar’s development is a project developed by filmmaker Alex Juhasz with the Vectors team in 2009, named Publishing Learning From YouTube. Juhasz recently conducted a college course on and about YouTube, with both Juhasz and students producing videos. She found YouTube’s interface too cumbersome for effective scholarship, describing YouTube’s inter-media links, community exchange, and search features as “inexcusably poor” (Jenkins, 2008). Juhasz and Vectors re-imagined the interface as an environment with tours, triage pages, and better balance between text and video.

The team realized that, depending on the length of the text, number of videos, or topic,
the arrangement (“view”) of the content should change between pages. The text-centered and media-centered views of Juhasz’s project are similar in design but provide enough distinction to meet the needs of the content. This led to a concept key to the future of Scalar: rather than conforming content to a single universal template, Scalar will feature an option for users to change views of content on the fly within the page. Users will see text, image, and video displayed in different orientations chosen from a pulldown box, including grid and graph views.

The symbiotic functionality of different views provokes viewers to re-consider the interfaces to knowledge that users have come to expect. When users ponder interface as the surface node of a large network underneath, they begin to understand the influence that computing paradigms have on their interpretation of information. The idea that the structure imposed by a functional paradigm influences understanding is common in fields such as linguistics but needs further exploration in data systems.

Nicole Starosielski, who researches undersea data cables, sees the Internet infrastructure as more than binary code and software:

*Cable infrastructures, which often remain out of view on the bottom of the seafloor, are often visualized as dematerialized network flows. We don’t see the spaces that they are routed through, and cannot see where local cultural forces end up influencing network structure. For example, local fishermen in California and New Zealand regularly contest cable development as it interferes with their use of the ocean as a resource.* (Starosielski, 2010)

Nicole’s stance points towards an environmentalist mentality where we can interrogate not only our virtual spaces but our physical environment. Re-integrating understandings of media and physical ecologies could shed new light on both. Jon Ippolito describes, “As nature teaches, in any swiftly changing ecosystem there is safety in numbers (think of spawning fish), in adaptability (think of amphibian DNA, which turns male or female depending on water temperature), and collaboration (think of the clown fish and anemone, or the tickbird and rhino). Media art that is capable of all three means of self-preservation will flourish in the media ecology of the twenty-first century.” (Ippolito, 2008) Software that adopts the agility of nature’s multivariate interactions will have an evolutionary edge over that which remains monolithic and staid.

**CONCLUSION**

Finding a balance between capturing every outlying piece of data and building a generalized but efficient information system is not easy. Though the conventional wisdom of programming suggests that building a large, generic system is the most efficient way to manage knowledge, the projects profiled here demonstrate how many small, targeted systems together can match the overall flexibility that the single system seeks. Such small systems provide an opportunity for developers to work together closely with domain experts and grant them the ability to incorporate nuances that could never survive in a generalized system. The final goal of such a collaboration is to better capture the full range of experience that is often lost when massaging data to fit a monolithic standard.

**REFERENCES**


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ADDITIONAL READING


**KEY TERMS AND DEFINITIONS**

**Bottleneck:** Scenario where many processes depend on the operations or results of an individual or few.

**Digital Humanities:** Broad term describing a field that combines the analytical and critical methods of humanities disciplines with computational analysis, design, and multimedia.

**Distributed:** For digital systems, placing data, components, and processes across a geography or network to limit dependency on a single, large system.

**Ecology:** Relationship of systems to their environments and each other. Network ecologies often mimic nature in their complexity of interaction.

**eXtensible Markup Language (XML):** A specification for the formatting of data in plain text files using tag blocks, descriptors, and attributes.

**Open Source:** A movement to allow access to the source code of computer applications to facilitate the enrichment of software by encouraging collaboration.

**Semantic Web:** Model for the World Wide Web where the meaning of data is stored and transferred. In this model, computer systems can understand data and infer action without human intervention.

**Variable Media:** New forms of cultural production where traditional views of authorship are difficult to define.
The Inuvialuit Living History Project: Digital Return as the Forging of Relationships Between Institutions, People, and Data

Kate Hennessy, Natasha Lyons, Stephen Loring, Charles Arnold, Mervin Joe, Albert Elias, and James Pokiak

Abstract: Digital return is described in this paper as a process of creating and maintaining relationships between heritage and cultural institutions, people, and digital data. Our project reflects a rapidly shifting technological context in which the creation of access for originating communities to their heritage in distant museum collections and the collaborative multimedia production are increasingly parallel projects. In 2009, a delegation of Inuvialuit Elders, youth, seamstresses, and cultural experts from the Inuvialuit Settlement Region in the north traveled with a group of anthropologists, archaeologists, educators, and media producers from the south to research and document the Smithsonian’s MacFarlane Collection. In the years following this initial visit, the project team collaboratively developed a virtual exhibit and community-based digital archive called “Inuvialuit Pitquisiit Inuumiarutait: Inuvialuit Living History.” This project features the digital MacFarlane Collection, documents the delegation’s visit to the Smithsonian, and connects contemporary Inuvialuit interpretations of the collection to ongoing cultural practices in Inuvialuit communities. Through the lens of this virtual exhibit, we explore central issues of access to Aboriginal cultural heritage, ownership of digital heritage, and new forms of collaboration between holding institutions and Aboriginal communities that digital practices are facilitating. We demonstrate how new digital networks connecting heritage institutions and their data are creating opportunities for Aboriginal recontextualization of heritage, while presenting significant challenges for the long-term preservation of digital materials.

[Keywords: Collaboration, Museums, Information Technology, Virtual Exhibits, Data, Museum-Community Relationships. Keywords in italics are derived from the American Folklore Society Ethnographic Thesaurus, a standard nomenclature for the ethnographic disciplines.]

Introduction

In 2009, a delegation of Inuvialuit elders, youth, seamstresses, cultural experts, and media producers from the Inuvialuit Settlement Region in the Canadian North traveled with a group of anthropologists, archaeologists, and educators from the South to research and document the Smithsonian’s MacFarlane Collection at the National Museum of Natural History in Washington,
DC (Figure 1). This collection is arguably the most significant assemblage of Inuvialuit material heritage in a museum or private collection. Purchased by Hudson’s Bay Company trader Roderick MacFarlane¹ at Fort Anderson in the Canadian western Arctic in the 1860s, it became one of the Smithsonian Institution’s founding collections (Morrison 2006). Only a small portion of the collection had ever been exhibited: a selection of objects in the now closed North American Indian Hall of the National Museum of Natural History (NMNH), a single pipe loaned for inclusion in the controversial “The Spirit Sings” exhibition at Calgary’s Glenbow Museum in 1987,² and several objects loaned for exhibition at the Inuit Circumpolar Conference in Inuvik, Northwest Territories (NWT), in 1992. The collection remained virtually unknown and inaccessible to the descendant Inuvialuit from whom it had been derived. With the goal of bringing knowledge of the collection back to Inuvialuit communities, the delegation spent a week at the Smithsonian’s Museum Support Center and handled, photographed, and documented responses to many of the collection’s 300-plus ethnographic objects, such as skin clothing, hunting tools, and artwork. The group viewed selections of the collection’s natural history specimens, such as bird eggs, animals, and skeletons, that MacFarlane, with his Inuvialuit and Dene collaborators, had collected almost 150 years ago (Lyons et al. 2011). The delegation also worked with Smithsonian curator Stephen Loring and Smithsonian digital collections expert Carrie Beauchamp to negotiate possibilities for creating Inuvialuit representations of the collection.

Figure 1. Albert Elias tries on snow goggles at the Smithsonian’s Museum Support Center. Photo by Kate Hennessy, 2009.
Inuvialuit and anthropologists worked for many years to bring together the MacFarlane Collection and community members. This process took a great deal of time due to costs and institutional requirements that created challenges for all who were involved. Several personal connections and events finally helped move this objective forward. Charles Arnold first encountered the MacFarlane Collection while pursuing graduate studies in the 1970s. In 1992, while he was employed by the Prince of Wales Northern Heritage Centre (PWNHC) in Yellowknife, NWT, Arnold arranged for a small number of items from the collection to be exhibited in Inuvik, NWT, when the Inuvialuit hosted the Inuit Circumpolar Conference. Plans for a larger exhibition were discussed, but faltered due to the high costs and conservation challenges involved in preparing some of the more fragile objects for display. In 2001, as part of a broader knowledge repatriation program that connected Aboriginal peoples to their heritage stored in museums outside the NWT, the PWNHC and the Smithsonian’s Arctic Studies Center sponsored the Inuvialuit Skin Clothing Project. This project brought a small number of Inuvialuit seamstresses and a museum curator to the Smithsonian to study and make patterns of garments in the MacFarlane Collection in preparation for a community-based replication project which took place in Tuktoyaktuk, NWT, in fall and winter 2002.

Natasha Lyons met Arnold during the course of her doctoral research, which focused on documenting and contextualizing Inuvialuit elders’ knowledge of archaeological objects from the Yukon North Slope (Lyons 2007, 2010b, 2013). She became aware of the MacFarlane Collection and of its potential for engagement with the Inuvialuit community through Loring, a museum anthropologist at the Smithsonian Arctic Studies Center who was the external examiner on her doctoral dissertation. Her Inuvialuit colleagues Catherine Cockney and Mervin Joe were equally interested in moving this idea forward. When Lyons began postdoctoral research at Simon Fraser University, the Intellectual Property Issues in Cultural Heritage project (IPinCH, housed at Simon Fraser University) put out a call for case study applications. In 2008, our burgeoning project team decided to apply for this funding and travel to the collection instead of trying to bring the collection north. We received seed funding through IPinCH and from there launched a broader fund-raising campaign to conduct the 2009 workshop. At this time, Kate Hennessy (assistant professor at Simon Fraser University’s School of Interactive Arts and Technology) joined the team, as did the broader delegation for the workshop, which included James Pokiak, Albert Elias, and Helen Gruben (Inuvialuit elders); Karis Gruben and Shayne Cockney (Inuvialuit youth); Freda Raddi (an Inuvialuit seamstress); and Brett Purdy, Dave Stewart, and Maia Lepage (documentary producers from the Inuvialuit Communications Society). This initial workshop at the Smithsonian launched the research and community consultations that led to the development of the Inuvialuit Living History website.

The Smithsonian’s Inuvialuit collections were acquired at a time of rapid western (and northern) expansion of Canadian and American economic and territorial interests (Morrison 1998; Hodgetts 2013). Smithsonian naturalists and their agents, such as MacFarlane, were eager to collect and describe the biological and cultural worlds they encountered in the North. The prevalent belief at the time was that the Indigenous peoples and cultures of the North would disappear. This salvage paradigm is a partial explanation for the apparent avariciousness and expansiveness of the collecting zeal that resulted in the museum’s holdings (Levere 1993; Lindsay 1993). Almost all of what MacFarlane collected pertained to day-to-day household objects and clothing, presumably what Inuvialuit were willing to trade. The collection includes
many small-scale replicas of larger objects, which appear to have been created specifically for trade with MacFarlane. Their preservation through conservation and curation over time has transformed them into extraordinary objects of heritage and symbols of Inuvialuit culture and continuity.

With the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990 and of the National Museum of the American Indian Act (NMAIA) in 1989, the relationship between U.S. museums and Native American, Inuit, and Native Hawaiian peoples was fundamentally transformed. The legislation mandated that museums consult with representatives of Native communities about the disposition of human remains and certain cultural materials (including associated mortuary objects), certain sacred objects, and objects of cultural patrimony. A consequence of this legislation and resulting practice has been a sea change in Aboriginal interest in museums and museum collections. Where Native communities previously had seen museums, for the most part, as agents in the dissolution and disruption of traditions and practices in tribal communities, under the impetus provided by NAGPRA and what we call the “philosophy of repatriation” (predicated on reciprocity and respect), the roles of and relationships between museums and descendant communities have been transformed (Brown 2003; Christen 2011; Mihesuah 2000; Peers and Brown 2003).

“Digital return” for the Inuvialuit Living History website project team has therefore involved the creation of relationships between the Smithsonian’s NMNH and the Inuvialuit Cultural Resource Centre (ICRC); and among members of our interdisciplinary team of Inuvialuit cultural experts, anthropologists, multimedia designers and producers, and community partners. It has been characterized by outreach and consultation with communities in the Inuvialuit Settlement Region, and by the creation of media that extend and support these ongoing relationships. Digital return for us has involved the negotiation of ownership and authority over digital collections data and its creative re-presentation by the ICRC. Our production efforts, in this way, have been deeply grounded in the team-based production of documentary and publicly available online media that communicate the significance of the MacFarlane Collection through Inuvialuit self-representation of tangible and intangible cultural heritage. For example, in the years following our initial visit to Washington, members of our group from the Inuvialuit Communications Society produced a two-part documentary about the research trip called *A Case of Access* (2011), which premiered on the Aboriginal Peoples’ Television Network. Our team also collaboratively developed a virtual exhibit and community-based digital archive called “*Inuvialuit Pitquisiit Inuuniarutait: Inuvialuit Living History*” (Inuvialuit Cultural Resource Centre 2012). It currently features ethnographic objects in the MacFarlane Collection; the addition of a representative sample of natural history objects is planned for the coming year. The virtual exhibit also documents the delegation’s visit to the Smithsonian, features the documentary *A Case of Access*, and connects contemporary Inuvialuit interpretations of the collection to cultural practices in Inuvialuit communities while inviting ongoing knowledge contributions.

We have been inspired by large-scale digital heritage projects such as the Great Lakes Research Alliance for the Study of Aboriginal Arts and Cultures (GRASAC) (Phillips 2010), the Mukuru Content Management System and the related Plateau Peoples’ Portal (Christen 2011), and the Reciprocal Research Network (RRN) (Rowley et al. 2010; Rowley *this volume*), for the potential they bring for increased access to collections and for Aboriginal control over their representation.
and circulation in digital contexts. Our project has explored how community stakeholders—here, the ICRC—can leverage the tools that these larger initiatives provide for Aboriginal communities to make use of institutional digital collections data. How can these digital records and networks support local goals for self-representation and cultural continuity beyond online access and contributions of local and traditional knowledge to museum databases? As we explain in more detail later in the paper, the development of the Inuvialuit Living History virtual exhibit was made possible through a partnership with the designers of the RRN, who worked with us to explore how we could leverage software developer toolkits such as the Application Programming Interface (API) to bring the NMNH’s MacFarlane Collection into an Inuvialuit-controlled digital space.

In this paper, through the lens of these projects, we explore central issues of access to Aboriginal cultural heritage, ownership of digital heritage, and new forms of collaboration between holding institutions and Aboriginal communities that digital repatriation practices are facilitating. We demonstrate how digital networks such as the RRN are connecting heritage institutions and their data, creating new opportunities for Aboriginal contextualization of heritage and the creative representation of Aboriginal collections by originating communities in which access to, and ownership of cultural heritage are being negotiated and reconsidered. We further describe our process of virtual exhibit production, which included extensive outreach and research with Elders in the Inuvialuit Settlement Region, consultations with teachers and students in schools in Inuvik and Tuktoyaktuk, and exhibit reviews and presentations with the Inuvialuit community more broadly. We discuss our team’s exploration of our ongoing research relationship, particularly our efforts to create “space” for negotiating the nature and outcomes of our collaborative work (Lyons 2011). While the Inuvialuit Living History project has been designed as a living archive, one that will be enriched by diverse contributions from users and Inuvialuit community members, facilitated by our Inuvik project partners, we are aware of the challenges of sustaining the momentum of the project into the future. In the conclusion to our paper, we address these challenges in a discussion of our impressions of digital repatriation after the return, and of future directions for our project.

**Overview of Project**

The Inuvialuit Living History project has been a multi-year collaboration between a range of community, academic, and institutional partners. It has transformed our relationships with one another and our ability to access and re-contextualize information at the center of the Inuvialuit digital repatriation effort, including Inuvialuit control over the representation of the MacFarlane Collection. However, the relationship-building at the heart of our project goes back to the 19th-century fur-trade expansion into the Canadian Arctic. MacFarlane was a Hudson’s Bay Company trader who travelled much of the western Canadian Arctic in the mid-19th century. In the 1860s, he established the short-lived Fort Anderson trading post at the southern edge of territory that was used by Inuvialuit of the Anderson River area. While managing the post, he purchased a substantial collection of items that would form one of the Smithsonian Institution’s earliest collections (Figure 6).
Inuvialuit and Dene assisted MacFarlane in this process, helping to collect, preserve, and prepare both cultural and natural history items for shipment south by canoe. The ethnology collection represents an impressive array of more than 300 subsistence-based and domestic objects made and used by Inuvialuit in the mid-19th century: parkas, mukluks, bunting bags, sewing kits, fishing tackle, hunting gear, fire starters, pipes and items of personal adornment; models of umiaqs, kayaks, and paddles; and natural history specimens including birds’ eggs, animals, and animal skeletons. This collection constitutes one of the earliest and largest ethnographic collections from Inuvialuit territory, yet it has been little studied or exhibited by either Inuvialuit or museum professionals (Morrison 2006).

In November 2009, our delegation boarded airplanes in different parts of the continent to meet at the NMNH, Smithsonian Institution, in Washington, DC, for a week-long workshop with the MacFarlane Collection (Hennessy et al. 2012; Lepage 2010; Lyons 2010a; Lyons et al. 2011). Inspired by projects such as Ann Fienup-Riordan’s explorations with Yup’ik elders at the Berlin Etnologisches Museum (2003) and by Looking Both Ways, Aron L. Crowell, Amy F. Steffian, and Gordon L. Pullar’s Alutiiq project in Alaska (2001), our team felt that it was important to bring the Inuvialuit delegation to the collection itself. Our primary motivation in coming together

Figure 6. The Inuvialuit Settlement Region. Map courtesy of the Prince of Wales Northern Heritage Centre.
was to create greater access and information sharing related to the collection: access to knowledge, interpretation, and meaningful engagement with the artifacts and, alternatively, access to the control and dissemination of information. Intellectual property is centrally implicated in this research, as the cultural items while purchased have long been removed from the control of the Inuvialuit people who were their makers (Nicholas and Bannister 2004; Bell and Paterson 2009; Bell and Napoleon 2009). Inuvialuit sought to both learn more and generate knowledge about the collection, to better understand how these objects came to be cared for so far away from their place of origin, and to transmit these findings within their communities, particularly to youth, who will be the primary recipients, users, and managers of Inuvialuit cultural heritage knowledge in coming decades. While our group recognized the museum’s title to the artifacts in their care, we also asserted the legitimacy of Inuvialuit control over their knowledge of the use and meaning of the materials examined, and we sought to make this a central tenet of our collaboration.

A critical part of this process was to build relationships between Inuvialuit culture-bearers and the Smithsonian museum anthropologists who care for their heritage. The workshop formed one step toward developing a more personal and equitable relationship between the community and the institution. Our delegation to Washington included descendants of the Inuvialuit who had traded at Fort Anderson, who had a great desire to view, engage with, and document their own knowledge about objects in the collection. The workshop brought together Inuvialuit elders, seamstresses, students, and cultural practitioners alongside a host of anthropologists and media specialists. Two Inuvialuit student research assistants learned techniques of anthropological and videographic documentation from three producers from the Inuvialuit Communications Society. We spent four days studying the collection and an additional day touring Washington. As each set of objects was brought to our worktables within the Smithsonian’s Museum Support Center, many sets of eyes would light up, and many voices would fall to exploring, discussing, questioning, and remembering. Individual Inuvialuit were drawn to particular objects: Elias studies sinew-backed bows (Figure 7), Pokiak throwing boards and spears (Figure 8), and Raddi Inuvialuit footwear (Figure 9). (View a chapter of A Case of Access to see more of our delegation at work with Curator Loring.)

As is well illustrated in Fienup-Riordan’s explorations of artifacts with Yup’ik elders in the Berlin Museum of Ethnology (2003, 2005), by the Smithsonian’s Living Our Cultures, Sharing Our Heritage Alaska Collections Project (Crowell et al. 2010), or in James Clifford’s description of Tlingit elders telling of oral narratives inspired by objects at the Burke Museum (1997), museum collections represent significant repositories of intangible forms of knowledge that are encoded in tangible objects. Workshop participants later returned home to conduct research with other elders and cultural specialists in their communities and to try their hand at recreating objects seen in the collection. In this way, the workshop engendered new directions for our research and questions about the changing histories, meanings, and significance of objects from an Inuvialuit perspective through time. These questions provided direction for our subsequent community consultations and the content produced for the Inuvialuit Living History website (Inuvialuit Cultural Resource Centre 2012).

The documentary A Case of Access (Purdy 2011) was an excellent way to communicate the experience of our delegation to the Smithsonian and built on the legacy of Inuvialuit Communications Society filmmakers who have been producing and broadcasting Inuvialuit
media in Inuvialuktun and English for more than 20 years. But our team wondered if there was a complementary way to share knowledge of the MacFarlane Collection. While members of our small delegation had been able to share and document their knowledge of the collection while handling the objects themselves in the Museum Support Center, would it be possible to digitally extend this experience to Inuvialuit communities more broadly and to the general public? We decided to investigate methods for the development of a virtual exhibit for which further knowledge of the collection could be elicited, curated, and represented in an Inuvialuit-owned space. As we discuss below, the negotiation of permission to use the Smithsonian Institution’s MacFarlane Collection digital data was central in this process. As with our project as a whole, our request to re-contextualize institutional collections data as a digital repatriation of the MacFarlane Collection required the rethinking of relationships between the NMNH, the ICRC, and the data themselves.

Figure 7. Albert Elias studies a bow from the MacFarlane Collection, while Stephen Loring, filmmaker Dave Stewart, and Shayne Cockney document the moment. Photo by Kate Hennessy, 2009.

**Transforming Institutional Data**

In 2009, the Smithsonian’s NMNH had recently become an institutional partner of the RRN, an online research environment that provides access to primarily First Nations collections from international heritage institutions. The RRN was co-developed by the Museum of Anthropology at the University of British Columbia (UBC), the Musqueam Indian Band, the U’mista Cultural
Society, and the Stó:lō Nation/Stó:lō Tribal Council as a part of the UBC Museum of Anthropology’s *A Partnership of Peoples* project (see Rowley et al. 2010; Rowley *this volume*). It was officially launched in 2010. According to RRN project lead Sue Rowley and her co-authors,

Our goal was to develop a new research tool for accessing information housed in geographically dispersed locales as well as providing networking functions for effective engagement and collaboration among researchers with diverse backgrounds. Most significantly, the creation of the virtual research space emerged from the desire of all participants to base the project on principles of respect for the originating communities’ different knowledge and value systems as well as for the partner museums. [Rowley et al. 2010:15]

In keeping with the original focus of the RRN on bringing together dispersed Northwest Coast collections, the NMNH had already contributed data documenting its Northwest Coast and some of its Arctic collections. The RRN mapped its collections data so that users would be able to search the NMNH collections seamlessly along with those of 19 other partner institutions.

Figure 8. James Pokiak is interviewed by Shayne Cockney about an Inuvialuit spear. Photo by Kate Hennessy, 2009.

Our team’s first step toward the development of the Inuvialuit Living History website was to request that the MacFarlane Collection data be made available in the RRN; essentially this meant
that RRN developers added the list of MacFarlane records to their existing data feed into the RRN. Once this material had been added to this data feed, the RRN’s data mapper automatically processed these new records and made them available in the system where they could be viewed, commented on, and added to the personal research collections of registered RRN users.

Our second step was to obtain permission from the NMNH to re-contextualize and alter the MacFarlane Collection records for use in our Inuvialuit project (while not changing the original records themselves). This step, in effect, negotiated the digital return and the terms of respect for alternative yet complementary institutional and community perspectives on the collection. Central in this shift of control over the representation of the MacFarlane Collection was the reconciling of Inuvialuit priorities for mobilization and contextualization of the collection with lingering institutional resistance to relinquishing control over curatorial authority. We suggest that our project and similar initiatives are reducing institutional reluctance to open collections to reinterpretation by source communities, and demonstrating the cultural, intellectual, and curatorial benefits of sharing control over representation.

Once NMNH staff granted permissions, we embarked on the third phase of the digital return. In order to republish the Smithsonian’s MacFarlane Collection data in an Inuvialuit-controlled virtual space, we harnessed the potential of the RRN’s API. An API is a publicly available software toolkit that makes computer code, documentation, and terms of service relating to an organization’s data available for republishing online (Hennessy et al. 2012). The RRN’s API is an easily accessible interface that simplifies access to its publicly available digital collections records, which enables developers to make use of those records in new works and applications. Working with RRN developers Ryan Wallace and Nicholas Jakobsen, we were able to query the RRN for all MacFarlane Collection item records and then bring this digital information into our web project. There, we could adapt and build on the Smithsonian’s documentation of the objects. New information generated in this process (for example, new curatorial descriptions and user contributions from the Inuvialuit community) can be added to the RRN’s parallel records. These additions are automatically sent back to NMNH curators, who decide whether or not to augment their original records. For our project team, museum APIs represent new opportunities for originating communities to republish and re-contextualize institutional and colonial archives of their cultural heritage in new digital forms. The Inuvialuit Living History project tests this new digital dynamic, making the RRN central in our process of transforming the Smithsonian’s collections data into an Inuvialuit-owned virtual exhibit.

Our process of bringing Smithsonian institutional data into a media space owned by the ICRC and combining it with documentary media and other user-generated content made it clear to our team that our site needed to creatively represent variable approaches to ownership of digital content that had been contributed by a range of institutional, community, and individual actors. We created an upload system in which media that were added to our exhibit (photographs, videos, sound files, and documents) could be assigned a range of copyrights and ownership licenses. These range from “All Rights Reserved” to specific identifiers and watermarks such as the Inuvialuit Communications Society or Smithsonian Institution to Creative Commons (non-commercial, no-derivatives) 3.0 licenses. Our research team also plans to pilot the Traditional Knowledge (TK) licenses that are under development now by Jane Anderson and Kimberly Christen in the context of the 2011 Mukurutu project (see Anderson and Christen 2012, this
volume). TK licenses draw attention to documentation of traditional and Indigenous knowledge as dynamic and collective forms of expression, for which Western copyright schema do not adequately represent ownership paradigms. Our team will experiment with the use of TK licenses, applying them to appropriate media as Inuvialuit community members contribute to the exhibit. Acknowledging and representing the complexity of ownership of media and cultural documentation in the digital age is yet another way in which originating communities are asserting authority over the representation of their cultural heritage in the contexts of digital return.

Figure 9. Freda Raddi traces patterns from Inuvialuit footwear in the MacFarlane Collection. Photo by Kate Hennessy, 2009.
Recontextualizing the MacFarlane Collection

Once the Smithsonian had granted permissions, our team was able to proceed with researching and re-writing the curatorial descriptions of objects in the collection. This work was central to the re-presentation and contextualization of the MacFarlane Collection in the Inuvialuit Living History website.

When the project team first examined representative selections of the ethnographic and natural history collection, it became apparent that identifications of some of the objects as recorded in the Smithsonian Institution’s records are incorrect or at least questionable, and that more could be added to the “bare bones” information contained in the catalogue. The misidentifications are puzzling. MacFarlane is known to have made notes and lists of items he collected at Fort Anderson when he prepared the collection for shipment to the Smithsonian Institution. He would have been aware of the function of many of the objects that he collected, and there is evidence to suggest that he was assisted in documenting the collection by a Roman Catholic Church missionary, Émile Petitot, who visited Fort Anderson in 1865 and subsequently wrote the first detailed ethnographies of the Anderson River Inuvialuit (see Petitot 1878). Unfortunately, MacFarlane’s documentation has not been located, but it can safely be assumed that the sparse information in a hand-written ledger in the curatorial files and on tags that remain affixed to some of the objects was transcribed from MacFarlane’s notes.

The sparseness of the extant information about objects in the collection is also of concern. To cite one example, there is an extraordinary set of drawings on small wood plaques described in the artifact catalogue simply as, “Series of Pictures,” with “Cut in outline on wood and colored. 8 wooden plates,” as the only added remarks (Figure 10); see objects at http://inuvialuitlivinghistory.ca/items/307, accessed October 30, 2013. These “Pictures” depict domestic, hunting, and fishing scenes; activities at Fort Anderson; and possibly images of mythical creatures, all from the hand of an anonymous Inuvialuk (Morrison 2006). As such, they provide unique windows through which we can peer at the life and culture of the Inuvialuit who traded at Fort Anderson, yet information that MacFarlane might have provided about their genesis and context is absent.

A curatorial team consisting of curators and anthropologists Arnold, Loring, and Joanne Bird and of Inuvialuit cultural expert Darrel Nasogaluak worked with the collection to verify or correct identifications and to provide descriptive and interpretive information for the objects. They brought complementary perspectives to their task. For example, with reference to the aforementioned pictures, a curator might be concerned mainly with identifying the materials and techniques employed in creating the object, and an anthropologist would comment on the role of graphic art in traditional Inuvialuit culture, while the Inuvialuit cultural expert could explain the activities depicted; in practice, however, no such compartmentalization took place, and the information that is presented for the object is the result of collaboration. In preparing the descriptions, the curatorial team utilized information found in ethnographic literature, including writings of Father Petitot (Savoie 1970).6 We also had the advantage of having input from Inuvialuit elders and cultural experts who examined many of the objects either in person at the Smithsonian Institution or through photographic documentation.
We consider this task to be ongoing. In offering opportunities to view the objects and our descriptions through the website, we are inviting comments from the Inuvialuit community and intend to add to or revise our contributions as additional information is offered. Our experience so far is that, even if specific information about some of the objects in the collection is beyond the experience and knowledge of elders, seeing the objects will evoke memories and information related to the activities that the objects represent and thereby breathe new life into the collection. However, our continuing challenge is to facilitate opportunities for engagement with the virtual exhibit that lead to contribution of information from Inuvialuit participants outside of the project team, which to this point has been limited.

Figure 10. A carved and painted wooden panel from a series in the MacFarlane Collection (NMNH-E2545-08B).
The Inuvialuit Living History Project

The Inuvialuit Living History project website was officially launched in spring 2012 as a work in progress (Figure 11). While the project’s core information, context, and the MacFarlane Collection are presented, the website is designed to grow and change as users contribute knowledge of the collection and related activities to the site.

![Figure 11. Screenshot from Inuvialuit Living History.](image)

The website is divided into seven key sections. The project home page features a blog that updates viewers on the activities of team members and on news about the website, and that offers a changing presentation of featured objects, photographs, and video. The “About” section provides background on the Inuvialuit people and the Inuvialuit Regional Corporation, the history of the MacFarlane Collection, issues related to intellectual property and the Smithsonian Institution, the RRN, and project credits and acknowledgments. “Media Galleries” presents photographs and videos that were documented or curated in the course of our project. These media, which can be browsed by tag or by media type, include our visit to Washington, DC, our experiences with the MacFarlane Collection, and media recorded during our project consultations in the Inuvialuit Settlement Region. Users also can view Petitot's illustrations of Inuvialuit material culture from the late 19th century and media contributed by community members.
participants. All media in this gallery are cross-referenced with item records, so that exploring these photographs also creates links to the collection.

The “Learn” section offers resources for further study of the MacFarlane Collection and Inuvialuit culture and heritage. We describe how the project has facilitated the development of a new sewing project inspired by objects in the MacFarlane Collection. Interactive lesson plans developed by Myrna Pokiak for elementary and high school students are designed to complement NWT school curriculum. Reports and articles related to our project; the MacFarlane Collection; and to Inuvialuit heritage, culture, and rights are available for download.

The “Conversations” section presents comments from a selection of our team members about their experiences working on the project as well as an extensive interview with Elder Billy Jacobson about his life on the land in the Anderson River region. This section includes descriptions of the community outreach in Inuvialuit communities that our team conducted in the course of producing the website. It also includes a feedback page for visitors. Feedback is not made public but is directed to the project team to review.

“People and Places” contextualizes the MacFarlane Collection with a detailed exploration of the region from which MacFarlane collected the objects. It includes maps of the Anderson River region, Inuvialuit place names, and information about the Inuvialuit group who used to inhabit the Anderson River area. It provides some history of Fort Anderson and information about MacFarlane and Petitot, the Catholic priest whose eyewitness accounts and illustrations of the Inuvialuit represent valuable documentation of that time, place, and material culture.

“The MacFarlane Collection” represents the heart of the Inuvialuit Living History project. This section features object records sourced through the RRN’s API, but then transformed by our team to represent the generation of new knowledge of the collection facilitated by our collaborations. Objects can be explored by “Type” or by categories of objects in the collection that were developed by our Inuvialuit and non-Inuvialuit team of curatorial researchers. Each general description of a Type (for example, “Adze,” “Sled,” or “Pipe”) is linked to a slide show of all objects of that type as well as to contributed community and documentary media relating to that type of object (for example, the Inuvialuit delegation handling an adze at the Smithsonian Museum Support Center or a video interview with an elder about that type of object). Users can also “Explore the Collection” using a series of tags: “Item Types” (for example, “arrow,” “footwear,” “graphic art,” “parka”); “Materials” (for example, “antler,” “bone,” “hide,” “sinew”); “Manufacturing Techniques” (for example, “cutting,” “drilling,” “scraping,” “weaving”); and “Siglitun Terms,” representing vocabulary for item types in the Inuvialuktun dialect of the Anderson River region. These tags were created in the process of re-writing and re-categorizing object records. Users can request password-protected access to the site and, with this access, can contribute new tags; however, this function is not available to general visitors to the site at this time.

Finally, users can “Explore A Case of Access,” the documentary that the Inuvialuit Communications Society produced about our visit to Washington, DC, as a way of learning more about the collection. The documentary has been edited into web-friendly segments, each of which is time-code tagged with object records for artifacts that appear in the video. As a viewer
watches a clip, artifact records appear to the right of the video window. These records can be clicked on to access information about the object in the video, making the video-viewing an interactive experience.

**Building Relationships**

We reflect here on a set of interrelated negotiations of relationships that this project has required: first, among members of our research and media production team, including curators at the NMNH; and second, with our project and community partners. We view the creation, negotiation, and maintenance of these relationships as central to our experience of digital return and as essential for the continued momentum of our digital projects and community initiatives.

**Research Relationships**

Our project team came together with a specific focus on creating greater access to the MacFarlane Collection for both Inuvialuit community members and the interested public more broadly. We made effective communication a priority for our project team and couched the project within a participatory methodology (Kemmis and McTaggart 2005). Part of our commitment to process involved creating space for negotiating different elements of our work, from setting our intentions to developing work plans to achieve our evolving set of goals, decide how and where to apply for and disburse funds, and decide where to place our individual energies (Lyons 2011; Lyons et al. 2012).

The concept of “communicative space” as a means to conduct such transactions between partners derives from Jürgen Habermas (1996), who closely considered the question of how groups of people communicate in the public sphere. Building on his “theory of communicative action” (Habermas 1984, 1989), Habermas recognized that establishing the groundwork for clear and meaningful communication creates a kind of theoretical and literal space between people. This communicative space must be cultivated and nurtured as part of a group’s negotiation process. Habermas (1996) observed that laying this kind of foundation facilitates trust, respect, and solidarity between group members.

As part of our commitment to effective communication, our project team drew up a group charter (Lyons 2011, in press). The charter involved collectively setting the terms for our project team interactions. It describes the kind of atmosphere we are interested in cultivating; specifies individual and collective roles and responsibilities; establishes protocols for resolving, reconciling and/or negotiating different perspectives and opinions; and outlines how we would seek input and provide feedback on project deliverables. The charter recognizes that the ICRC holds copyright to the data we produce and gives partners latitude to produce articles, presentations, and media that support project goals. We consider the charter to be a living document, subject to ongoing revision and re-consideration.
Relationships with Community Partners and Stakeholders

In addition to the cultivation of personal and research relationships, the digital return of the MacFarlane Collection has depended on the development and maintenance of relationships with community partners and stakeholders. The ICRC has been central to the Inuvialuit Living History project since the project was first conceived. ICRC is a program of the Inuvialuit Regional Corporation (IRC), the organization that has the overall responsibility for managing the affairs of the Inuvialuit Settlement Region as outlined in the Western Arctic Claims Settlement Act (Department of Justice, Canada 1984). ICRC’s mandate includes preservation and promotion of Inuvialuit culture and history with a specific focus on the Inuvialuktun language. ICRC Manager Cockney was instrumental in the planning, implementation, and administration of the project. She has taken a hands-on approach, participating in the 2009 visit to the Smithsonian Institution and carrying out community consultations, presentations, and other outreach as well as bringing her unique perspective and knowledge as an Inuvialuk anthropologist with long and diverse experience in community-based culture and heritage projects. ICRC will also be key to future developments and activities that grow out of the Inuvialuit Living History project.

Parks Canada conducts a large amount of the heritage work in northern Canada. Parks endorses a broad spectrum of outreach initiatives within cultural communities, such as oral history research, and supports a variety of school and on-the-land programs related to archaeology, ecology, and art (Parks Canada 2004; Lyons 2004). It also supports many Arctic researchers through on-the-ground support; sharing knowledge and research materials; and fostering relationships between academic, government, and other institutions (see Lyons in press; Friesen 1998). Several of our team members are or have been employed by Parks Canada. Lyons, Joe, and Cockney met in the early 2000s working for this agency. Cockney subsequently became manager of the ICRC, Lyons pursued doctoral research at the University of Calgary, and Joe continued to engage with local student groups through his work at Parks Canada. These individuals worked closely together during Lyons’ dissertation research, which was supported and partly funded by Parks Canada, Inuvik; and which engaged with many elders in the community. The Inuvialuit Living History project has followed in the course of these relationships and benefited greatly from its connections to Parks Canada. Our project mirrors many of Parks Canada’s outreach and curriculum development goals in the Western Arctic. Our project team has maintained close communication with Parks staff through ongoing consultations and presentations of our activities and through Joe’s important contributions to the project. The relationship between our project and Parks Canada was solidified in a partnership agreement in 2011.

The PWNHC, which is the central museum and heritage facility of the NWT government, became a partner in the Inuvialuit Living History project when Arnold was director of that institution. Subsequent to his retirement in 2009, Arnold continued with the project in another capacity, and Bird, curator of collections, became the PWNHC’s liaison with the project as well as participating as a member of the team that prepared curatorial descriptions of the ethnographic objects. The PWNHC also provided financial support for the development of the website, including support for community consultations and outreach that informed the website’s format and content.
Simon Fraser University’s School of Interactive Arts and Technology is another partner. Financial support and technical resources have been provided through Hennessy’s Making Culture Lab, where software developers, research and media preparation assistants, and designers worked to realize the project team’s evolving vision of the virtual exhibit. This included an ongoing collaboration with the developers of the RRN (Rowley this volume), who facilitated the transformation of the Smithsonian’s MacFarlane Collection data, thereby playing a fundamental role in the technical process leading up to a digital return.

The production of the Inuvialuit Living History website also included a broad spectrum of outreach and consultation activities within the Inuvialuit and other Western Arctic communities (see “Community Work”). We have given many presentations focused on sharing our experiences with the MacFarlane Collection and at the Smithsonian Institution, and have solicited Inuvialuit feedback on project directions. These presentations were given in schools, colleges, and local hamlets; with research organizations and elders groups; and at successive Inuvialuit Day celebrations. Elders, community members, and educators expressed interest in having us produce a website that would create visual access to the collection, feature community knowledge and use of the collection, and provide a variety of interactive resources. A later set of presentations sought to gather input on website prototypes and related deliverables, such as lesson plans suitable for NWT curriculum and interactive maps of the Anderson River area showing both past and present uses. The feedback gathered in the course of these consultations guided subsequent iterations of the site design and organization of content; questions raised by students were important in guiding areas in need of additional research for website content.

We conducted interviews with close to 20 elders as well as with many students and educators that focused on creating a dialogue about Inuvialuit cultural heritage and on building awareness and gauging local significance of the collection. Our team collectively developed an equipment-and-interview kit with guidelines for recording interviews and cataloguing media and with a guiding set of interview questions revolving around the themes of memory, objects, land, and language (Hennessy 2010). Elders looked at images of the collection and talked about their knowledge of specific objects, about how they were made and used, and about making a living on the land in the Anderson River region (see, for example, Pokiak’s interview from February 2010 in Tuktoyaktuk where he discusses trapping in the Anderson River area). We asked both elders and other interviewees what kind of impact knowledge of the collection is making and how they would like the collection to be used in their communities (see, for example, Rebecca Pokiak discussing the project and the potential for the MacFarlane Collection as an educational resource, and Elias discussing his interviews with other elders for the project). The information gathered in these interviews and in many more that were not posted on the website was used to help our team write Inuvialuit descriptions of objects to complement those written from a curatorial perspective; both perspectives are featured in the object gallery of the Inuvialuit Living History website.

Due in part to the mounting community interest in the Inuvialuit Living History project, Aurora College (the NWT post-secondary educational institution) invited our project team to inaugurate its new “Northern Speaker Series” with campus and community presentations in Fort Smith, Yellowknife, and Inuvik in November 2011. The project team selected Arnold and Joe to make the presentations, which were based on the theme “Inuvialuit at the Smithsonian: Connecting the
Past to the Present” (see http://inuvialuitlivinghistory.ca/posts/8). Feedback on the presentations was highly positive. One of the college students remarked, “Mervin, you are like a superhero for bringing your culture back—thank you!”

This level of engagement with the Inuvialuit community has built considerable interest in both the MacFarlane Collection and the ongoing project. Our northern project partners are frequently fielding questions from community members and website visitors about our activities, the products we are creating, and the collection itself. This regular, informal level of feedback provides us with a barometer of community members’ thoughts, feelings, and ideas about the project. Our consultation process has also attracted media attention, in both the South and the North, helping to create and sustain interest in our activities. With its official launch, the website itself is now propelling this interest, but we will be challenged on a number of fronts to sustain momentum. Outside of school programs that facilitate online access and learning, Parks Canada programs that use the website as a pedagogical resource, or media-based documentation projects specifically related to our website and the MacFarlane Collection, it is difficult to predict how much engagement we can expect from the Inuvialuit community at large.

Conclusion

Our project team has experienced digital return in large part as a process of forging relationships. We have viewed the creation, negotiation, and maintenance of these relationships as central to the realization of our project to date and to its continued activity into the future. As we have described in this paper, these relationships have been among the Smithsonian’s NMNH and Arctic Studies Center, a range of community and university partners, and our project participants. New relationships also have been created between the digital data that represent the MacFarlane Collection and expressions of Inuvialuit knowledge, positioning digital return as a process of re-contextualizing institutional collections data to better represent contemporary interpretations of Inuvialuit tangible and intangible heritage. This process of relationship-building has played a role in an increasingly visible institutional shift towards greater openness and flexibility that is grounded in growing recognition of the value of curatorial collaboration with originating communities. The developing relationship between the Smithsonian’s NMNH and Arctic Studies Center and the ICRC has required the Smithsonian to relinquish curatorial authority over the representation of the MacFarlane Collection and to allow the collection to take on a new life in an Inuvialuit-controlled space. This has enabled the re-writing of curatorial descriptions and the reorganization of object records into new semantic, classificatory, and linguistic categories. It has further required a collective re-thinking and recognition of variable approaches to digital media ownership and the development of flexible options for demonstrating different modes of sharing and circulating these media online.

Parallel with the direct activities of our project team in the development and production of our website, we have prioritized community consultation and outreach. From visits to school classrooms in the Inuvialuit Settlement Region to oral history interviews with elders in Inuvik, Tuktoyaktuk, and Paulatuk; from presentations at Inuvialuit Day celebrations to a lecture tour in the NWT to publicize the project, we see the long-term success of the project depending on continued interest from the Inuvialuit community and our northern partners. What is the meaning
of a digital return if the website is no longer used or if its content does not grow and change over time? With this in mind, we are aware of central challenges in keeping the project alive into the future. First, travel in the North is expensive, both for our northern and southern participants; funding is limited, and we will be challenged to continue to raise funds to continue our collective research and media production. Second, the preservation of digital data generated in the course of the project will require financial support and technical expertise to ensure that the website is archived for access by future generations of Inuvialuit and the general public. To this end, we aim to support the ICRC in developing its approach to archiving digital materials and its digital infrastructure over time. The Inuvialuit Living History project will ideally continue as one element in a range of digital and community-based projects that are focused on the documentation and transmission of Inuvialuit culture and language.

Several projects related to the Inuvialuit Living History project are already in progress. Our team has been working to photograph representative samples of MacFarlane’s natural history collection, which will be added to the Inuvialuit Living History website and cross-referenced both with objects in the collection and with documentation of related contemporary community activities (for example, hunting and fishing). We also are working on adding a section to the website that features the natural history photography and mapping initiatives of naturalist Joachim Obst, whose extensive and ongoing documentation of the Anderson River region, environment, and wildlife add significant context to the MacFarlane collection.

The Inuvialuit sewing project that our project team initiated during our workshop at the Smithsonian in 2009 will soon result in the publication of print-based clothing patterns and information brochures that will bring knowledge of clothing in the collection to Inuvialuit seamstresses. It was determined in the course of the project that these patterns should be kept offline to protect them from appropriation by commercial sources; instead, the patterns and brochures will be available upon request and mailed (or picked up) from the ICRC. We hope to be able to represent some of the resulting clothing re-creations on our website, while emphasizing that not all outcomes of the digital project need to be circulated online to support the continuity of local practices.

Finally, we continue to liaise with our partners at Parks Canada and in schools in the Inuvialuit Settlement Region to develop cultural, environmental, and educational programs that both support local learning initiatives and generate documentation that will enrich the content of the Inuvialuit Living History website. These projects all depend on the maintenance and strengthening of the relationships formed in the course of our work with the physical and the digital MacFarlane Collection. We look forward to ongoing exploration of the meaning of a digital return in Inuvialuit communities, at the Smithsonian Institution, and in the Internet-connected world beyond.

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Notes

1. Roderick Ross MacFarlane’s life and contributions are summarized in the Smithsonian Institution Archives as follows: “Roderick Ross MacFarlane (1833-1920) was born in Scotland, but joined the Hudson's Bay Company in 1852 and spent most of the rest of his life in Canada. MacFarlane had charge of a number of fur-trading posts in western and northwestern Canada between 1852 and 1894. These posts were the only settlements in these areas and, as a result, were used as headquarters by a number of naturalists who explored and collected in the region. In 1859, Spencer F. Baird sent Robert Kennicott to the Mackenzie River area to collect for the Smithsonian Institution. Kennicott's work there stimulated MacFarlane's interest in natural history, and MacFarlane began to collect specimens from the areas where he was stationed. He made a number of important collections for the Smithsonian in this manner, chiefly of birds and mammals. He also published a few works on the birds and mammals of western and northwestern Canada” (Smithsonian Institution Archives 2012).

2. A pipe (Catalog # E1648-0; Figure 2) was loaned to the Glenbow Museum in Calgary, Alberta, for the exhibition “The Spirit Sings.” While popular with the general public, the exhibition was ultimately boycotted by the Lubicon Cree and supporters and some international organizations
because of exhibit funding by oil companies who were drilling in lands claimed by the Lubicon Cree. The exhibit raised significant questions about relationships among anthropologists, museums, and communities (Harrison 1988).

Figure 2. An Inuvialuit pipe from the MacFarlane Collection (NMNH-E001648). Smithsonian Institution.

3. Examples of small-scale replicas in the MacFarlane Collection include this kayak model (E1097-0; Figure 3); this bow and arrow model (E1632-0; Figure 4); and this clothing model (E1689-0; Figure 5).


5. These trade relationships likely echoed those described in Alison Brown, Nancy Wachowich, and Tim Ingold’s online project, Material Histories: Scots and Aboriginal Peoples in the Canadian Fur Trade (n.d.), which uses artifacts from that period to explore the histories and experiences of people involved in the fur trade. The project can be viewed at: http://www.abdn.ac.uk/materialhistories/index.php, accessed October 30, 2013.
Figure 3. A model kayak from the MacFarlane Collection (NMNH-E1097). Smithsonian Institution.

6. Father Émile Petitot lived between 1838 and 1916; he was a French Roman Catholic priest in the congregation of the Missionary Oblates of Mary Immaculate. He visited Fort Anderson in 1865 and, in his time there, documented invaluable eyewitness accounts of the Inuvialuit who traded there. For more details and to view Petitot’s illustrations of people he encountered and objects traded at Fort Anderson, see the Inuvialuit Living History website page about Father Petitot.

Figure 4. A model bow and arrow from the MacFarlane Collection (NMNH-E1632). Smithsonian Institution.
Figure 5. A clothing model from the MacFarlane Collection (NMNH-E1689). Smithsonian Institution.
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Virtual Repatriation and the Application Programming Interface: From the Smithsonian Institution’s MacFarlane Collection to “Inuvialuit Living History”

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Abstract

Digital technologies are providing heritage institutions and stakeholder publics with new possibilities for sharing curatorial and ethnographic authority. More than creating access to museum collections, institutional practices of making digital records public have opened spaces for “virtual repatriation” and the production of alternative representations of tangible and intangible cultural heritage. In 2009, a delegation of Inuvialuit elders, youth, cultural workers, and media producers traveled with anthropologists to the Smithsonian Institution’s National Museum of Natural History to view and document the MacFarlane Collection, arguably the most significant collection of Inuvialuit material culture. In the months after the visit, the group worked with Smithsonian curators and developers of the Reciprocal Research Network (RRN) to make the MacFarlane Collection’s digital records available for the Inuvialuit production of a virtual exhibit and archive. In lieu of physical repatriation, the exhibit producers leveraged the RRN’s API (Application Programming Interface) to recontextualize publicly available institutional data as a virtual repatriation of the collection. “Inuvialuit Living History” demonstrates ongoing connections between the MacFarlane Collection and contemporary Inuvialuit knowledge and cultural practice. In the process, new questions are raised about histories of ownership, the possibility of physical repatriation, and opportunities and challenges associated with the digitization and return of cultural heritage.

Keywords: Inuvialuit, Smithsonian, MacFarlane Collection, Reciprocal Research Network, API, virtual repatriation

Introduction

Digital technologies are providing heritage institutions and stakeholder communities with new possibilities for sharing curatorial and ethnographic authority. In recent years, a number of projects have demonstrated the potential for museum digitization initiatives to connect tangible and intangible cultural collections to Aboriginal peoples in particular, opening up discussions of the benefits and problems associated with “digital repatriation,” or the return of heritage documentation in digital form to communities of origin (Hennessy, 2009, 2010; Resta et al., 2002; Powell, 2011).

In these projects, technical experimentation and innovation intersects with diverse cultural contexts and protocols, research ethics, and approaches to ownership of cultural property. The Mukurtu Archive and the Plateau Peoples’ Portal (Christen, 2011), for example, demonstrate possibilities for integrating digital cultural objects into archives that respect and support existing cultural traditions and practices by replicating dynamic protocols for access and circulation of cultural knowledge.

In another example, a collaboration between the Cambridge Museum of Archaeology and Anthropology and the A:shiwi A:wani Museum and Heritage Center (AAMHC) representing the Zuni Nation (Srinivasan et al., 2010) makes digital collections available for local reconnection to narrative and other forms of intangible knowledge.

These new works in media and heritage are challenging the default of open access in favor of local control over sensitive cultural heritage (Christen, 2009), while demonstrating the extent to which institutional ontologies have previously excluded Aboriginal interpretations of their material culture.

These initiatives similarly grapple with the legacy of colonial collecting practices, which resulted in the global distribution and accessioning of Aboriginal cultural heritage. GRASAC, the Great Lakes Alliance for the Study of Aboriginal Arts and Culture, was created with the goal of determining if it would be “possible to use information technology to digitally reunite Great Lakes heritage that is currently scattered across museums and archives in North American and Europe with Aboriginal community knowledge, memory, and perspectives” (GRASAC, 2008), suggesting possibilities for the generation of new cultural knowledge by reuniting fragmented Aboriginal collections.
The Virtual Museum of Canada exhibit *Dane Wajich*—Dane-zaa Stories and Songs: Dreamers and the Land (Doig River First Nation, 2007) has shown that digitization and virtual repatriation initiatives must take into account local cultural property rights discourse, and that while the digitization and return of cultural documentation to communities of origin can facilitate self-representation and the articulation of local cultural property rights, digitization and circulation can make it virtually impossible to enforce those rights (Hennessy, 2009, 2010; Ridington and Hennessy, 2008).

With the initiation of these projects and many more in production, institutional collections data are becoming accessible to descendant communities, and web developers are facilitating Aboriginal recontextualization of their digital heritage in new forms. A series of questions are raised in the process: How do new digitization practices shift the balance between institutional expertise and Aboriginal participation in the representation of their cultural heritage? How are existing systems of ownership, copyright, and intellectual property rights challenged as originating communities gain better knowledge of their cultural property in museum collections? How are these technologies able to accommodate and reflect indigenous protocols for the management and circulation of cultural knowledge?

In this paper, we begin to explore of the effects of digitization and access in the Reciprocal Research Network (RRN), an online museum portal that has been co-developed by the Museum of Anthropology at the University of British Columbia in collaboration with three Northwest Coast First Nations—the Musqueam Indian Band, the U’mista Cultural Society, and the Stó:lō Nation/Stó:lō Tribal Council—and currently partners with a total of nineteen international museum institutions that have made their Northwest Coast collections data available in a single online archive.

In particular, we are interested in the role of the RRN’s Application Programming Interface (API) in facilitating Aboriginal self-representation of cultural heritage. We describe elements of a virtual museum exhibit created by the Inuvialuit Cultural Resource Centre in Inuvik, Northwest Territories, Canada, and collaborating researchers, curators, and media producers (the authors included). Inuvialuit Pitqusiit Inuuniaruit: Inuvialuit Living History (Inuvialuit Cultural Resource Centre, 2012) used the RRN’s API to curate and remediate object records from the Smithsonian’s National Museum of Natural History’s MacFarlane Collection—which originated in Inuvialuit territory—and to reconnect the collection to intangible knowledge, local cultural practices, and revitalization initiatives.

**The Reciprocal Research Network**

The RRN’s homepage (<http://www.rrnpilot.org>) features a welcome in three First Nations’ languages—*Han̓q̓eliaxʷam*, *Halq̓eméylem*, and *Kwak'wala*—representing the languages of the project’s co-developers, the Musqueam Indian Band, the U’mista Cultural Society, and the Stó:lō Nation/Stó:lō Tribal Council. In January 2012, the RRN listed access to over 400,000 objects coming from a growing number of holding institutions, including the First Nations’ co-developers (RRN, 2012). These digital object records are available to registered users through a faceted search interface (see Rowley et al., 2010).
According to RRN project lead Sue Rowley and her coauthors,

Our goal was to develop a new research tool for accessing information housed in geographically dispersed locales as well as providing networking functions for effective engagement and collaboration among researchers with diverse backgrounds. Most significantly, the creation of this virtual research space emerged from the desire of all participants to base the project on the principles of respect for the originating communities’ different knowledge and value systems as well as for the partner museums. (Rowley et al., 2010:15)

In keeping with these intentions, the RRN homepage also displays a striking blue, black, and white logo designed by Terry Point, a member of the Musqueam Indian Band, and William Wasden Jr., a member of the ‘Namgis tribe of the Kwakwág̓̓’sq̲̲̲̲̲w̲̲̲̲̲̲̲̲̲̲ First Nations (RRN, 2012). Point and Wasden were both RRN interns between 2004 and 2005 and developed the logo considering traditional navigation and creation themes, relating ideas of communication and renewal of knowledge to the function of the RRN. The logo depicts dynamic elements of a canoe, salmon, killer whale, and human beings. A “messenger canoe” in the mouth of the human is described as being used to rescue salmon from low-water rivers and relocated to new territory, while a “box of treasures” in the middle of the canoe represents cultural knowledge being returned to descendant communities through the RRN (RRN, 2012). The box of treasures finds its digital counterpart in the RRN’s servers, processors, and data storage, which have been structured to support the reciprocal sharing of knowledge between researchers, members of originating communities, students, and museum institutions.
It remains to be seen how the RRN will be able to facilitate the kind of reciprocal research and collaboration suggested by its logo. Will it be labeled as one of many emerging "asymmetric spaces of appropriation" (Boast, 2011:63) currently being developed in the name of collaboration and spirit of repatriation? Does the project merely replicate anthropology's salvage paradigm in digital form, seeking additional cultural data to enhance institutional collections without giving in return? Or might technical experimentation and innovation, the forging of new partnerships, and collaborative media production facilitate the kind of reciprocal research initiatives that the RRN was built to create? "Virtual repatriation" is a contested term; copyright of digital materials and their originals is rarely returned to communities of origin in the course of projects described as digital repatriations, making the term suspect at best (see Reed, 2009, on the Hopi Music Repatriation Project, and Fox and Chie, 2007, on a Columbia University Musical Heritage Repatriation Project, for rare examples of the repatriation of ownership of intangible cultural heritage). As RRN community liaison David Houghton (2010) wrote:

Virtual repatriation seems nothing more than lip service to an idealized concept. The reality is it is just a capacity building exercise on the museum side. Repatriating cultural artifacts will stay firmly ensconced with the status quo of the institutions. Capturing and preserving indigenous knowledge is important work. Community based involvement with an increasing recognition of the value and relevance of originating communities is now spurning a whole new branch for museums involving information technologies.

With this critique of virtual repatriation in mind, we suggest that the RRN should also be understood as a tool for Aboriginal self-representation and reclamation of ethnographic authority, a process that "requires that museums learn to let go of their resources, even at times of the objects, for the benefit of the use of communities and agendas far beyond its knowledge and control (Boast, 2011:67). To this end we look at the RRN’s API and the Inuvialuit Living History Project, which used the RRN’s API to represent the Smithsonian’s MacFarlane collection from an Inuvialuit perspective.

The Reciprocal Research Network’s Application Programming Interface

An API is a publicly available software toolkit that makes computer code, documentation, and terms of service relating to an organization’s data available “so that people can access and republish content created within them” (Ananny, 2011: 31). While APIs are designed to create access to information architectures and data, the structures of APIs both mediate and determine what access to data means (Ananny, 2011). The RRN API is an interface that simplifies automated access to its publicly available digital collections records. This enables developers to make use of those records in new works and applications. While the API facilitates a new degree of public access to collections, it also represents an opportunity for originating communities to recontextualize their cultural heritage in new digital forms, reclaiming control over their representation of history and culture.

Though the purpose of the RRN API is to facilitate automated access, it is not solely for machines. In order to encourage its use, we (Wallace and Jakobsen) felt it was necessary to focus on optimizing the API’s user experience. Other museums that have taken this route include the Brooklyn Museum API (Bernstein, 2008) and the Victoria and Albert Museum (Lewis, 2011). As much as possible, we tried to use the same terminology within the API as on the website itself. We wanted it to be immediately obvious what each field contained within without need for a detailed description of abbreviations or synonyms used. Though slightly more verbose, we also include all fields in the API responses to allow the developer to see all data fields without consulting extra documentation. Like the RRN website, the API was built using a REST-style architecture. REST (Representational State Transfer) architectures are based on the concept of exposing collections of elements (resources) to the user. A RESTful API works by responding with different representations of the same resource based on the user’s request. In the case of the RRN’s API, the primary resource being exposed is items from participating museums. Any item or collection of items can be retrieved in one of two representations: XML or JSON. What differentiates the RRN’s API from those of other museums is that it shares the same RESTful architecture as the website itself. One can think of the entire RRN as an API with XML and JSON representations for machines and a third representation, HTML, for humans. Whereas the XML and JSON representations expose only item data such as materials, cultures, and dates, the HTML representation provides additional content for users to interact with. This scheme allows developers to experiment with the API’s search capabilities using the RRN’s rich HTML user interface. Switching between these representations is as easy as changing the extension at the end of the URL. For example, using the RRN’s faceted search tools, a user could navigate to rrnpilot.org/items/type-mitten.html for a list all of mittens, while rrnpilot.org/items/type-mitten.json will return the same list in a JSON representation.
(Figure 2a: Mittens from the Smithsonian in an HTML representation)
(Figure 2b: Mittens from the Smithsonian in a JSON representation)
In this way, the RRN’s API should be understood as a tool that promotes the recontextualization of data by people, as well as by machines. We see the RRN’s API as illustrative of broader movements in museum institutions to use digital tools in the service of greater transparency and engagement with stakeholder publics.

From the MacFarlane Collection to Inuvialuit Living History

Roderick MacFarlane was a Hudson’s Bay Company trader who established Fort Anderson on the Anderson River in the Mackenzie Delta in 1861 and remained in charge for the next five years. It was the first post in the Northwest Territories aimed at trading with the Inuvialuit, but was abandoned in 1866 largely as a result of a disease epidemic that ravaged the region (Morrison, 2006). While serving at Fort Anderson, MacFarlane was recruited by Robert Kennicott, an agent of the Smithsonian Institution, to collect natural and cultural history specimens for the museum.

The MacFarlane Collection came to include over 5,000 objects, most of them natural history specimens but also many ethnographic objects such as skin clothing, hunting tools, pipes, adornments, and graphic arts. The majority of these objects went to the National Museum of Natural History in Washington, D.C., while some were donated to the McCord Museum (then the Natural History Society in Montréal, Canada) and the National Museums of Scotland (then the Edinburgh Museum of Science and Art) (Morrison, 2006). A small amount of the MacFarlane collected objects that came to the Smithsonian were later exchanged with other institutions principally in Chicago and Copenhagen.

The MacFarlane Collection is arguably the most significant assemblage of Inuvialuit ethnographic artifacts, but it has never been exhibited in its entirety. While the collection had been partially photographed, and digital catalogue information was available on the National Museum of Natural History’s website, the collection had remained largely inaccessible to Inuvialuit peoples, separated by great distance and by unfamiliarity with the Smithsonian’s online catalogue. Available online catalogue information communicated what little was known about the objects, and organized the collection using generalist regional identifiers such as “Northwest Territories, Canada” and outdated categories.
The collection is of great interest to contemporary Inuvialuit peoples, who are actively engaged in building educational resources for Inuvialuit communities and representing Inuvialuit culture and language to local, national, and international audiences. In 2009, we (Hennessy and Arnold) traveled with an Inuvialuit delegation from the Western Arctic, and a team of filmmakers, archaeologists, and educators to view the MacFarlane Collection at the Smithsonian’s National Museum of Natural History.

The delegation to the Smithsonian’s National Museum of Natural History included, from the north: James Pokiak, Albert Elias, and Helen Gruben (Inuvialuit Elders); Karis Gruben and Shayne Cockney (Inuvialuit youth); Freda Raddi (a seamstress); Brett Purdy, Dave Stewart, and Maia Lepage (documentary producers from the Inuvialuit Communications Society); and two trip organizers—Cathy Cockney, manager of the Inuvialuit Cultural Resource Centre, and Mervin Joe, from Parks Canada, Inuvik. From the south, our team included: Natasha Lyons (Ursus Heritage Consulting, Inuvialuit-Smithsonian Project Director and Organizer), Charles Arnold (University of Calgary), Kate Hennessy (Simon Fraser University), and Stephen Loring (Smithsonian Institution, Arctic Studies Center) (for a detailed report on the trip and its preliminary outcomes, see Lyons et al., 2011). Our delegation spent five days in the collections storage facility at the Smithsonian’s Museum Support Center with curator and project partner Stephen Loring, handling, discussing, and documenting the MacFarlane Collection.

(Fig. 3: Mervin Joe, James Pokiak, Albert Elias, Catherine Cockney, Karis Gruben, Freda Raddi, Natasha Lyons, and Dave Stewart discuss and document objects in the MacFarlane Collection at the Smithsonian’s Museum Support Center. Photo by K. Hennessy, 2009.)
Recognition of the responsibility of museums to make their collections accessible to descendant community interests has been a defining component of the Smithsonian’s Arctic Studies Center since its inception (Loring, 2001, 2009, 2010; Crowell et al., 2001, 2010). Museum collections represent significant repositories of intangible forms of knowledge that are encoded in tangible objects. Their role in eliciting narrative expressions and use as political touchstones has been well documented (see Fienup-Riordan, 2003a, 2003b; and Clifford, 1997).

The responses of our Inuvialuit team members to the MacFarlane Collection, similarly inspired by reconnection to their material heritage, were documented by Inuvialuit Communications Society producers, and became a documentary called *A Case of Access* (Inuvialuit Communications Society, 2011) that came to be featured on the Inuvialuit Living History website with interactive links to object records in our exhibit.

However, beyond communicating the results of our workshop, our team wondered if it would be possible to extend the experience of exploring the collection to more Inuvialuit peoples and the general public, and to create a forum within which Inuvialuit knowledge of the collection could be elicited, curated, and represented in an Inuvialuit-owned virtual space. We decided to embark on the production of an online exhibit and dynamic archive that would contribute to the revitalization of the MacFarlane collection as a “living collection”—hence the name of the site: *Inuvialuit Pitquisit Inuuniarutiat: Inuvialuit Living History*.

Our first step was to request that the Smithsonian National Museum of Natural History make the MacFarlane Collection’s digital data available in the RRN. As the National Museum of Natural History was an existing RRN partner, they had only made their Northwest Coast collections available at that point. Facilitated by the Smithsonian’s Stephen Loring and Carrie Beauchamp, the MacFarlane records were added to the data feed provided to the RRN, and the RRN’s data mapper automatically processed these new records and made them available in the system. Once this had been done and we had been granted permission from the Smithsonian Institution to recontextualize the MacFarlane Collection digital data without limitation, we used the RRN’s API to appropriate images and catalogue information (see http://www.rpmilot.org/api).

The *Inuvialuit Living History* virtual exhibit in its present iteration is organized around the presentation of both objects in the MacFarlane Collection and multimedia documentation of our delegation’s first encounter with the objects in Washington, D.C. It has been designed to...
function as an archive of user contributions, ongoing research activities, and community projects that are being developed as interest in the collection grows and as funding and resources become available. The exhibit has been created to be fully editable by our team, so that the website itself can grow and change as priorities and interests shift over time. In the course of production since 2009, members of our team have conducted several major community consultations in the Inuvialuit Settlement Region, visiting with elders, community workers, and teachers and school children.

Each consultation has raised new questions about the collection, access to it, ownership of it, its potential repatriation to the north, all of which have informed successive iterations of our exhibit design. Building on the affordances of the RRN's API as a tool for recontextualization of digital collections, the production of the virtual exhibit has been grounded in a process of rewriting curatorial descriptions of the objects, revising classificatory categories, and using semantic web and tagging functions to build new relationships between objects records and related media. We describe this process and its outcomes below.

Recontextualizing collections data: Rewriting curatorial descriptions, classifications, and types

The task of acquiring and presenting information about the objects in the MacFarlane Collection was undertaken by a curatorial team consisting of Charles Arnold, Joanne Bird, Stephen Loring, and Darrel Nasogaluak. Arnold, Bird and Loring brought extensive knowledge of museum practices and academic knowledge of Inuvialuit ethnography. Nasogaluak contributed expertise that he has acquired through observations of and discussions with his Inuvialuit elders, through firsthand experience making and using traditional Inuvialuit material culture, and through his extensive reading of written accounts of Inuvialuit culture.

One of the issues we had to address was how to organize and describe the items in the MacFarlane Collection in ways that aligned with Inuvialuit knowledge of and perceptions about their traditional material culture while employing current curatorial methodologies. We also had to keep in mind how best to facilitate access to that information in a virtual environment.

(Fig. 5: An original object label describing deerskin mittens, MacFarlane Collection, National Museum of Natural History. Photo by K. Hennessy, 2009.)

The original catalogue for the collection includes a functional identification for most of the objects, and in some cases a brief description of the item and identification of the materials from which the item was made. The genesis of the information in this catalogue is not clear. Quite
likely MacFarlane provided a list and perhaps other notes with the artifacts, but unfortunately we were not able to locate that documentation. We assume that MacFarlane learned about the functions of many of the items through observations and from information provided by Inuvialuit.

It is also quite likely that some of the identifications were provided by a Roman Catholic missionary, Émile Petitot, who visited Fort Anderson in March 1865 and spent some time travelling with local Inuvialuit. Petitot's interest in Inuvialuit material culture is demonstrated by descriptions and illustrations many similar objects in various publications (Petitot, 1878, 1887). French-language terms used for some of the objects in the MacFarlane Collection, such as capuchon (cap) and chignon (topknot), may have been contributed by Petitot.

We chose not to rely entirely on the original catalogue information for the website. For one thing, the catalogue uses the now-outdated term “Esquimaux” whereas current practice is to use “Inuvialuit.” In addition, in some instances we were able to identify items that were not identified in the original catalogue, and through our work we were able to determine that some items had been misidentified.

In order to verify and update information about items in the collection, we began by discussing them with Inuvialuit elders. The elders who were part of the 2009 delegation to the Smithsonian Institution contributed a considerable body of information, including names (in English and Inuvialuktun) of many of the items, how they were made, and how they were used. We also consulted elders in their home communities, using a comprehensive set of photographs taken by the Smithsonian Institution as well as by members of the project team. The curatorial team also conducted extensive research of published and non-published sources of information on traditional Inuvialuit material culture.

Based on this information, the objects were organized into categories (“types”) such as knives and pipes, which allowed us to provide general information pertinent to all objects in each category without having to repeat that information for each individual item. More detailed descriptions are provided for each individual item. Our objective at this level was to provide sufficient information so that the viewer could, by using that information in conjunction with the images that are provided on the website, visualize each individual item.

However, reorganization of objects into new categories, and the tagging of object records and newly recorded media, also resulted in the creation of new semantic relationships between object records and documentary media. For example, object records are now related to images of the delegation viewing the MacFarlane Collection at the Smithsonian, of the team’s research activities in the Inuvialuit Settlement Region, of related school activities, and of recreations of objects by community members, representing the collection as a part of contemporary Inuvialuit cultural life once again. MacFarlane Collection objects can also now be searched using these new semantic categories, including, in addition to English, Inuvialuktun language terms to locate artifact types.
In addition to the curatorial descriptions, we have also made provisions for “Community interpretations” and “Historical Documentation.” The Community Interpretations provide an opportunity for Inuvialuit today to add their own knowledge of items in the collection, as well as personal reflections on their traditional culture. Submissions of information from users are sent to an Inuvialuit committee to moderate, discuss, and determine what should be posted on the website. Each object record includes a link back to its counterpart in the RRN, where contributions can be made, questions can be asked, and institutional curators can be contacted in a password protected space.

The Historical Documentation includes firsthand accounts by non-Inuvialuit observers of traditional Inuvialuit culture that contribute to an understanding of the items in the collection. In keeping with our goal of ensuring that this will be a “living” website, ongoing activities and educational programs have been or will be devised that will generate additional information for both the Community Interpretation and Historical Documentation sections of the website. For our production team, the RRN’s API was a tool that facilitated ongoing dialogue at many levels—from the development of the virtual exhibit’s interface to the cultural activities that recontextualizing the data required—that will continue to add new knowledge about the collection and at the same time allow people to make the collection relevant to their own experiences.

Conclusion

The Inuvialuit Living History Project, ideally a work in perpetual progress, constitutes an attempt to relate media objects and cultural knowledge in new ways, and to communicate both the experiences of our Inuvialuit delegation with the MacFarlane Collection and forms of knowledge associated with the collection that have emerged in the context of our collaborations. After the Inuvialuit Living History Project is officially launched in early 2012, a new phase of our collective work in representing the MacFarlane Collection, and in understanding the effects of institutional collections digitization and Aboriginal remediation, will begin. This will include funding and carrying out related research and media production projects in collaboration with our project partners, such as Parks Canada in Inuvik, archiving these activities on the website, and semantically relating them to MacFarlane Collection object records. Such projects may be aimed at recreating objects from the...
collection; for example, sewing clothing from patterns traced by members of the Inuvialuit delegation to Washington, D.C., or fabricating replicas of artifacts for use in Parks Canada interpretive programs and in schools in the Inuvialuit Settlement Region. Our goal is to build on the digital design and cultural work described in this paper, and to support ongoing initiatives that potentially reconnect and recirculate intangible knowledge of objects in the MacFarlane Collection. A further outcome of this project may be the long-term loan of MacFarlane Collection objects for exhibition in the Inuvialuit Settlement Region; however, this remains to be negotiated, funded, and carried out.

Mobilization of the RRN’s API has been central in our process of reframing institutional collections data and creating new and dynamic relationships between media objects. We have taken seriously the notion that the RRN’s API exists for the remediation of its publicly available digital information, and we continue to explore what it might mean for the Inuvialuit Cultural Resource Centre to use the RRN’s API to “make something great” (RRN, 2012). We see value in an API that has been designed with human beings, as much as machines, in mind. As we use the Smithsonian Institution’s digital data in ways perhaps not previously imagined by the holding institution, and indeed beyond institutional control (Boast, 2011), we hope to better understand the meaning, possibilities, and challenges associated with “virtual repatriation” in Inuvialuit communities, the Smithsonian Institution, and beyond.

Acknowledgements

The authors thank all the other members of the Inuvialuit Living History project team: Natasha Lyons, Project Director, Ursus Heritage Consulting; Catherine Cockney, Manager, Inuvialuit Cultural Resource Centre; Albert Elias, Inuvialuit Elder and interpreter, Inuvik; Mervin Joe, Parks Canada, Inuvik; Maia Lepage, Photographer, Inuvik; Stephen Loring, Arctic Studies Center, Smithsonian Institution; James Pokiak, Inuvialuit Elder and hunter, Tuktoyaktuk.

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Anthropologists, Indigenous Scholars and the Research Endeavour
Seeking Bridges Towards Mutual Respect

Edited by Joy Hendry and Laara Fitznor
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Indigenous Values and Repatriation

Cara Krmopotich

INTRODUCTION

The location of indigenous repatriation efforts—whether of artefacts, human remains, or information—within indigenous rights movements or international cultural property forums belies a tendency to think of repatriation as a post-colonial action or a form of identity politics. While drawing upon notions of historic and ancestral continuities to land and customs, the phenomenon of indigeneity remains a product of the 20th century: a global network building a shared identity out of experiences of exploitation, oppression, and dehumanisation by colonial powers (Nietzsche 2003, Ramor 1998). The events of colonisation and decolonisation for aboriginal nations and collectives undoubtedly contribute to expressions of identity and cultural construction, but neither cultural identity nor cultural ideologies should be reduced to the effects of colonialism or post-colonialism. Similarly, repatriation is more than the sum of colonial collectives and post-colonial repatriations and characterisations of repatriation as a political manoeuvre risk producing simplistic or facile accounts (Førde 2002: 37).

Based on my ethnographic fieldwork with the Haida Repatriation Committee, in Haida Gwaii, British Columbia, I argue that there is a need to consider how pre-colonial cultural ideals and epistemological structures instigate and direct repatriation requests and manifest within repatriation efforts of indigenous societies. Describing Haida repatriation efforts as a singularly politicised response to colonialism or as evidence of post-colonialism can obscure the significance of kinship in creating meaning, social values and even political action. Moreover, the language of politics fails wholly to describe the force of mourning, healing and especially kinship, within Haida efforts to repatriate their ancestral remains from museum and private collections (see also Hallam, Hockey and Howarth 1999, Hubert and Førde 2002, and Thornton 2002). I argue that pre-colonial cultural ideals regarding kinship relations and obligations, as well as ideas about human agency both in life and death, create a context for understanding the moral, emotional and political impetus for repatriation.
Haidas have actively been pursuing the repatriation of their ancestors' remains since 1996. The Haida Repatriation Committee (HRC) consists of volunteers from the villages of Skidegate and Old Massett who have come together to locate their ancestors' remains in institutional and private collections, petition for their return to Haida Gwaii, coordinate the making of button blankets, bentwood boxes and other offerings to honour the repatriated remains, travel to reclaim their ancestors' bones, and host funerary ceremonies (for details on Haida repatriation efforts, visit www.repatriation.ca, the website of one branch of the HRC, the Skidegate Repatriation and Cultural Committee). They have succeeded in returning all known Haida remains from North American collections—over 450 ancestral remains. They have also hosted a conference on repatriation for other indigenous groups, museum professionals and archaeologists, collaborated in documentaries (Bear and Jones 2002, 2003a, 2003b; McMahon 2004), spoken publicly and published on their experiences and the outcomes of repatriation for their nation (see for example, Bell and Collison 2006).

Throughout their existence, the Haida Repatriation Committee has sought to keep the political sphere at bay. It maintains its autonomy, working independently of village councils and the Council of the Haida Nation.* The Haida do not see the return of their ancestors as a matter of negotiation, nor have they wanted to endure the lengthy process before being able to repatriate their ancestors' remains. Although the Haida Repatriation Committee encourages reporters writing stories on their work to consider pressing post-colonial matters within their nation such as title to their land, sovereignty, sustainable economic development and government accountability, it is important not to let this model mask the deeper meanings and motivations of repatriation. Understanding Haida repatriation efforts fully requires an awareness of and appreciation for the enduring moral relationships that create, and exist between, kin. Kinship, personhood and morality are at the heart of the Haidas' process of repatriation. Indeed, Haidas feared the effacement of these aspects if a route of political negotiation was pursued in order to repatriate their ancestors' remains. For Haidas, the bodies and objects of ancestors are central to the ongoing relationships between the living and the dead.

The most striking element of the Haida repatriation process that forced me to consider the role of kinship, and not just politics, comes in Haida explanations of why and how repatriation became known to them as a possible course of action. To many of those involved in the repatriation process, it was the ancestors themselves who first encouraged repatriation, followed by the pleading of support from families and friends. As Irene Mills explained to me,

it's like everything has a germination time. So the seeds that were planted, however subconscious at the start of it—whether it was written in the paper or whatever—the ancestors have a way of working their magic to

say 'Okay, I think they're ready now. Let's send a few little signals their way.' And that's how it started (Irene Mills, May 11, 2006).

Similarly, Christian White explained,

in a way, you know, it was meant to happen. That's what we always used to hear when we were younger: it'll happen if it's meant to happen. So I believe that it was meant to happen. Sooner or later, really. They were calling us to bring them home. And some of us listened, I guess. If not, we'd go to those museums now and we'd still hear them calling us to bring them home. I think if the people had learned about them, then there would have been an effort (Christian White, November 19, 2005).

As Fabian points out, cultural notions of time can impact our ideas of the possibilities of kinship:

relationships between the living and the dead . . . presuppose cultural conceptions of contemporaneity. To a large extent, Western rational disbelief in the presence of ancestors . . . rest[s] on the rejection of ideas of temporal coexistence implied in these ideas and practices (Fabian 2002: 34).

Haida cosmology and beliefs very clearly describe the co-existence of the living and the deceased (and see also Pullar 1994). During interviews, repatriation committee members frequently explained that their prime motivation for repatriating Haida ancestral remains is to ease the anxiety and sorrow of their displaced ancestors. The disturbance of resting places (the caves, trees, mortuary poles or grave interments) distresses the spirits associated with those remains. If the disturbance of remains is noticed immediately, the stress can be more readily eased by re-covering the remains and offering food and prayers. However, as the remains sought for repatriation were surreptitiously taken from Haida Gwaii and then shipped to museums around the world anywhere from 30 to 100 years ago, Haidas lamented that these ancestors had been held in strange, foreign places where no one had talked to, fed or prayed for them. To intentionally disturb a final resting place and to remove the remains of another human being for the purposes of gathering information is beyond comprehension for most Haidas. Such acts simply fall outside the boundaries of what should be possible. The disturbance of the deceased and the neglect the deceased received in institutions was described to me as 'cruel', 'wicked', and 'inhuman'. In their remote locations, the ancestors were prevented from being fully active in Haida life while their descendants were prevented from being fully active in attending to the well-being of their ancestors. People felt this indignity deeply and wanted to rectify the treatment of their family members. The goal of the repatriation committee was
to make these ancestors well again, and to allow them to re-engage with their home and their world. They wanted to demonstrate **yahgudang** to their family members: to invigorate them on Haida Gwaii, to help them, to honour them with button blankets, to bury them in bentwood boxes painted with lineage crest designs, and to reintegrate them within their families and villages. In these actions, the committee was abiding by cultural protocol, thus making their demonstrations of **yahgudang** recognizable to the ancestors and meaningful to themselves.

Normally, rituals surrounding death are the prerogative of close lineage family members, but individuals, lineages, moieties, and communities are all involved in honouring the deceased. At one level, the repatriation process on Haida Gwaii appears as a community effort, and as such would be a departure from historic Haida mortuary practices. But 'community' on Haida Gwaii needs to be understood more specifically as being comprised of interdependent lineages and opposing moieties who have responsibilities to themselves and to each other, past and present, especially at times of death and loss.

The HRC took care to ensure all known Haida lineages, whether or not they still possessed living members, were represented — as volunteers or as crest designs painted on boxes — within the repatriation process. The headstones marking the reburied remains carefully note the villages they were removed from. For Haida villages, clear links exist with particular lineages. Marking them in this way positions the ancestors as belonging to one of only a few possible lineages. The anonymity of the ancestors within museums is replaced with enduring familial connections. Re-positioning the ancestors as kin was perhaps the first step in Haida efforts to treat them with **yahgudang**.

As much as Haida repatriation efforts sought to convey **yahgudang** to their ancestors, it is necessary to understand the dual aspects of this quality. **Yahgudang** is also to be worthy of respect. Ideally, every Haida should strive to embody the dual principles of **yahgudang**. This epiphenomenal social value is at the core of Haida social value and is fundamental to their assessments of others. Indeed, to act with **yahgudang** is often postulated by Haidas as synonymous with being *Haida*. This can be seen in the documentary *Stolen Spirits, Stolen Hearts* (McMahon 2004), which follows the return of ancestral remains from the Field Museum in Chicago to Haida Gwaii. A central theme of the film is that Haidas want what they once had; control over their lives, families, beliefs and cultural practices. The repatriation process is framed as a reassessment of Haida abilities to control their lives and re-enact and adapt their traditional beliefs and cultural practices within contemporary contexts. Within the documentary, the late Ethel Jones evaluates the period when Haida remains were being taken off island. Speaking to the camera, she hesitates, then proceeds, explaining Haidas were 'being Indians' at that time, not knowing what white people were doing to them or on behalf of them (McMahon 2004).

In comparison to Ethel's reading of this earlier time is an analysis of contemporary Haida society, including the work of the HRC, made by the late Nils Wes, Ernie Wilson the hereditary leader of Skedans. 'Gradually we're getting back to normal Haida life', he says, 'for a long while it was squashed, now it's slowly coming back' (McMahon 2004). Nils Wes' words conjure images of landmasses rebounding after the weight of a glacier melts away. Although smallpox, Indian Agents, missionaries, residential schools and collectors seeking remains have disappeared from Haida villages, people are still recovering from their weight. Today, core Haida values such as **yahgudang** are resurfacing, no longer needing to be suppressed or veiled within Euroamerican traditions in order to evade prying eyes from the outside. Rather, they are being embraced, enacted and affirmed as crucial components of Haida identity and life.

The acts of repatriation re-position Haida families in an important way. Haidas can speak of their success to restore honour and respect to their ancestors, and in so doing bring **yahgudang** to themselves (see also Krmotich 2010). It is not recognition from the non-Haida world that has driven Haidas to repatriate their ancestors' remains. Rather, it is the importance of **yahgudang** within their own consciousness and evaluations of self and society that made repatriating their ancestors imperative and meaningful.

CONCLUSIONS

Haida repatriation efforts have an identity politics within them, but this can not be assumed to be a politics of post-colonialism. The identity politics exists within the sense of pride, self-respect and the earned respect of others, **yahgudang**, that comes through caring for one's family and fulfilling the obligations of kinship within one's lineage and between moieties. This reading of Haida repatriation efforts is only possible if we treat post-colonialism as a moment in time rather than a defining and determining quality of Haida actions. The nuances of kinship relations within Haida society, and their central role in building and negotiating Haida identities personally and collectively must not be superseded by vogue theories and discourses of anthropology or indigenous studies.

Moving beyond the specifics of repatriation, the inclusion of pre-colonial cultural values and ideas can be critical in avoiding the harm of colonialism itself: namely, the replacement of local epistemologies and ontologies with structures that privilege colonial actions as starting points and organising elements (see also Harkin 1998). The term 'pre-colonial' then remains somewhat unsatisfying as colonialism remains at its root. Yet to categorize these values as indigenous runs the risk of rendering values incorporated by populations after contact, such as Christianity, as inauthentic or
unindigenous, regardless of the creidence indigenous peoples may give these values, the length of time they have been part of cultural practice, or the specific ways in which these values have been appropriated and read within local practices. In short, indigenous cannot be synonymously with past. Likewise, in a North American context, ‘pre-contact’ often assumes contact with Western Europeans. It generally fails to recognize contact between distinct indigenous groups or non-colonising peoples as culturally significant events.

To avoid this impasse, we may need to relegate the concept of post-colonialism to the temporal sphere, and no longer laden it with prescribed sets of identities and politics. Alternatively, we may need to revisit the temporalities existing within indigenous communities and re-centre or multiply what events are used as milestones for reckoning time and cultural change locally. In their own ways, anthropology and indigenous studies both pursue, affirm and legitimate local ways of knowing, thus putting both disciplines in good stead to take these initiatives forward.

NOTES
1. This research was supported by the Social Sciences and Humanities Research Council of Canada, Award 752-2004-2129, the United Kingdom’s Overseas Research Scheme and a University of Oxford Clarendon Bursary.
2. This term comes from the premier of British Columbia, Gordon Campbell, who proclaimed in the summer of 2001 that the B.C. government would be actively developing new policies and programmes with First Nations (Lee 2002). The response from First Nations to this pledge was a mixture of hope, distrust, incredulity and pensiveness.
3. Requests for the return of human remains and cultural property by indigeneous peoples were undoubtedly fortified during the 1970s by the American Indian Movement, Red Power, Black Power, feminism and indigenous rights movements on a global level (Brown 2003; Fine-Dare 2002; Nielsen 2003). But requests for repatriation from indigenous communities have a much longer history, occurring simultaneously with the removal of human remains and artefacts. In British Columbia, for example, an early, though unsuccessful, attempt was made in 1888 by the Cowichan, a Coast Salish group living in central Vancouver Island, to repatriate a set of human remains removed by James Sutron for Franz Boas. The request was put before the Justice of the Peace, but denied (Cole 1995). Perhaps the most striking case of this kind was the plea of Truganini, a Tasmanian woman, that her body not be obtained upon her death for research (Florde 2004). Despite her explicit wishes to be protected in death, her remains were collected by the Royal Society of Tasmania shortly after her death in 1876. The aboriginal community of Tasmania sought to honour her wishes and requested her repatriation, finally receiving her body in the 1970s. In the 1980s, Iroquois nations protested and filed suits in New York state against the sale of wampum (beaded belts representing alliances and accords between people); requests continued throughout the 1970s and 1980s, until the Iroquois were successful in repatriating the belts to caretakers within the Iroquois nations (Fine-Dare 2002: 91-94).

4. In contrast, among other First Nations in British Columbia, the repatriation of artefacts and remains is being negotiated within contemporary treaty writing. For examples of treaty agreements which include clauses on repatriation of artefacts and remains, see the Draft Shamanson Agreement-in-Principle (2001: Ch. 18), the Snezy Savwe Treaty Negotiations Draft Agreement-in-Principle (2003: 60-66) and the Nisga’a Final Agreement (1999: Ch. 17, appendix L).
5. On Haida’s appropriation of the practice of raising headstones, see Blackman 1973.
6. And see also Brian Noble’s (2002) work on the repatriation of Blackfoot bundles and their reinforcing of local systems of governance, law and authority.

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History and Memory in Cape York Peninsula, Australia

Marcia Langton

INTRODUCTION

In the early 1990s, I worked as a member of a team of experts on a land claim in Cape York Peninsula in north Queensland, Australia, lodged by Yirrkwarra, Lalamalama and some other Aboriginal peoples (Aboriginal Land Tribunal (ALT), 1993, 1996). It was this experience that caused me to develop an understanding of Aboriginal accounts of their lineages, families and ultimately their land holding corporations, one more inclusive than the standard anthropological explanations, and which relied on the exegesis of knowledgeable men and women from these groups. Although this was not an innovative idea—Rigsby and Williams had influenced me—it was a problem I have elaborated in different ways. (Langton, 1997, 2002, 2006; Rigsby & Williams, 1991; Williams 1982, 1986, 1987). From the late 19th century, thousands of their people had been forcibly removed from their traditional lands and incarcerated as wards of the state in highly regimented and supervised Aboriginal Reserves and brought under the strict control of ‘Protectors’ or their agents in order to evacuate the presence of Aboriginal people from land designated for pastoral leases for stock grazing purposes.

Another main aim of the Colony of Queensland was to create a controlled native labour force (Kidd 1997, 1998, 2000; Loos 1982; Rowley 1970). The removal of Aboriginal people from their traditional territories and detention in Aboriginal Reserve settlements was authorised by the 1897 Aboriginal Protection and Restriction of the Sale of Opium Act, 1897. In 1897, a few large reserves existed in Cape York Peninsula. Then more were created and all became restricted areas, accessible only by permit. The Protectors invoked the Act’s relocation provisions to incarcerate thousands of Aboriginal people on Reserves (Kidd 1998).

It was the practice of the Protectors to sail the coastline of Cape York Peninsula in the H.M.V. Melville, collecting Aboriginal people from their camps, and delivering them to detention at points along the coast supervised by Departmental officers. The few older people who escaped removal to missions ended their lives on the fringe of white settlement at Cooktown.
Information Technology and Indigenous People

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Information Technology and Indigenous People

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Portals and Potlatch

Carol Leclair, Wilfred Laurier University, Canada
Sandi Warren, Trent University, Canada

Abstract

The authors are Métis scholars and members of the Métis Women's Circle. The Métis Women's Circle is a not-for-profit, national organization that represents approximately 200 aboriginal women of Métis and mixed heritage from across Canada. The Circle offers services and programs to develop and share Métis communities' knowledge with their people and the broader Canadian public. This chapter represents a dialogue between the authors regarding the protocols for information technology as seen from their indigenous worldviews.
Introduction

It is easier to predict the technology than the application of the technology; and it is easier to predict the application than its social impact. To attempt to foretell the meaning of all this in terms of human values is hardest of all (Rothmann & Mosmann, 1976, p. 406).

Our society is in the midst of a debate. We are trying to determine whether technology can be controlled and directed toward the betterment of humankind or whether it will lead to the restriction of human liberty (Rothmann & Mosmann, 1976, p. 9).

Protocols for Information Technology from an Indigenous Worldview

[Sandi]: I came across the above quotes several years ago, when I was studying information technology (IT) as a chosen career. In the late 1970's, as one of many industry analysts, I began to ponder the ethics associated with knowledge sharing, particularly the level of responsibility required by information developers in a global context. However, like many IT professionals, I continued my work with little input from our aboriginal communities. As a consequence, the information technology era has advanced and operated within a narrow philosophical, structural and intellectual framework, as defined by a Eurocentric worldview.

Thirty years later, the debate regarding information technology and its social impact surfaces once again within our communities, as we reach out to share indigenous knowledge within a framework of exchange and reciprocity.

[Carole]: As communally based peoples, we have always sought to bring wealth and possessions to the people. To have is to share. Sharing is both an economic necessity and a prized virtue. No native culture I’m aware of is indifferent to the impoverishment of the community. Our Métis Women’s Circle mandate is to support, educate and empower our community. To do this, our leaders seek cross-cultural strategies to interact as equals with universities, government and scientific bodies to develop our resources. It’s good to think about our ancestors and how they cared for the people, overcoming many obstacles by their resourceful, intelligent and hard-working approach to life.

I met elder and educator Oscar Kawagley (Yupiaq) at a CASTS (Canadian Aboriginal Science & Technology Society) Conference, in the summer of 2003. During our personal conversation, we talked about the use of science and technologies. His view is that we should be teaching our youth both traditional ways and western skills, so that when the youth travel outwards to the wider world they can carry their “specific cultural mandates regarding the ways in which the human being is to relate to other human relatives and the natural and spiritual worlds” (Kawagley, personal communication, Summer 2003). So, if we remain close to our aboriginal traditional thought worlds, we will continue to use our powerful minds to stay awake and aware to our surroundings. At that same conference, Jennifer Morrison presented a session entitled “Coyote Goes Virtual.” In her talk she asked the question, “What if a First Nation had the power and capability to link their knowledge with scientific knowledge about the land on their terms?” She described the merging of PEM (predictive ecosystem modeling) with Nlaka’pmx GIS (geographic information system) data, the breaking down of barriers and the development of a new virtual reality whereby the Chiefs will be able to build future management options for the Nation’s forests.

Nancy Maryboy (Navaho) is a professor in the Department of Physics and Astronomy at Northern Arizona University. She is developing an Internet-based course on Native American Astronomy. She shares her people’s ancient knowledge of the Navaho night sky and tells the stories of the constellations, their names and how they came to be. She gives national and international presentations on the juxtaposition of native knowledge, quantum consciousness, western science and the protocols of conducting indigenous research. Dr. Maryboy sat with a panel of experts at the end of last year’s CASTS conference. She was cautioned by one of the non-native experts that she ought to formally document the broader contextual and ceremonial elements of Navaho cosmology, since it would likely disappear in future. She gently made the point that certain knowledge must remain within the Navaho people’s possession and that she was very confident that they could be entrusted with its preservation, as they had done so for thousands of years.

[Sandi]: Our contemplation of information technology and its social impact appears to fall into two perspectives within our communities....

The first perspective seeks to utilize information technology for sharing knowledge and resources as a means to increase the capacity and capability of the community, either through e-commerce, e-learning or via a community Web portal. The argument is that the inclusion of knowledge networks raises the demand for technology and communication infrastructures that provide vehicles to the world, foster culture and tradition, maximize resources, increase services, enhance organizational and individual development and create wealth (Sixdion, 1997, p. 19). Furthermore, partnerships and technology-based solutions equalize the playing field for small or rural communities by providing access to governments, schools, health institutions, social services or business partners. Consequently, an equalization of the playing field reduces brain-drain of talented...
aboriginal youth and professionals, who leave for more competitive opportunities (Hqnet, 2002).

The second perspective cautions against situating indigenous knowledge, among a platform of social and intellectual hierarchies, power relationships and other discursive frameworks, which feed the embedded histories and misunderstandings of indigenous peoples, through stereotypes, which create "Pan-Indian" or simplified characteristics of a people (Dei, Hall, & Rosenberg, 2002, p. 7). The concern challenges the platform developers and network systems' ability to distinguish authentic and inauthentic resources (Fee, 1995, p. 245). Consequently, it may be difficult to distinguish who is writing as "other" or who may be deliberately or unknowingly espousing events from a perspective located in a dominant ideology (Fee, 1995, p. 244).

[Carole]: David Kanatawakhon (Mohawk) tells me that the word for computer in Mohawk is "kawennarha" — in English, "hanging words" — a literal description of how the words appear on a computer screen, no lines, just words hanging in space. He has no difficulty using email in Mohawk since the language relies less on visual images than precise language use. He argues that "language is the way in which you deliver yourself to the world," and so, the value of relationship, embedded in language, is expressed with greatest clarity in native languages. Native traditional knowledge is a high-context system. This means that how knowledge is acquired is critically important, since we are responsible for healthy relationships between humans and the object, whether a plant, another animal or an energy. Low-context cultural systems express no such responsibility. Similarly, Philip H. Duran (Twa Pueblo), from the Northwest Indian College, shares with us that an Indian Paradigm of science includes these concepts:

[A]: All things are related, the system is of cycles, reciprocity, natural (vs. written) law is at premium, renewal, all matter is vibrating energy, mysteries are part of the universe (accepted as nature's gifts and as something only the heart can access), there is constant change. (Duran, 2003)

[Sandi]: These perspectives call for strengthening of indigenous knowledge(s) through protocols that respect the intellectual property of elders, community members and indigenous research. The fortification is grounded by traditional relationships, which recognize a reciprocal responsibility by the receiver and the custodian of the knowledge to the knowledge itself, which extends beyond either person (Battiste [Micmac], 2000, pp. 135-136). Without a commitment to reciprocity, respect and responsibility, information technology risks a breach of communal and individual rights, as well as claims of appropriation and infringement of cultural integrity.

These risks surfaced in the broader public domain of the information network during the advancement of the knowledge evolution. In 1996, the U.S. Senate drafted a report regarding security in cyberspace, which identified a security culture that has left people vulnerable to hacker technologies and fraud. As an outcome, ethical cyberspace community development was proposed (Palloff & Pratt, 1999, p. 44). The goal was to create a balance between open dialogue and a cautionary approach, which maintains integrity and security.

A cautionary attitude is shared among aboriginal communities. Historically, aboriginal identity and worldviews were only understood from the Eurocentric legacy of anthropology and social analysis (Henderson [Chickasaw], 2000, p. 255). This legacy has shaped decisions within Eurocentric society that permeated a primitive perception of indigenous knowledge systems, in terms of their structure, process and philosophy.

[Carole]: As for concerns over authentic and inauthentic sources, I think that our oral traditional protocols continue to guide us. Web sites, which claim to offer native knowledge, are scrutinized through some of the basic concepts embedded in oral tradition. I check for clear statements of who is writing, identifying self, family, place, of how you come to know from your own experience, or who has passed on the information and how this person has demonstrated knowledge in the past. When I look at Métis Web sites, I use my intellect and my intuition, (another word for wisdom or experience) to assess the usefulness of the site. We acknowledge that for hundreds of years now, we have been "in the pot, trying not to melt." Luckily, a hallmark of most traditional cultures is their success at adapting and changing with conditions.

[Sandi]: Pan-Indianism goes beyond acting together, to build on existing traditions, or to replace them entirely. Those who fight for tribal integrity have deep concerns about the erosion of tradition, the corruption of the teachings which make them distinct. While I respect this concern, I also note that pan-Indianism is not always to be viewed with suspicion, since many urban aboriginal peoples would be lost without a Native Friendship Center or broader access to indigenous cultures to nurture them when they have lost their family of origin. From what I observe, there is still great respect among native nations for diversity, for self-determination. The value of respect is made real in the daily responses to life.

[Carole]: Some years ago when I was young and learning my Anishnaabe ways, I was sitting with a Haudenosaunee woman and expressing my confusion over what, I was sitting with a Haudenosaunee woman and expressing my confusion over a certain protocol to be used for one who has died. My friend sat quietly, nodding encouragement as I struggled to remember what I'd been taught. I thought it odd that she didn't join in with suggestions, "you know, maybe it goes like this, or that," the usual kind of helpful dialogue. Today I understand and acknowledge her gentle refusal to speak in error about another Nation's traditions as the value of respect in practice.
Our relatives from different tribal backgrounds have often chosen to act in concert, to join together as close allies. For millennia our economies were conservative and largely stationary. During the fur trade period, Cree and Assinaboine quickly became merchants and seized business opportunities to trade inland with many other native nations. Cree culture experienced profound social transformations as they went from canoe-based to horse-based, from fur trappers to provisioners and buffalo-hunters over a very short time. For hundreds of years my Saulteaux/Métis world experienced this clash between natural communities and new capitalism, between “the new technological juggernaut and plain people trying to make a home along with our tribal relatives” (Howard, 1952, p. 6). So I would say that we have much experience in “going with the flow,” in “stealing fast horses” from western ingenuity.

[Sandi]: Subsequently, the introduction of indigenous information technology portals, grounded by protocols based upon indigenous practices for ceremonies, go beyond prediction, emancipation and deconstruction responses to colonization. These portals, articulate a re-acculturation process by influencing new agendas and understanding of indigenous and Eurocentric thought.

[Carole]: We have guidance from the peoples of the Six Nations’ Kahswentha (Two Row Wampum), which was intended as an agreement that native peoples should keep their own laws, customs and ways and the settler nations should keep their own laws, customs and ways. It was the intention of this agreement that neither nation would try to make compulsory laws or interfere with one another, although interaction was expected. Groups such as The Alaska Native Science Commission have taken a leadership role in the development of guidelines, which scientists and others must use when interacting with native communities. Native scientists are aware of how important the appropriate context is when using a piece of knowledge. We can borrow the expression, “autonomous appropriation” (Aikenhead, 1997) to describe the careful distinction between appropriating western knowledge without assimilating to western ways of valuing the world.

[Sandi]: My initiation to the Teachings of the Potlatch introduced me to a commitment to how knowledge, story, resources and/or economy are transferred from one person(s) to another, through principles of respect, responsibility and reciprocity. As background, the Potlatch Teachings serve as a venue, which narrate and transfer ownership of economic and ceremonial privileges from one community member to others. As such, Potlatch Ceremonies are social occasions to mark a significant event in aboriginal family or community. Traditionally, Western aboriginal communities along the coast of Canada and the United States were associated with this practice. Some Eastern Nations practiced similar ceremonies, often called “give-away” ceremonies, which fit the intent and meaning of the potlatch.

[Carole]: Respect prevents me from speaking as an insider authority about Potlatch, but I can make some observations from my own perspective. I’m told that Potlatch is a Chinook word meaning “to give.” I can think of Potlatch metaphorically as a Haida information technology, a kind of “data storage” through family-owned dances, objects, stories, songs and ceremonies. Many witnesses confirm and preserve an organic process. Of course there are many other dimensions to Potlatch, which are properly held by the community and not shared globally. Historically, potlatch ceremonial material has been confiscated and sold to collectors worldwide. This could be analogous to computer hacking and theft of data. We know how difficult a process of repatriation of cultural materials continues to be. I imagine the repatriation of information will be very difficult. The U’mista Cultural Center Web site does a fine job of offering information while protecting sacred knowledge.

[Sandi and Carole]: By participating in give-away [Potlatch] ceremonies with members of the Métis Women’s Circle, we recognize that gifts represent the intangible and tangible relationship between mind, emotion, spirit and body, embodied in the relationship between the donor and recipient of the exchange (Leclair, 2003, p. 142). In this manner, the relationship creates shared meaning, which both members seek to create, sustain and grow through interdependency and reciprocity.

[Sandi]: In this context, information networks create a “space” for sharing stories, values, customs and experiences, which represent the roles and responsibilities of self and community. Individuals and the community participating in the “space” articulate a shared meaning through a process that facilitates an exchange between the internalization of meaning and the externalization of actions and behaviours. This exchange creates a phenomenology about indigenous knowledge that is associated with specific ways of knowing and being, which are constructed as a collective reality for the individual and the community (Little Bear, 2000, p. 77).

Similarly, “portals” provide an opportunity for resource and knowledge-transfer. The word “portal” is derived from the Latin word porta, which translates to “gate.” In the strictest sense of the word, anything that acts as a gateway to anything else is a portal. From a technology standpoint, portals increase the participation of a large “network” of people through shared information or resources.

The portals create avenues that enable indigenous communities to articulate community systems, such as justice, education, health and other social priorities that have relevance for their people (Giroux, 1997, p. 227). The participating members recognize that the process of re-acculturation involves an appreciation of diverse traditions, histories and identities (1997, p. 268). Specifically, the community negotiates the socio-cultural relations and structures that reflect the complex experiences of aboriginal communities within the broader context (in this instance, the information network community) (Freire, 1970, p. 153).
Knowledge is a community resource. It defines and drives the community. It's interconnected, it's multifaceted and multidimensional, it's revered, and it's language, communication and history. It's collective memory. It's captured and maintained for future generations. It's a reflection of life experience. It's acquired listening and being empathetic. It's wisdom, strength and leadership. It's a strategic resource. It's the power of a good mind. It's imperfect. It's a gift bestowed by the Creator. (T. Maracle, cited in National Aboriginal Health Organization Report, February 5, 2001)

Maracle's definition suggests that knowledge is a fundamental character, a social process, and the foundation that guides our everyday life, whether we are consciously aware of the process or not (Berger & Luckmann, 1967, p. 14). Consequently, knowledge represents a common or shared expression of our social and cultural relations (Warmoth, 2000, p. 4). Within a concept of indigenous worldview, knowledge, language, consciousness and social order are understood as four complementary perspectives that require time and a lifetime of experiences to cultivate ways of being and knowing (Henderson, 2000, p. 261).

By incorporating the concepts of organic or natural laws into principles for creating indigenous information portals, the model observes a practice which honours information from various sources, such as environmental observations, dreams, visions, ceremonies, communion with spirits of nature and time spent with Elders. This practice supports an indigenous way of being and knowing through behaviours and actions that regard all things as Sacred (Cajete [Tewa Nation], 2000, p. 190).

In accordance, indigenous knowledge systems, which generate shared meaning and action, begin with our narratives and our experiences. In exchange, our collective narratives and stories nurture a shared knowledge, which has high meaning and generates high actions within the community (NAHO, 2001, p. 3). Within an information technology application, knowledge has the potential to generate and share indigenous narratives, stories and experiences as a source of meaning that is "lived and made transparent in everyday relations, rituals and activities" (NAHO, 2001, p. 3).

In her text, The Knowledge Evolution: Expanding Organizational Intelligence, Verna Allee describes a knowledge archetype that suggests a movement away from a single person having data toward a community of wisdom-keepers (Allee, 1997, p. 45). Specifically, the knowledge evolution demonstrates a movement outward from a single repository of data, to more integrated patterns of information, knowledge, meaning, philosophy, wisdom and union (Allee, 2003). The increased community knowledge facilitates problem-solving more quickly, by building on the experiences of others, articulated as learning communities.

Aboriginal information networks utilize harmony, trust, sharing and kindness as a similar model which guides relationships, establishes rules and recognizes categories for necessary actions (Henderson, 2000, p. 273). Under the principles of responsibility and reciprocity, phenomenology (of experiences) is influenced by aspects of knowing, which are derived from all creation. Pam Colorado (Oneida) articulates this distinction as an integral part of indigenous knowledge systems, which she identifies as indigenous science (Colorado, 1988). This concurs with Henderson's premise that aboriginal knowledge systems move beyond concepts of subject and object and into a complexity of a state of community that is reflective of all creation (Henderson, 2000, p. 264).

The complex institutions, which have continued to exist in our communities as various models of political, economic, social and cultural knowledge systems, are characterized as interconnected and multidimensional (Champagne, 1989, pp. 2-13). Subsequently, aboriginal responses and ability to negotiate the "mainstream" exist through well-developed and complex traditional decision-making structures, which can serve as guidelines for current information network structures and protocols.

The implication is an interpretation of indigenous societies as sophisticated participants rather than victims of an imperial hegemonic power. Battiste argues
that aboriginal knowledge systems have been undermined and discredited through cognitive imperialistic presentations of indigenous societies and historical events. She advocates for the re-visioning of aboriginal communities and our knowledge systems from an indigenous perspective (Battiste, 1998, pp. 16-27).

Supportively, Champagne (Chippewa) challenges the passive or understated image of indigenous peoples in society, which presents the focus of indigenous responses as actions associated with coping with the colonial systems. Instead, aboriginal societies are recognized as strategists, who develop specialization and institutionalization processes as innovative responses to the social, political, normative, economic and cultural changes brought about through contact with Eurocentric institutions (Champagne, 1989, p. 3). In this context, these strategies are deliberate efforts to preserve the cultural and national autonomy, as well as to create options for sustaining a collective resistance (1989, p. 14).

By articulating an information technology protocol, based on indigenous theories associated with proactive measures for addressing change, we begin to build a legacy of indigenous change models and associated characteristics that is reflective of our ways of knowing, being and doing. These models provide a benchmark for contemporary information networks.

As community theorists, it is our responsibility to facilitate the creation of models based upon experiences which observe natural patterns, through the linkage of theory, strategy and action. These patterns are influenced by the environment as a component of aboriginal thought and identity (Henderson, 2000, p. 252). For our community, we envision that these models reflect a worldview that is "not a description of reality but an understanding of the processes of change and ever-changing insights about diverse patterns and styles of flux" (Henderson, 2000, p. 265).

An information technology protocol developed for and by aboriginal communities articulates a specific voice that represents the diversity and complexity of our aboriginal nations. By proposing models based on strategic differentiation, we introduce the concepts of certain institutional configurations that facilitate adaptation of social change as well as other configurations that present obstacles to change (Champagne, 1989, p. 10).

In this sense, the information protocols represent a complex process with features from both deconstruction and construction theory. These protocols facilitate the reclaiming of our histories, social structures, political and cultural vocabularies that define and shape our individual and collective identities (Giroux, 1997, p. 198).

The protocols enable community development efforts to operationally address the day-to-day re-traditionalization of programs, while establishing long-term scenario planning to strategically position the community's internal capacity and capability. The long-term scenarios create portals for indigenous information sharing while facilitating our communities' adaptations to on-going societal, economical, political and cultural influences. From this perspective, we foresee a proposed indigenous information technology that builds upon our communities' skills as strategists, who negotiate social priorities that have contemporary and future application for our people, while safeguarding values and norms, which are relevant to one's community.

[Carole]: Our nations have the gift of beautiful speech, a gift, which persists even through the dimming effect of the English language. Our material creativity has been taken up and imitated worldwide. I read recently that our Métis beaded moccasins will be walking down New York fashion runways this year. Anishnabe wisdom questions where we stand with respect to the Seven Fires prophecies.

Has that Fourth Fire come to pass where the light-skinned race brings new knowledge and technologies which can be joined with native knowledge to produce a mighty and healthy nation? We understand the warnings of our wise ones that a headlong rush into embracing western sciences and technologies will result in disaster for the earth and for the nations if the. In the past we did not have the option of choosing between vanguard technology and a rearguard community (Cook, 2001). Today we do have more choices to make. I leave the discussion to wiser ones to decide whether we are children of the Fourth or Seventh Fire, but I do observe that scientists of integrity are interested in learning our indigenous science views. Hope for the future lies in bringing the two elements together to create the kind of thinking we must develop if we are to solve the problems, which reductionist science and capitalism have created.

References


Ethnopoetic Translation in Relation to Audio, Video, and New Media Representations

Robin Ridington, Jillian Ridington, Patrick Moore, Kate Hennessy, and Amber Ridington

Introduction

This chapter describes our use of video and Web-based media to present an electronic equivalent of “interlinear” translations of ethnographic texts. The initial tape recordings of elders of the Dane-zaa of northeastern British Columbia were made by Robin Ridington in the 1960s. Jillian Ridington and Howard Broomfield joined the work in the 1970s and 1980s, and Jillian continues to be a partner in the projects. In recent years, Robin has added video recordings to the collection. The entire audio archive has been cataloged and digitized and is available to members of the Dane-zaa community. More recently, the Doig River First Nation, working collaboratively with Amber Ridington, Kate Hennessy, Patrick Moore, and Robin and Jillian Ridington, began recording video as part of their Virtual Museum of Canada exhibit entitled Dane Wajich—Dane-zaa Stories and Songs: Dreamers and the Land.

Interlinear and Ethnopoetic Translations

There is a long tradition in anthropology of presenting ethnographic texts as transcriptions of the native language, accompanied by a close interlinear translation. Some of the most important work resulted from a collaboration between a native-speaking researcher and a non-Native ethnographer. Many of the Kwakiutl (Kwakwaka’wakw) texts that Franz Boas published were collected by George Hunt. Those of Alice Fletcher and
Francis La Flesche derived from an even closer collaboration in which the Omaha native-speaker, Francis La Flesche, was also a coauthor of the published work. In his *Ethnology of the Kwakiutl*, Boas presented lines in English at the top of each page and corresponding lines in Kwak’wala at the bottom (Boas 1921). His work, however, is not known for its poetic value or for making First Nations literature accessible to a non-Native audience. In 2000, Ralph Maud suggested that Boas’s collaborative work with his Tsimshian colleague Henry W. Tate to produce *Tsimshian Mythology* (1916) misrepresents the narratives as “authentic,” when in fact they were edited heavily by Tate and reflect Tate’s personal and multicultural perspective on Tsimshian mythology. With this new perspective, *Tsimshian Mythology* may be seen to represent an interesting syncretic creation in itself, but perhaps not the age-old tradition as transmitted among the Tsimshian people that it was purported to be.

Some premodern ethnographies also included free, often line-for-line, verse translation. They are therefore examples of what we now call anthropological poetics. Fletcher and La Flesche (1911) were particularly successful in using this method of translation when presenting highly formalized ritual song texts, such as those relating to the Sacred Pole of the Omaha tribe. These song texts were first presented with accompanying musical notation, then with a literal translation, and finally with a free translation. Their presentation of one song is as follows:

Omaha text:
Thea’ma wagthitonbi tho ho! gthitonba
Wagthitonbi, wagthitonbi, tho ho
Te’xi ehe gthitonba
Wagthitonbe, wagthitonbe te’xe ehe gthitonba

Literal translation:
*Theama*, here they are (the people); *wagthitonbi*—the prefix *wa* indicates that the object has power, *gthitonbi*, touching what is theirs (“touching” here means that the touching that is necessary for a preparation of the objects); *tho ho!* is an exclamation here used in the sense of a call to Wakonda, to arrest attention, to announce that something is in progress relating to serious matters; *te’xi* that which is of the most precious or sacred nature; *ehe*, I say.
Free translation:
The people cry aloud—tho ho! before thee.
Here they prepare for sacred rites—tho ho!
Their Sacred, Sacred Pole.
With reverent hands, I say, they touch the Sacred Pole before thee.
(1911:233–42)

During the 1970s, the journal *Alcheringa*, first edited by Jerome Rothenberg and Dennis Tedlock, featured a number of experimental works using poetic translations of ethnographic texts. Unlike earlier ethnopoetics, *Alcheringa* presented translations of recorded audio documents. It also innovated the practice of including thin vinyl audio records, bound within the magazine. Tedlock’s 1972 collection of Zuni narrative poetry (*Finding the Center: Narrative Poetry of the Zuni Indians*) is an excellent example of *Alcheringa*’s ethnopoetic tradition applied to a substantial body of oral literature. Tedlock set out his translations of Andrew Peynetsa and Walter Sanchez in a line-for-line form, using typography to represent performance values documented on the original audio documents.

An ethnographic text produced prior to the advent of audio recording depended on the transcriber’s ear and on his or her ability to take dictation quickly using a phonetic script. Ethnographers like John Swanton and John Peabody Harrington were exceptionally talented in this regard. Harrington, it should be noted, was also a pioneer in the use of audio recordings (wax cylinders and later aluminum disks) for documenting Native American texts. A written transcription and translation depends on the translator’s ability to understand the poetics of the native language as well as on the ability and patience of the native “informant.” By necessity, the ethnographic texts and translations found in traditional ethnographies document a particular collaboration between speaker and ethnographer. Because of the need for a translator as an intermediary, they do not document naturally occurring performative events. The Omaha ritual song presented above accurately *re-creates* the text of an actual performance (but not its actuality) in that the ritual song texts were performed by priests of the Honga clan accurately and without improvisation or interpretation.

Swanton’s sensitive transcription and translation of Haida texts has been the source of poet Robert Bringhurst’s remarkable poetic translations.
of Haida oral literature (Swanton 1905; Bringhurst 1999). Swanton worked with a bilingual translator, Henry Moody, who, as Bringhurst explains, would “listen to the poem and repeat it sentence by sentence in a loud, clear, slow voice, proving to the poet he had heard each word and giving Swanton time to write it down” (1999:32). Swanton’s sessions with Moody and a number of other Haida poets document a careful and studied rendition of oral literature in which the storyteller is the primary author of the document realized through the assistance of Moody and Swanton. The storyteller is the one who makes the authorial decisions about what to commit to writing. The resulting translation is a document of the authorial process, not a document of a naturally occurring performance event.

Tedlock provides a useful distinction between what he calls recitation and performance when he contrasts two versions of the Zuni “Word of Kyaklo” as respectively canonical and interpreted. The canonical version is, while technically an oral performance, more like the reading of a written text. The other is in Tedlock’s words (and italics),

spoken
rather than chanted
interpreted
rather than reproduced
told on some quiet evening at home
rather than proclaimed on a holy day in that holy chamber
known as the kiva. (1991:311–15)

He goes on to say that

Tales have no canonical versions
no Kyaklo who recites them verbatim.
They exist only
in the form of interpretations
and it takes a multiplicity of voices to tell them. (1991:338)

The canonical version could, probably, have been written down by a skilled nineteenth-century ethnographer. The interpretive version could only have been documented as an audio recording. As Tedlock points out, Andrew Peynetsa’s version came about
on a chilly evening in early spring
by the hearth in his farmhouse with his family
with me there, too
and my tape recorder. (1991:315)

Prior to the advent of audio recording, a text told by a non-literate, perhaps even monolingual, informant in collaboration with a transcriber/translator was more like a written document than an oral performance. It was of necessity studied and constructed. The text did not document intonation, gesture, or in many cases even the repetition that is so important to Native American narrative tradition. Bringhurst rightly credits the storytellers with whom Swanton and Moody worked as the authors of poetic texts. The advent of audio and later film and video recording made possible a new kind of documentation. Field recordings can, of course, be as formally contrived as texts that are dictated, but they can also document performative events in their natural setting. Whether performed intentionally “on air” or captured in the natural flow of events by an ethnographic documentarian, going from the raw audio document to a translation or interpretation requires aesthetic and epistemological choices.

Most texts transcribed from audio recordings have been, of necessity, removed from the recorded actuality. Even when a written translation is accompanied by a disk or CD of the original audio document (as in Alcherenga), there is an inevitable disconnect between the two representations. The experience of reading is separate from the experience of listening. Conventional ethnography has generally privileged the written text over the audio original; it has seen the audio as merely a means to the production of a written document. Ethnographic film, by contrast, has borrowed from the practice of subtitling films in a foreign language to produce translations that are more immediate and effective in preserving the link between text and actuality.

David MacDougall suggests that the idea to use subtitles in ethnographic film came about in 1961 when filmmakers Tim Asch and John Marshall were collaborating on a film about the !Kung. MacDougall says: “The idea of subtitling it was so obvious that it seems to have come to Asch and Marshall simultaneously... One day Asch went to see Godard’s Breathless at the Brattle Theater, and he remembers the moment of revelation when he thought of subtitling the !Kung material. But when he
mentioned the idea to Marshall, he found that he had thought of it too” (1995:83).

Probably the most interesting and innovative use of subtitling as a medium for ethnographic translation comes from the artistically and financially successful Igloolik Isuma Productions. The name Isuma means “to think,” and they describe their mission as making it possible for young and old to “work together to keep our ancestors’ knowledge alive.” In addition to a series of documentaries in Inuktitut with English (and French) subtitles made between 1989 and 2006, Isuma has made two commercially and critically acclaimed feature films, also using subtitled Inuktitut. The Isuma Web site (www.isuma.ca) describes their “unique style” as “re-lived drama.” In an article about Igloolik Isuma, Katerina Soukup points out that the Inuit have adopted the Inuktitut term *ikiaqqvik* ‘traveling through layers’ to describe the Internet. “The word,” she says, “comes from the concept of describing what a shaman does when asked to find out about living or deceased relatives or where animals have disappeared to: travel across time and space to find answers” (2006:239).

Isuma’s latest feature film, *The Journals of Knud Rasmussen*, travels through layers of time to portray the defeat of shamanism by an indigenous Inuit Christianity. In one extraordinary continuous monologue lasting 9 minutes and 50 seconds, Inuit actor Pakak Inukshuk, playing Avva, a shaman whose life story explorer and ethnographer Knud Rasmussen documented at Igloolik in 1922, describes the events that led Avva to become a shaman. Rasmussen was a native speaker of Inuktitut and able to understand and document Avva’s narrative. Pakak Innukshuk is in a unique position to re-create that story in the original Inuktitut. The viewer is brought into the story through the use of subtitles. The film presents complex intercultural and intergenerational translation strategies to convey Avva’s life as a shaman. Avva told the original story in Inuktitut, and Rasmussen wrote it down in Danish. It was first published by Rasmussen in 1929 in *The Intellectual Culture of the Iglulik Eskimos*, which was translated into English by W. Worster (Rasmussen 1976). Zacharias Kunik and Isuma Productions then adapted Rasmussen’s text so as to “re-live” it as an audio and visual actuality. Like Tedlock’s interpretive version of the Kyaklo story, Pakak Inukshuk re-created Avva’s narrative eighty-five years later in the Inuktitut language he and Avva and Rasmussen all shared. The feature film then translated the Inuktitut as subtitles (two lines at a time) for distribution to a variety of written language communities. While the
film version omits some of Rasmussen’s original and adds an introductory statement, the subtitled translation complements the Inuktitut performance effectively. The film version of Avva’s statement began with a statement not in the Rasmussen original:

My mother was cursed
by an evil shaman

who befriended my father
in order to lie with her.

When my mother refused, the
shaman whispered angrily in her ear,

“All your children will be born dead!”
And so it happened that all my

mother’s children born before me
had lain crosswise and were stillborn.

Pakak Inukshuk’s performance is gripping and faithful to Avva’s narrative as Rasmussen translated and transcribed it. Through his skill as an actor, the viewer gains an insight into the moment that Avva and Rasmussen shared those many years ago.

Subtitles, Re-creation, and Translation of Dane-zaa Audio Documents

Dane-zaa songkeeper Tommy Attachie told Robin and Jillian Ridington that each time a person with knowledge sings one of the dreamers’ songs, he or she creates it anew. In Tommy’s words, “When you sing it now, just like new.” To use Tedlock’s distinction again, the singer gives an interpretation a recitation. With each new performance, the singer re-authorizes the dreamer’s song that he or she holds in the mind. The same interpretive style is true of Dane-zaa storytelling. The audio recordings we have made of Dane-zaa singers and storytellers document the actualities of particular interpretive performances. Younger members of the Dane-zaa community no longer speak the Beaver language fluently. One strategy for
making both the content and performative style of Dane-zaa oral tradition available to a new generation has been to present the original audio documents with an English translation in the form of subtitles against a visual field that shows a picture of the storyteller or photographs taken at the same time as the recording.

With the advent of digital video recording and computer-based editing, subtitling to simultaneously display a written translation along with the original performance has become available to any reasonably computer-literate ethnographer. The act of translation, of course, still remains the authorial responsibility of a bilingual translator, but the primary audio (or video) document can show the translated text in its performative context. Some of the recordings we have made with the Dane-zaa have been arranged in advance; in these, the narrators are clearly performing for an unseen audience that will experience the work in a different time and place. Others document events that are ongoing and independent of the presence of a microphone or camera. Within the category of interpretive performance documents as defined by Tedlock, we have found it useful to distinguish between those done self-consciously “on air” or “on camera” and those that document ongoing events that would have taken place in much the same way had they not been documented. The new video documents that went into the Dane Wajich-Dane-zaa Stories and Songs Web site (discussed later) are largely of the former kind, made in part with an outside audience in mind. In contrast, many of the songs included on the Web site as audio clips, several of which were recorded by Robin Ridington in the 1960s, were recorded in a natural and community-oriented context.

In early January 1966, Robin Ridington recorded the Dane-zaa Dreamer, Charlie Y ahey, in an entirely unself-conscious setting. Robin had brought some elders from another community to visit Charlie. The Dreamer spent the best part of two days singing and telling people about his dreams of Heaven. Robin made the original recording on a portable Uher reel-to-reel machine in a community that did not have electricity. From time to time he switched on a reel-to-reel tape recorder, but he did not have enough blank tapes or spare batteries to attempt anything like a complete document of the event. Along with the rest of the thousands of hours of audio recording, this recording is now available to members of the Dane-zaa community in digital form (Doig River First Nation 2003).
In the passage presented below, the Dreamer warned that many people “go the white man’s way” and do not sing and dance as they should. He said that the coming winter would be hard but that by singing he hoped to make it better. The Dreamer was aware that Robin was recording some of what went on during these two days, but he was in no way performing for the tape recorder (on other occasions he did allow Robin to record interviews in which he asked the Dreamer specific questions about his knowledge). In this passage, Charlie was speaking to his contemporaries, elders from Prophet River and members of his own community. Many years later, songkeeper Tommy Attachie (a young man, as Robin was, when the original recordings were made, and now, like Robin, an elder himself) provided a close translation of Charlie’s words. Below is a short passage from this translation. The transcription of the Beaver in italics is Robin’s own and is not intended to be a proper linguistic rendering of the Beaver-language text. Rather, he uses it to locate Tommy’s English translation at the appropriate places in the audio document. Robin created the subtitled audio on Final Cut Express software, using a still photo of Charlie Yahey as a visual backdrop. He has used the same technique to visually present other audio documents from the 1960s, as well as to subtitle recently recorded video documents. Robin gave a draft of this paper to Gerald Yahey, Charlie’s oldest grandson, and obtained his approval to use the text here.

Charlie Yahey Recorded by Robin Ridington in 1966, Catalog #CY1-5.
Translation by Tommy Attachie in 1998, Catalog #CY Tommy 3b.

*Kuu gruhtį alin ku.* 0:04
All those animals,

*Kaa echı onla.*
even they pray with their songs. 0:08

*T’aa kehni achu keli djuu*
but some people

*ke su’ dučhi* 0:12
are not even scared [drumming]
Achu chu dane ye dzu onli klike ahka kadzi’ a’ tsita.
One of these evenings, nobody will be singing these songs.

Achu adawaschi. 0:19
They don’t know anything.

Ah tre Monias kuh kah che kuh ga dane.
They go the white man’s way. 0:22

Achu ah wuu ‘de kaa la grachi
People who don’t want to sing or dance, are not going to live forever. 0:26

Yaa da de’ sat’
Beyond [inside] the Sky, that’s too far for them. 0:32

[svs 0:39—speaks at 0:53; continues with sung vocables]
Chaa wu’dane—daa wu’naa na—ah ah yeh ah ah yeh—ah yeh 1:04
ha wah yeh, ah yeh [to end of phrase] 1:14 [new phrase]
Chee wu’dane—daa wu’naa la—ah ah yeh—ah ah yey wuh yeh . . .
1:47
Chuu yaske’ sin daata grinta—

kaiila, iiila iiila ki du’duchi, muh nah ge, siize wut’se. 1:55
This winter, it’s going to be pretty hard

Dane-zaa onli duh
Where the Dane-zaa are living.

wu’tsieh kuh naa eh duh wu’t’zu.
That’s why I was singing, even during the winter.

Du’ut’si eh muh ga, si de yaskee wu’tsize wu’t suh ga, 2:04
Chuu, naa dehnla. 2:07.
I was singing to make the cold weather stop. [song ends 3:24]

It is difficult, of course, to represent a moving audio document in the static medium of print on a page. Charlie Yahey’s song and oratory took
place at a particular time and place. It would have lived on only in the memories of those who experienced it (and understood it) at the time. Robin’s experience of the event was limited by his inability to understand anything but the gist of what Charlie Yahey said. Later, Tommy Attachie’s translation gave him a fuller understanding. Listening to the performance on DVD with English subtitles cued to the Beaver text now allows Robin to understand what went on better than he did at the time. More importantly, it allows members of the Dane-Za community who never knew Charlie Yahey and do not speak Beaver to gain some insight into the poetics and metaphysics of this truly powerful orator. We hope to continue with the project of translating and presenting other material from the archive in this way for the benefit of future generations.

**Indigenous Culture on the Web: Dane Wajich—Dane-Za Stories and Songs: Dreamers and the Land**

While Robin’s documentation of Charlie Yahey’s oratory in 1966 was unorchestrated, the work that Amber Ridington, Kate Hennessy, Patrick Moore, and others did in collaboration with Dane-Za youth and elders between 2005 and 2007 was intended for a wide audience. This more recent ethnographic work was undertaken specifically for a Virtual Museum of Canada exhibition that features subtitled video narratives deliberately performed for global and local audiences. Like the Igloolik Isuma productions discussed above, the Doig River First Nation’s recent online exhibit, *Dane Wajich—Dane-Za Stories and Songs: Dreamers and the Land* is an example of indigenous agency and self-expression that brought elders and youth together to document their culture.

The *Dane Wajich* project grew out of a number of collaborative digital heritage projects initiated by members of the Doig River First Nation. These drew on archival materials from the Ridington-Dane-Za Archive and included a compact disc, *Dane-Za Dreamers’ Songs: 1966–2000*; two videos, *Contact the People* and *They Dream about Everything*; and a Web site designed and built by Dane-Za youth, *Hadaa ka naadzet: The Dane-Za Moose Hunt* (Doig River First Nation 2000, 2001, 2004, 2006). Doig River’s 2007 production, *Dane Wajich—Dane-Za Stories and Songs: Dreamers and the Land*, represents one of the most ambitious projects to date, and was produced by the First Nation in collaboration with ethnographers (Robin Ridington, Jillian Ridington, Kate Hennessy, Amber Ridington, and Peter Biella), linguists (Patrick Moore and Julia Miller),
and multimedia professionals (Unlimited Digital, Vancouver BC). The exhibit’s community-directed production process facilitated the articulation of local goals for revitalizing language, recording oral traditions, and traveling to important places in their territory. It brought elders and youth together to document stories, songs, and their relationship to the land. Through community reviews during post-production, it provided the First Nation with primary control over their representation to local and global audiences.

The project also represents a contemporary expression of oral narrative grounded in hypermedia, situated at one end of a continuum that includes the work of Fletcher and LaFlesche (1911), Tedlock and Rothenberg (1970–80) and Zacharias Kunik’s subtitling and translations in *The Journals of Knud Rasmussen* (2006), which we have already described. Hypermedia is defined as combining written, theoretical, descriptive, pedagogical, and applied anthropological narratives with reflexive audiovisual and photographic representations of knowledge and experience; these are most effectively communicated audio-visually (Pink 2006). Sarah Pink points to Peter Biella’s *Maasai Interactive* and Jay Ruby’s *Oak Park Project* as examples of a new direction in visual anthropology that embraces hypermedia’s multiple possibilities for framing research, creating stronger links with writing, and resituating video as a primary element of scholarship (Pink 2006).

Similarly, John Miles Foley, known for his ethnopoetic representation of the Milman Parry, Albert Lord, and Nikola Vujnovic recordings of South Slavic oral epic poetry from the 1930s, has recently embraced what he calls “cyber-techniques” and the “cyber-edition” as a way to include video, audio, and images of oral performances along with texts and writings about the performances. Foley, in his work with the online journal *Oral Tradition*, encourages the inclusion of “eCompanions” (in essence hypermedia Web sites) for journal articles. With these multimedia tools for ethnographic representation, texts do not lose connection to their original performance and, as Foley writes, “denature what we seek to understand and represent by reducing its diverse, many-sided identity to a print-centered shadow of itself. Sound and gesture and context and back-story are but a few of the innocent victims of this ritual sacrifice” (2005:260).

The multimedia exhibit *Dane Wajich—Dane-zaa Stories and Songs: Dreamers and the Land* demonstrates the potential for ethnopoetic translation in hypermedia and cyber-techniques. The *Dane Wajich* project pro-
vides a degree of reflexivity and transparency not easily achieved with textual and videographic representations of oral narratives alone. The project integrates subtitled Dane-zaa and English video narratives, hot-linked interpretive text, photographs of the production process, recordings of songs, and contemporary images of traditional Dane-zaa lands. In doing so, it addresses the current concerns faced by the community as they negotiate legacies of colonialism. As we will explain, the process of producing the videotaped oral narratives produces an aesthetic and thematic focus on intertextual representation. The co-presence of interpretive exhibit text, orthographic Dane-zaa Záágéʔ transcriptions, and English translations places the narratives in their linguistic, cultural, and political contexts. Production photos represent the collaborative process of the creation of the exhibit’s narratives.

Video recordings of narratives told by Dane-zaa people are central to the Dane Wajich project. Many participants spoke in their own language, presenting their own stories and their own perspective on their culture. Over a period of three weeks in the summer of 2005, Doig River First Nation elders, ethnographers, and a team of young Dane-zaa video documentarians traveled to seven significant places in their territory. They recorded narratives about Dane-zaa dreamers, personal experiences, and changing relationships to the land and its animal, spiritual, and mineral resources. The places, speakers, and narrative themes were chosen by Doig River elders, and the young videographers recorded under the elders’ direction. These primary documents, included as translated and subtitled video clips on the Web site, were recorded specifically for the project with the knowledge that both a community and an outside audience would see them.

**Linguistic Anthropology and Translation**

The process of translation and transcription of Dane Wajich recordings was long and time-intensive. In the year that followed the recording of the videos, the linguistic and ethnographic team worked collaboratively with fluent Doig River community members to translate the mostly Dane-zaa Záágéʔ (Beaver) narratives into English, and to orthographically transcribe Dane-zaa Záágéʔ for use in the Web exhibit and in other local Beaver literacy programs. The Dane-zaa narratives in the Dane Wajich Web site were translated principally by Eddie Apsassin, who worked with linguist Pat Moore. Eddie had been present at most of the recording
sessions and was familiar with the goals of the project and with the speakers. In the past he had participated in Dane-zaa literacy workshops that Marshall and Jean Holdstock conducted, and he has experience translating for elders at Doig River and Blueberry River. Eddie is fluent in Cree as well as in Dane-zaa Záágéʔ, the Beaver language, and English.

The procedure used in preparing the transcripts and translation for use on the Web site was for Pat to play the sound files on a laptop computer and have Eddie repeat each phrase or sentence clearly so that it could be transcribed using the orthography developed for Dane-zaa Záágéʔ by Marshall and Jean Holdstock. Although rough transcriptions and translations were available, Pat and Eddie based their transcriptions and translations largely on the recorded version. After each segment was transcribed, Pat wrote English terms under the Dane-zaa Záágéʔ. Pat Moore is familiar with some of the common Dane-zaa terms from his work on this project and from his knowledge of the closely related languages Dene Dhāh (Slavey) and Kaska, but Eddie had to translate the terms Pat was unfamiliar with. Finally, Eddie and Pat discussed how best to express what the speakers wanted to convey as they composed the smooth English translation, a compromise between colloquial Dane-zaa English and standard English, which Pat wrote. Eddie provided extensive commentary about the stories and about certain Dane-zaa expressions the narrators used that he found especially evocative or intriguing, but these comments were not included in the translation. When passages were especially obscure or difficult to translate, they were played for elders Tommy Attachie or Billy Attachie, who were able to interpret particularly challenging terms. One of the most difficult narratives to translate was Charlie Yahey’s creation story, which uses abstract metaphorical references that cannot be interpreted literally, as well as multiple unmarked third-person verbs with no clear referent. Unfortunately, as we discuss later, Charlie Yahey’s narrative was not ultimately included in the Web site. Pat also recorded the Dane-zaa Záágéʔ place-names and dreamers’ names with Tommy and Billy, and together they created a standardized orthography for them.

The translation of narrative texts has been a central concern of linguistic anthropology since its inception, and approaches to translation have evolved along with the subdiscipline. Alessandro Duranti (2003) has argued that linguistic anthropology in North America has employed three overlapping research paradigms. The first is associated with the work of
Franz Boas and his students and associates, and featured the recording of narrative texts and translations, often as interlinear texts as a way of documenting both the culture and language of American Indians. Pliny Goddard’s Dane-zaa (Beaver) texts (1916) are an example of interlinear texts and translations in the Boasian mode.

Duranti characterizes the second paradigm of research in linguistic anthropology as more centrally concerned with the use of language in social life and with the study of performance. This research on the ethnography of communication was facilitated by the development and use of tape recorders, which enabled linguistic anthropologists to capture details of interactions for later analysis. Dell Hymes was one of the central figures in the development of this second paradigm during the 1960s and 1970s (Duranti 2003:327), and he is well known for his contributions to the translation and presentation of translations of American Indian narrative texts (Hymes 1981). Hymes brought attention to aspects of the structure of narrative performance that had been obscured by the ways earlier translations were presented as prose. Scholars such as Dennis Tedlock became advocates for explicitly presenting performance features recorded on tape in their translations. Robin Ridington’s documentation of Dane-zaa (written as Dunne-za in his early work) narratives and his use of ethnopoetic translations is another example of the work of scholars of the second paradigm.

Duranti finds that the ongoing third paradigm of research in linguistic anthropology sees language as evidence of larger social processes. Linguistic anthropologists continue to be concerned with micro-linguistic data, including details of narrative performances, and they increasingly highlight the creative potential of language for the construction of identity. This third paradigm has focused on new approaches to genres, the roles of speakers and audiences in performances, the construction of gender and ethnic identities, the use of semiotic resources, and wider power relations (Duranti 2003:332).

Although successive paradigms of research have developed within linguistic anthropology, earlier research programs have remained active, so that the documentation of American Indian languages and questions of translation continue to be central concerns for many scholars. During the process of translating the video recordings of narrative performances for the Doig River First Nation’s (2007) Dane Wajich virtual exhibit, the
linguists made use of well-established techniques. These included the preparation of interlinear transcripts with fluent speakers and the identification of intonational phrases and pauses that were used as line breaks for the Dane-zaa text and English translations. The translation process also facilitated reflection on the part of both linguists and Dane-zaa translators concerning the nature of the messages Dane-zaa narrators sought to convey and how they used varying narrative genres to address different potential audiences.

The storytellers and singers who contributed to the *Dane Wajich* exhibit took a leading role in determining what would be recorded and selected for the site. The participants all had a depth of experience working with linguists and anthropologists to document their language and culture, but they made individual choices about how to represent their culture and address both their immediate audience of Dane-zaa elders, youth, and academics as well as a wider Internet audience. The diverse nature of their performances reflects differences in their purposes and the ways they anticipated the interests of their audience. Other scholars of oral performances who have examined contemporary narrative performances in novel contexts report similar variability. Julie Cruikshank (1997), for instance, has described how storytellers at the Yukon International Storytelling Festival used different genres, including potlatch-style oratory, stories, songs, and archival documents, to engage the largely non-Native audience with indigenous issues of place and rights. Like the performers at that festival, the participants in the *Dane Wajich* project made use of different genres to express their culture in a form that could be translated for a wider Internet audience.

The ways Dane-zaa storytellers chose to express themselves reflected their training, their roles in the project, and their perceptions of possible audiences. Tommy Attachie, Dane-zaa elder and songkeeper, took a leading role in determining the nature of the project as he established the twin themes of traditions of place and the history of the Dane-zaa dreamers. His address at one of the first planning meetings directed the participants to share the stories, songs, and traditions associated with some of the most significant places in Dane-zaa territory as they traveled to each location in turn. He invoked the authority of the dreamer Gaayęą, whose drum the group had examined that morning, and who had traveled between the Dane-zaa communities in the early 1900s, holding tea dances at each location. Tommy Attachie’s address was directed toward the assembled
Dane-zaa elders; the nature of any possible Internet audience was a secondary concern. His narrative is an example of what we have identified as performances that are not staged, but rather ongoing events that are largely independent of the presence of a video camera. A small portion of his address is reproduced below. Tommy echoes the earlier addresses of Dane-zaa dreamers as he speaks about Gaayęą’s drum, the purpose for going to the places where their ancestors lived, and the possibility of reviving sacred knowledge. The Dane-zaa orthography below is based on the orthography developed by Marshall and Jean Holdstock that is described on the Web site, and the time codes are keyed to the video in the Dane Wajich Web site (Doig River First Nation 2007).

**Tommy Attachie at the Dane Wajich Planning Meeting,**
**Doig River Band Administration Complex, June 29, 2005**

01:19 Juuhdzenéh Ahhatāʔ kuuts’adéji̱ih hač.
   Today, we believe in God.
01:26 Nahhadzēʔ ajuu déhgash;
   Our hearts are not black;
01:28 nahhadzēʔ dadal.
   our hearts are red.
01:31 Ii k’aastaah juu jegūʰ déhgash,
   I think the black side, the one I looked at [on Gaayęą’s drum],
01:36 ii sō ajuu úújuu.
   that must be the side that’s not so good.
01:40 E ii k’aasenéhtah iidekēh,
   I am going to tell you about what we saw in the past,
01:42 gukeh wowajiich jii hahk’ih nahnanaajuunuu,
   we will talk to them about how our ancestors lived,
01:48 hōch’ii ḫēh,
   how it was back then,
01:51 ii tl’gwe ná́čhesne jéts’ēʔ.
   and after that, where the dreamers were.
01:55 Kēnaasji̱ih dah náághaghačéʔ de shin háádaʔah dé.
   We remember where they lived, where they dreamed the songs that they brought back.
People went toward them [people went to see them].

That way, too,

[je hááké? náásehiihdéh háákkaa juuhdzenéh,]
[we'll talk about how we live still today,]

and how people lived long before us.

[That drum, they rewrapped the one that the dreamer Gaayęą drew on,]

Gaayęą’s, the one we looked at yesterday.

It was not by accident that we looked at it.

It will come back, maybe.

For that reason, he dreamed for people.

After Tommy Attachie established the theme of the Virtual Museum project, the participants traveled to seven locations to record stories. Although their performances were thematically unified following the general outline established at the planning meeting, each storyteller conceived of his or her audience in different ways. The types of generic differences in their accounts are clearly illustrated by comparing the performance of Sam Acko (also known as Sammy Acko) at Madáats’atl’oʔje (Snare Hill) with the performance of Billy Attachie at Nétl’uk (Osborn Creek).

Sam Acko’s story, which describes events that occurred at Madáats’atl’oʔje, is an example of the Dane-zaa genre of tôch’iitóh wawajijéʔ ‘long ago stories,’ and he begins his account with “Aadzhëhdëh tôch’iitóh” ‘A long time ago,’ a common frame for this type of story. As Richard Bauman (2001) has pointed out, such framing devices carry expectations as to what type of performance will follow and facilitate the recontextualization of descriptions from one performance to the next. Sam continues by contextualizing the events of the story by explaining the difficult life people had in the past as they struggled to obtain enough food by hunting during periods of intense cold. Madáats’atl’oʔje (Snare Hill) was one of the places
where people gathered in times of hardship, because they could capture moose there by driving them into snares at one end of the hill, even after the stocks of moose at other locations had been depleted. The protagonist of the story is a young Dane-zaa man who maintained an exemplary lifestyle but who kept to himself so that his moose-like qualities could be concealed.

Sam Acko at Madáts’atl’oje (Snare Hill)
“The Man Who Turned into a Moose” July 1, 2005

00:00 Aadzhedôh tôch’iidôh jii
A long time ago
00:03 Madáts’atl’oje dane yêhjii.
they called this Madáts’atl’oje [Snare Hill].
00:06 Dane yadáádzé? háá ghđđđaa.
People depended on this place to live.
00:10 Dane yadáádzé dáánejjîlh.
People depended on this place to survive.

Although Sam Acko’s introduction to the story provides contextualization that could be helpful for an audience that is unfamiliar with Dane-zaa traditions, the main part of his account is delivered in fluent Beaver language, in a style that would be most appropriate for his immediate audience of fluent Dane-zaa elders steeped in local traditions. His account was challenging to transcribe and translate because of his sophisticated use of the language, including technical vocabulary such as hadaa dzisgii ‘moose mane’ and complex sentences with embedded direct discourse. It was difficult to track the many characters in the story, as they are referred to primarily with unmarked third-person verbs. When the people realized that something was peculiar about the young man, they told his brother to stay with him at all times. However, in the excitement of chasing moose toward the snares, the young man was able to elude his brother and turn into a moose in order to lead the moose past the snares, preserving a small group of moose to replenish their stocks. Although the English translations in this section typically extend well beyond the more succinct Dane-zaa account in an attempt to convey the action being described, it is still challenging for an English-speaking audience to visualize the events, because they are unfamiliar with the reactions of hunters and conventions for describing the hunt. In their study of Southern
Tutchone storytellers, linguists Patrick Moore and Daniel Tlen (2007) have argued that this type of sophisticated performance in native language by storytellers serves to assert the prestige of indigenous language and cultural knowledge as a countermeasure to the threat of language shift and loss of cultural knowledge.

Sam Acko at Madáts’at’loje (Snare Hill)
“The Man Who Turned into a Moose” (continued)

04:58 Háá jó ćhtzęzh guu naađę sô, All of a sudden, right in front of them,
05:04 hadaa taawadéhsat jii. the moose all ran off.
05:07 Jii lhigé čhchaage guts’egúh hadaa taawadéhsat úh, One moose and then another separated from the rest of the herd and started to run away.
05:12 “Jii naade ustlę. Juude jii naade něłtëh,” “I’m going to go around this way really fast. You go around that way and turn the moose around,” yéhjii juude sô łaanewôʔôh, he said [the younger brother to his older brother], Everything happened so quickly,
05:17 ɓ wanehjuude juude yanáʔaak. the young man was able to fool his brother who was trying to stay close to him.
05:20 Juude yanáʔaak ḥóhch’ii. He fooled him.
05:24 Jii lhigé déhso ədə lhigé déhso dę. While the young brother ran after one moose, his older brother ran after the other one.
05:27 Ii wats’êh zôh najwé. Then he was gone.

While Sam Acko provides additional contextualization for a wider audience, the core of his account was not simplified for a potential Internet audience. In contrast, Billy Attachie, in his account at Nétl’uk (Osborn River), chooses to provide a general orientation for an audience that lacks familiarity with the local language and traditions. His observations
were quite general and make use of short statements that could readily be translated into English. He frames his performance by providing the date, a convention he may have adopted from anthropologists who include such information to later identify the recording.

**Billy Attachie at Nétl’uk (Osborn River)**

00:00 Juuhđzenéh, July sixth, 2005.
Today is July sixth, 2005.

00:09 Jô ats’ach’ê Nétl’uk dê;
We are here at Nétl’uk, [the end of the flat];

00:12 jô laa Nétl’uk wúuzhe.
this place is called Nétl’uk.

00:15 Tôchchedôh, jô dane náájeh, jô dê.
Long ago, people used to live here, right here.

00:23 Ii kwâ wôle gwe kwâ wôtlô.
There were many houses.

00:26 Haatseh júúhje
The first ones over here

00:28 north ts’égúüh dane nááje eh,
lived north of here,

00:31 e ii watl’ôh yeh ts’èlegae wadzis Ɂhtseʔ.
and later on they lived by the creek.

Billy’s full account provides an overview of the life of Dane-zaa at Osborn River and other locations in the early twentieth century. Billy Attachie has extensive experience as a translator working with anthropologists and linguists. He may have been inclined to craft his presentation based on his perceptions of the level of knowledge of a non-Dane-zaa audience. Although he spoke in Dane-zaa Ɂáágeʔ, he relied on basic descriptions to deliver a clear picture for a diverse Internet audience.

The variation in the Dane-zaa speakers’ presentation styles enhances the appeal of the Web site. Viewers can experience a range of genres requiring different degrees of interpretation. The storytellers have extensive experience working with academic researchers and seeing the ways indigenous cultures are represented in publications, in films, and on television. For them, self-representation through storytelling and singing has become a common experience. The variation in the approaches they take

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to these performances indicates the extent of their involvement in, and knowledge of, indigenous documentary projects, as well as differences in their training and social roles.

**Curation and Interpretation: The Politics of Voice**

Sam Acko’s narrative “The Man Who Turned into a Moose,” told at Madáts’atl’oje, was filmed along an old seismic cut, tangible evidence of the extensive oil and gas exploration and extraction activity in the area. Photographs of the process of recording this narrative are featured prominently on the Madáts’atl’oje page and throughout the exhibition. An example of hypermedia, these photographs, along with interpretive text and links to other places and narratives, contextualize the narrative to a greater degree than text or video alone could do. In this way we can see that the project offers a textual and audio-visually reflexive reading of the actual production of the narrative and of the representation of Dane-zaa culture, histories, and language.

The production of the virtual exhibit was a collaborative process, and the storytellers demonstrated agency in communication to a range of audiences. Still, translating the narratives and the inclusion of the translations and transcriptions within the exhibit raise questions that anthropologists and folklorists have been grappling with since the emergence of performance studies and reflexivity articulated in *Toward New Perspectives in Folklore* (Parades and Bauman 1971) and *Writing Culture* (Clifford and Marcus 1986). To what extent do the translations impose language as “a figurative, structuring power that constitutes the subject who speaks as well as the one that is spoken to” (Poster 1990:14)? David MacDougall’s description of Asch and Marshall’s initial excitement at the idea of subtitling ethnographic films is tempered by his assertion that subtitling itself does not negate ethnographic obscurations of the subject’s voice, as Asch and Marshall might have hoped. For MacDougall, the act of converting raw recorded speech into subtitles is a process of creating a written text. This text is negotiated by the filmmaker and translator, and the result is the writing of a definitive version of a narrative that banishes alternative readings (MacDougall 1998:174). In other words, the process of interpretation and translation is, and has always been, subjective.

To attempt to address this methodological and epistemological concern, the exhibit curators, Amber Ridington and Kate Hennessy, had to make decisions about the form that the narrative translations and tran-
scriptions would take within the exhibit. Financially, it was not feasible to subtitle videos in English, in Dane-zaa Záágéʔ, and in French as required by the funder. Also, throughout the production and translation process, orthographic spellings were continually adjusted. This meant that it was essential for the design team to be able to replace words as more accurate spellings emerged. The team chose to present translations adjacent to the video window rather than within the video frame. In this way, transcriptions could be replaced as necessary without re-creating every video. More importantly, the translations and transcriptions could be viewed together, reflecting both spoken Dane-zaa Záágéʔ and the English translations that were produced together by Doig River community members and linguists. Aware of local Beaver literacy initiatives, the curators thought that giving the translations a longer amount of time on-screen would make them easier to read. While this method may not resolve the issues of authority and power that MacDougall raises, it at least represents a process of translation that sits alongside, rather than obscures, Sam Acko’s narrative performance. In addition, for those interested in studying the textual representation more closely, the transcript is available for download as a PDF file.

The selection of these narratives and their translation and transcription were only the beginning of an interpretive curatorial process that informs our understanding of ethnopoetics and ethnography, and the many layers of translation that contribute to Dane-zaa representations in this hypermedia context. Talal Asad (1986) writes that one of the tasks of social anthropology that emerged after the 1950s was the use of ethnography in the translation of cultures. He, like MacDougall, also discusses the power differential in this process, in which the words of the culture as object are often replaced with the voice of authority of an outsider. One of our goals for the Dane Wajich exhibit, as curators and interpretive text writers, was to facilitate the community’s self-representation. To this end, the curators drew on the participatory process and the inclusion of the community in reviewing multiple prototypes and drafts of the exhibit in order to make sure it represented their culture as they wanted it shown to a worldwide audience.

Even though the curators wrote the interpretive text that frames the primary video and audio documents in the exhibit, they were directed by the community to write it in the first person so that the voices of the Doig River people were prioritized. To do this, Kate and Amber had to identify
and figuratively translate the messages and themes from the videos and the planning and review meetings, and re-present them in a manner that would be both comprehensible and engaging to an outside audience unfamiliar with Dane-zaa culture or tradition. In essence, the curators used their ethnographic skills to translate the messages and themes from the primary audio and video selected for the exhibition into textual summaries which were then supplemented by graphics, such as maps and photographs. This multimedia approach allowed them to present the material in a number of formats so that, like the narratives themselves, the material would be accessible by multiple audiences and cultures.

The community chose to assert the primacy and existence of the Dane-zaa language by using it as frequently as possible on the Web site. They labeled places that are more commonly known by English names with their Dane-zaa place-names. The interactive medium of the Web site enabled the inclusion of audio clips that were activated as the mouse rolls over the word, so that it could be heard as well as read. In addition, the primary video documents were orthographically transcribed in Beaver as well as translated into English. All of these bilingual (Beaver and English) transcriptions place Beaver first, ahead of the English translation. These cyber-techniques are political statements claiming cultural authority. Because of the historical inequality between the Beaver and English languages, it was important for the Doig River people to assert the legitimacy of their oral culture through textual representation in the exhibit. As the Canadian government exercised their colonial policy of cultural assimilation, Doig River people, like most other Aboriginal groups in Canada, were forbidden to speak their own language while they were in school. Several of the stories that were told at AlááɁ Sato/Petersen’s Crossing described experiences of punishment for using their Native language in school. Many children who were punished became ashamed of their language and chose not to teach it to their children.

However, unlike the children of many other First Nations, Dane-zaa children were never taken from their families and placed in residential schools. They returned to their homes every afternoon and spoke the Beaver language with their families. Until the late 1970s, most children spoke and understood Beaver. Television, which became available to the Doig River First Nation only in the 1980s, and co-education with white students had a great impact on the loss of the Beaver language; the children became immersed in an English-speaking environment. Now, lan-
guage revitalization is a priority for Dane-zaa communities, and many elders have made efforts to teach their grandchildren their language. As May Apsassin said in her video included in the exhibit: “That's what I was saying to my family. I say, 'Go to school, hang on to your language, hang on to your tradition way of living, and you be a hundred percent good person.'” The *Dane Wajich* virtual exhibit has helped to build a public presence and to strengthen a positive public identity for the Doig River First Nation as Indigenous Dane-zaa people. Both the process of creating the exhibition and the final public product copyrighted by the Doig River First Nation are forms of social action inextricably tied to multiple forms of translation.

**Indigenous Heritage and the Internet: Emerging Issues in Intellectual Property**

During the fieldwork and storyboarding process, the curators assembled far more information than could possibly be included in the exhibition. Selecting which stories, what places, and what type of interpretive text to include as part of the Web site was part of the multifaceted translation process that emerged in the community exhibit review. It is within this process of selecting information to share with an outside audience that a new intellectual property rights discourse developed—which ultimately meant that a great deal of material originally selected for inclusion was removed from the exhibition.

As Amber and Kate have described (2008), the exhibit raised many questions at the heart of the politics of cultural representation: How can curators and communities balance the benefits of sharing Aboriginal cultural heritage with the necessity of protecting it? Can consensus be reached over what is appropriate to show a worldwide audience versus a local audience? How is local intellectual property rights discourse constituted? The *Dane Wajich* exhibit facilitated discussion about all of these questions and focused on emerging protocols for the use and distribution of images and sound recordings from the Ridington-Dane-zaa digital archive, particularly with regard to the digital distribution of these valued cultural materials to new global audiences on the Internet.

Robin Ridington has published pictures of the last Dane-zaa dreamer, Charlie Yahey, in a number of publications that the communities know about, value, and have access to. Yet in the course of this virtual museum project, and in the context of discussions related to the reach of the
Internet, intellectual property rights and obtaining permissions from community members to use the materials became an issue. After extensive dialogue as part of the community review process, facilitated by Amber and Kate in their capacity as project co-curators, it became clear that permission would be required from both the copyright holders and the intellectual property right holders for this Web-based project. However, we found that it is not always simple to determine who the intellectual property right holders are, especially with materials from people like Charlie Yahey who are now deceased. Some saw dreamers’ songs and drawings as collective cultural property, while others began to claim it as individual and family cultural property.

The Doig River community ultimately decided that relevant families—and particularly the recognized family head or elders—should help decide how and where the materials relating to their family are publicly circulated. Throughout his lifetime, Charlie Yahey was a member of the Fort St. John band. In 1978, two years after his death, the Fort St. John band split into the Blueberry River and Doig River First Nations. Charlie Yahey’s immediate descendants, who are now members of the Blueberry River First Nation, decided that they did not want pictures or recordings of Charlie Yahey included in the Doig River production, in part because they wanted to save them for use in a production of their own. The Doig River people, many of whom are closely related to Charlie Yahey through blood or marriage, still talk about their memories of Charlie Yahey and about the importance of his prophecies for their people. However, because of concerns expressed by members of the Yahey family, the curators decided not to include sound recordings of Charlie Yahey that Robin had collected, along with their accompanying translations and transcriptions, in the exhibition. Because Charlie Yahey had said on tape that through Robin's recordings “The world will listen to my voice,” this decision was a difficult one.

The reasons for this materials’ removal reflect emerging intellectual property rights concerns faced by many First Nations as they begin to exercise control over both their oral and material cultural heritage (see, for instance, Tuhiwai Smith 1999; Brown 2003; Karp et al. 2006). The immediate concerns that arose, however, seem to have more to do with divisions between different Dane-zaa communities than with an agreement about restricting access to their shared heritage. Because Robin's audio documents contain what amounts to a verbal agreement between him and
Charlie Yahey that the tapes should be made available to a wide audience (“The world will listen to my voice”), it is difficult to know whether this verbal permission to reproduce tape recordings should extend to distribution on the Internet. Neither Charlie nor Robin could have known that this technology would come into existence, although Charlie as a dreamer and prophet certainly used his powers to see into the future. Many of his prophecies tell about the present industrialization of Dane-zaa territory, and members of his family and larger community credit him with remarkable prophetic insight.

The Yahey family is concerned that it may not be possible to guarantee that the material is protected and handled in a culturally appropriate manner on a public medium like the Internet. They feel that their right to control the public use of their cultural heritage materials must always be acknowledged through the courtesy of asking permission. Ultimately, the Doig River community did choose to share a large selection of cultural heritage materials from their community, but they also chose to remove from the exhibit culturally sensitive materials deemed by some to be too powerful for uncontrolled access on the Internet. The approved materials include archival recordings and pictures taken without a public audience in mind as well as the newly recorded video and images, which were taken anticipating a public and global audience; both can be seen throughout the exhibition. We hope that sharing some of the details of the participatory process utilized during the creation of the *Dane Wajich* exhibit will be valuable to others working with the public display of similar politically charged cultural materials from other First Nations communities.

**Conclusion**

This chapter has described our use of video and Web-based media to represent “interlinear” translations of ethnographic texts. It also has placed our own work within the context of the history and development of translation, transcription, and interpretation in anthropology and ethnographic film. Indigenous-directed video projects like the Igloolik Isuma productions, as well as Doig River’s 2007 *Dane Wajich* exhibition, exemplify the potential of new visual media to show original performances in indigenous languages alongside their textual translations. We hope that both the performances we have described and the accompanying interlinear translations will become a valuable resource for Dane-zaa, and others
interested in their culture, who may wish to learn Dane-zaa Záágéʔ with
the benefit of both spoken and written materials.

Our experience indicates that translation and the choices involved in
textual and visual representations are part of a subjective process. Each
representation carries different connotations reflecting the decisions of
each agent involved in the original and translated performances. It is only
by acknowledging and detailing the processes involved in translation that
a reader can understand it more fully. Many early ethnographers did not
describe the process of translation, and no technology existed to enable
them to create audio or video documentation of the performances. We
are fortunate to have modern methods that enable us to better convey
the original meanings and to represent the voice of the original speakers.
Most importantly, we are aided by the best tool of all—the collaboration
and cooperation of the people of the Doig River First Nation. We hope
our work is worthy of their trust.

Notes
Robin Ridington and Jillian Ridington are ethnographers, Patrick Moore is a lin-
guistic anthropologist, Kate Hennessy is a visual anthropologist, and Amber Rid-
ington is a folklorist.

1. See the book of that title, When You Sing It Now, Just Like New, by Robin
and Jillian Ridington.

2. Co-curators Amber Ridington and Kate Hennessy coordinated the initial
production process; coordinated and facilitated the tasks of all the team mem-
bers and partners; wrote, edited, and curated content; worked with multimedia
designers on drafts of the exhibit design; and also conducted a number of com-

munity consultations and exhibit reviews at Doig River between 2004 and 2007.
They also worked with two different chiefs, and their councillors, during the
course of the project, each with different perspectives and concerns about sharing
and protecting their culture with the public and on the Internet.

Throughout the production and consultation process, Robin and Jillian Rid-
ington assisted the curators by drawing on their own wealth of knowledge and
experience in Dane-zaa communities to provide contextualizing information for
the exhibit's interpretive text, and suggestions for the use of particular archival
images, texts, and sound recordings from the repatriated digital archive.

3. To address one of the community's core concerns, about language docu-
mentation and revitalization, the community also formed a partnership with lin-
guistic anthropologist Dr. Patrick Moore (University of British Columbia) and
Dr. Dagmar Jung (University of Cologne), who had recently received funding from the German Volkswagen Foundation for Beaver language documentation. Working with Dane-zaa language experts such as Billy Attachie, Madeline Oker, and Eddie Apsassin, Moore, Jung, and their colleague Julia Miller were able to use these funds for extensive translation and orthographic transcription of Dane-zaa Záágé’, both for use in the virtual exhibit and for use in local language revitalization programs and oral history projects.


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The Reciprocal Research Network: The Development Process

Susan Rowley

Abstract: In this paper I explore some of the challenges, opportunities, and transformations that occurred during the development of the Reciprocal Research Network (RRN). Due to the nature of the project—creation of a research infrastructure—and the methods of development—collaborative and agile—issues of interest to communities and museums working together and/or involved in digital projects occurred during development. Some of the creative tensions and frictions within this project are described along with the RRN specific resolutions that were reached. Process, dialogue, transparency, and letting go of control were all key to establishing the trust relationships necessary for the development of the network.

[Keywords: Collaboration, Information Technology, Museums, Museum Community Relationships, Technology. Keywords in italics are derived from the American Folklore Society Ethnographic Thesaurus, a standard nomenclature for the ethnographic disciplines.]

Recognizing that collections and work space was a serious problem, recognizing that collections were being moved to and fro on a daily basis to create working space, recognizing that accommodating community visits was becoming difficult, and agreeing that this compromised the museum’s mission, the staff of the Museum of Anthropology at the University of British Columbia (MOA) decided to take action. Following consultation and discussion with Indigenous communities exploring how to improve and further their relationships with the museum, the MOA submitted a major grant application to the Canada Foundation for Innovation (CFI). Founded in 1997, this organization funds research infrastructure creation to facilitate Canada’s “capacity to undertake world-class research and technology development that benefits Canadians and the global community” (CFI 2013). MOA submitted A Partnership of Peoples: A New Infrastructure for Collaborative Research at UBC’s Museum of Anthropology in 2001. Engaging with notions of power realignment (Ames 1999), MOA extended previous practice in moving beyond academics to include three Indigenous communities as named researchers on the application. In addition, 12 cultural organizations submitted letters indicating an interest in contributing data to one component of the project, the digital research infrastructure, tentatively called the Reciprocal Research Network (RRN).

Part of MOA’s successful CFI application boldly proclaimed:

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Collaborative museum research is grounded in the belief that originating communities should have a major voice in shaping research questions and should benefit from the new knowledge that is produced. There is no doubt that collaborative research with communities will be the dominant model for museums in the future. As yet, however, no existing museum facility adequately supports this research model. The design of current buildings resists community participation and impedes the kind of critical research on cultural heritage that First Nations and other communities need and want. Furthermore, until now museums have used new electronic technologies largely to computerize museum inventories and create virtual exhibits. The enormous potential of technologies to support interactive research partnerships among geographically dispersed researchers and across culturally distinct knowledge systems has yet to be realized.

The RECIPROCAL RESEARCH NETWORK will be the first of its kind in the world for collaborative museum research. It will link all participating researchers and collections and provide an innovative, dynamic tool for interdisciplinary research of regional, national, and international significance. For community researchers, the RRN will revolutionize access to artifacts, images, and knowledge. It will overcome a major existing barrier to cross-cultural research by adapting electronic tools to culturally diverse traditions of knowledge management and by accommodating indigenous rights to traditional knowledge. Initially, the RRN will support research on Northwest Coast expressive culture.

These words, forming the original vision for the RRN, provided guidance and benchmarking from development through to launch in 2010. The RRN (http://www.rrncommunity.org) is designed to provide a mechanism for bridging knowledge communities by facilitating and promoting research across institutions. This makes the RRN fundamentally different from many museum/community digital technology projects with deliberate educational outcomes. While the intention of the project was to increase access to cultural heritage through digital technology, the development of contextual information and educational tools was specifically prohibited within the terms of the grant.

After the initial exuberance of receiving the grant passed, MOA staff had to deal with the challenge of turning vision into reality. The RRN clearly needed to be developed through a collaborative process, but collaboration means different things to different people. Where would the RRN be positioned along the so-called “collaboration continuum” (Colwell-Chanthaphonh and Ferguson 2008)? What ways of working together would be appropriate to the task at hand? In what became on-going practice in the RRN’s development, process and dialogue cleared the pathway.

The three First Nations organizations named in the research grant were: the Musqueam Indian Band, the Stó:lō Nation (This organization has since divided into the Stó:lō Nation and the Stó:lō Tribal Council, both of whom continue to work on the RRN), and the U’mista Cultural Society. They voiced the desire to be actively engaged in the RRN, not as collaborators but as co-developers with a voice in both the direction and the decision-making at all levels. A
Memorandum of Understanding (MOU) laying out representation was drafted and signed by all parties. These early discussions established what became a hallmark of the project: the importance of the process. Occasional frustrations were expressed when process delayed what appeared to some to be obvious solutions. However, with the benefit of hindsight, it was the times when actions leapfrogged process that led to disruptive, rather than creative, friction.

While each of the First Nation co-developers had worked previously on numerous projects with MOA, they had rarely worked with each other. Each co-developer brought different strengths to the project and also articulated different reasons to engage with the RRN.

**Musqueam Indian Band**

It is encouraging to see over the past few years...an increased presence of Musqueam culture and people within the Museum of Anthropology, which has been a repository of cultural wealth. Museums have the obligation to bring that cultural information back to the community where it originated. [Leona Sparrow, Director Treaty, Lands and Resources, Musqueam Indian Band (RRN 2004)]

The traditional territories of the Musqueam Indian Band include the mouth of the Fraser River and the land occupied by the Vancouver campus of the University of British Columbia (Musqueam Indian Band 2006). Musqueam has been at the forefront of using the Canadian legal system to strengthen aboriginal rights. Landmark Canadian Supreme Court cases fought and won by Musqueam are *Guerin v. The Queen* 2 S.C.R. 335 (1984) and *Sparrow v. The Queen* 1 S.C.R. 1075 (1990). Indigenous groups around the world use these precedent-setting decisions in their legal cases (Reynolds 2005).

Musqueam has had a long relationship with MOA, continually challenging the institution to reflect on its relationships and behaviors towards Indigenous communities. One small example is provided as illustrative of this relationship. In 1980, MOA opened *Visions of Power, Symbols of Wealth: Central Coast Salish Sculpture and Engraving*. This exhibit, curated by Michael Kew, which focused specifically on Coast Salish cultures, contained many culturally significant, sacred, and ceremonial artifacts. Among the displays was the initiation regalia worn by a novice Longhouse spirit dancer. Prior to its arrival at MOA this regalia had been spiritually cleansed so that it could be placed on display. Almost immediately after the exhibit opening, community concerns were raised. At a community gathering in the Musqueam Longhouse, spirit dancers expressed their discomfort with the public visibility of private, sacred belongings. They instructed Leona Sparrow, a Musqueam band Councillor with an M.A. in anthropology, to take their message to MOA. Subsequently, MOA Director Michael Ames and Kew met with a delegation of spirit dancers at Musqueam where they formally requested the removal of the regalia from the exhibit (Sparrow, personal communication to the author, March 23, 2013). This marked the first time that MOA removed an item from display at the request of a community, and it opened the discussion on culturally sensitive heritage at the institution. For the Musqueam Indian Band, their involvement with the RRN is a continuation and furthering of their ongoing relationship with MOA and the university as well as an example of indigenizing the academy.
Museum of Anthropology

The mission of the Museum of Anthropology is to investigate, preserve, and present objects and expressions of human creativity in order to promote understanding of and respect for world cultures.

The Museum strives:

To provide information about and access to cultural objects from around the world, with emphasis on the achievements and concerns of the First Peoples and British Columbia's cultural communities;

To stimulate critical thinking and understanding about cross-cultural issues;

To pose questions about and develop innovative responses to museological, anthropological, aesthetic, educational, and political challenges. [MOA 2008]


In 1976, MOA pioneered the concept of visible storage. By placing the majority of the museum’s collection on public display, the museum invited visitors to be researchers. This act was seen as democratizing access to collections and, thus, to knowledge. Over the years, the strengths and weaknesses of this approach became apparent. While some Indigenous community members appreciated unmonitored access to the collections, others questioned the rights and authority of MOA to display this material as well as its decontextualized presentation and adherence to a Western classification system (Cunningham 1999). In the A Partnership of Peoples project, MOA undertook to re-conceptualize visible storage, working with communities to display materials in respectful, culturally appropriate ways using Indigenous classification schema (Kramer in press). The RRN was conceived as a way to take this new vision beyond the physical constraints of the museum building and the collections of a single institution.

Stó:lō Nation/ Stó:lō Tribal Council

The network established by this project will give us greater access to information about our own culture and history housed in centres around the world. It is important that we continue to conduct research with our Elders, traditional Stó:lō historians, and Western-trained scientists alike on the many aspects of our culture.
and history; the RRN project will assist us to this end. [Albert “Sonny” McHalsie, Director, Stó:lō Research and Resource Center, (RRN 2004)]

The Stó:lō Nation (SN) and the Stó:lō Tribal Council (STC) represent 19 First Nations bands located along the Fraser River in British Columbia (BC). Seeking to educate the public, they have engaged in public archaeology, initiated conferences, developed public outreach programs, assisted with exhibits, and published books (Carlson 1997, 2001). Over the past 20 years they have hosted numerous university-based courses in archaeology, ethnography, and history. These include field schools with the University of BC, Simon Fraser University, University of the Fraser Valley, University of Victoria, University of Saskatchewan, and University of California at Los Angeles. Students undertake projects developed by and with community members. For the Stó:lō, this is a way of altering future practice through training the next generation of scholars in new ways of working with Indigenous groups and sensitizing them to community-based collaborative research (Carlson 2001; Clapperton 2010). Working on the RRN continues this tradition of developing relationships based on reciprocity.

U’mista Cultural Society

We are a house providing information about our cultural and historical heritage first to our own peoples and then to the world of researchers, educators, and students. We are also coordinating and assisting our members to extend their boundaries of research worldwide. So much information about our cultural heritage exists outside of our boundaries and this information is very important to the intellectual and cultural growth of our nation. The RRN will allow us to bring this all together in a cohesive manner and enable us to further maintain our culture. [Andrea Sanborn, Director, U’mista Cultural Society (RRN 2004)]

The U’mista Cultural Society is located in Alert Bay, on Cormorant Island off the northern tip of Vancouver Island. It serves members of many Kwakwaka’wakw bands. The Society was formed as a direct result of the enforcement and abuse of colonial authority. In 1884, the Canadian government outlawed the potlatch, a ceremony whereby hereditary rights, titles, and privileges were transferred, celebrated, and witnessed (Bell, Raven, and McCuaig 2008). Along the Northwest Coast, these ceremonies continued to be practiced, usually in secret. In 1921, when Dan Cranmer, a ‘Namgis chief, held a large potlatch, the local government-appointed Indian agent decided to make an example of the attendees. Participants were illegally given the option of surrendering their regalia to avoid prosecution and prison (Webster 1995:138). The seized regalia were sent to the Canadian Museum of Civilization, and later almost 100 items were transferred to the Royal Ontario Museum (Jacknis 1996). Several pieces were illegally sold to George Heye. Over time, masks also found their way into several international museums and private collections. Following the repeal of the potlatch ban, community members worked towards the return of their regalia. In the early 1970s, the Canadian Museum of Civilization agreed to repatriate, but only if a museum-like facility was built to house the treasures (Mauzé 2003:505-506). In 1974, the U’mista Cultural Society was founded with the express purpose of constructing the required facility and working towards bringing the rest of the collection home. It has since brought back regalia from the Royal Ontario Museum, the National Museum of the
American Indian, and private collections in France, and has negotiated a long-term loan with the British Museum (Sanborn 2009). For the U’mista, the RRN is a way to continue their mission by bringing more of their material heritage visually home for their members.

**First Steps**

After an initial flurry of activity, including the first MOU, the entire *A Partnership of Peoples* project (MOA 2001) existed in limbo for five years. CFI and the BC Knowledge Development Fund had each contributed 40 percent of the costs, leaving the university to fund the final 20 percent. Planning continued, but the uncertainty weighed on all. Ann Stevenson, then MOA lead for the RRN, wrote grants enabling the hiring of a RRN intern from each co-developer. Tasked with engaging community and promoting the idea of the RRN, these interns rode the same roller coaster of optimism and pessimism. Terry Point (then Musqueam RRN intern) expressed concern and hesitancy about promising something to his community that might not materialize (personal communication with the author, March 24, 2013).

During this period, staff at MOA changed, including the director (twice), the project lead, and the RRN lead. The constant for the RRN throughout the development was the First Nations co-developers and their representatives. Working together, a Steering Group (SG) was formed to drive the RRN forward. It consisted of a member from each of the co-developers: Leona Sparrow for Musqueam, Dave Schaepe for SN/STC, Andrea Sanborn for U’mista, and myself for MOA. The SG put forward that it would make all major decisions regarding the scope and schedule for the RRN, including overseeing the hiring of project personnel and allocating the budget. For MOA and the university, this represented another step in letting go of control. This was facilitated and formalized in the RRN Project Charter (RRN 2006) compiled by the SG and signed by the governing authority of each co-developer.

The task of creating the Project Charter and the discussions that it engendered built trust and served to coalesce the SG members into an effective team. Whereas each co-developer had different reasons for participating, all agreed on the potential of the RRN to alter access and enable “community members to become active participants in and one of the drivers of research” (RRN 2006:3).

The charter reflected decisions derived through consensus. An example was the definition of the RRN’s scope. In the final charter, the scope was presented as a series of tables with three columns. These columns were headed: “In Scope and Funded,” “In Scope and Unfunded,” and “Out of Scope and Unfunded.” For an item to be placed in either of the first two categories, the SG had to determine that its successful implementation was critical to the project. The second and third categories led to the most discussion. The In Scope and Unfunded category included such items as: support for co-developer community members to work on the project. This category caused the most problem as budgets needed to be reworked or other funds secured. The Out of Scope and Unfunded category included many items that SG members agreed were important but not on the critical path and that, therefore, could not be supported through the grant. Examples of items in this category included: tools for quantitative analysis, support for virtual reality, and implementation of purely educational content. The scope became the “stake in the ground” against which progress was measured.
The Project Charter also contained several lists of deliverables. Included at the top of the first list was a signed “Framework Document” to include governance, research guidelines, access, use protocols, and other issues (RRN 2006:12). Further down the list were the technical documents for the RRN and the development of the system. The SG decided to focus on two aspects at the beginning of the project: the Framework Document and solutions for the creation of the RRN. Work commenced immediately on drafting a Framework Document.

Perhaps the largest stumbling block facing the project was the SG’s lack of technology knowledge. All SG members used technology daily, but only one had working experience with information technology (IT) project management, and no one had experience in IT development. The task seemed daunting, and perceived hurdles were exacerbated by project management professionals who informed the SG that almost 90 percent of IT projects fail due to a poor understanding of requirements and attendant “scope creep.” The SG was uncomfortable, as the front ending of requirements did not mesh philosophically with a collaborative participatory action model. We wondered how requirements could be set without ongoing community engagement and review. Here we experienced tension between our emphasis on dialogue and the hired consultants’ expertise. With the completion of the Project Charter (RRN 2006), the SG decided to move forward without external project management. As the SG finished this document, MOA received the green light for the entire A Partnership of Peoples project (2001) from the university despite the ongoing need for fundraising to acquire the matching funds required by the original grant.

The early community input gathered by the RRN interns had been tempered by the concerns alluded to above. With the uncertainty now resolved, the SG felt comfortable requesting broader community assistance to develop requirements for the RRN. It researched websites with features similar to those outlined in the Project Charter (RRN 2006) and grant application. A subset of these was demonstrated to the Stó:lō Xyolhmet S’olhetawtxw Sq’éq’ip (Stó:lō House of Respect Caretaking Committee, composed of respected and knowledgeable Stó:lō elders). Meetings also were held with UBC staff and community members. Several basic principles were developed based on participants’ feedback. These were: (1) make the site easy to use, (2) avoid form-based searches, (3) encourage discovery, and (4) keep it visually uncluttered.

Despite recommendations from management professionals that technical consultants be hired, the SG chose instead to work with university students. There were several reasons, including budgetary ones, for this decision. Paramount was the SG’s desire to build capacity and to develop local expertise for all co-developers. For one term, a team of computer engineering students explored the technical requirements for the site as part of their course work. Two of these students were hired for the summer to develop a prototype. Within six weeks, the first features were ready for testing. Heeding the comments from members of the Stó:lō Xyolhmet S’olhetawtxw Sq’éq’ip, the developers created an open environment where all object records were available without having to enter any search terms. Instead, they included a faceted search based around questions of Who, What, Where and When, allowing users to focus in on their desired criteria. These searches employed tag clouds of words organized alphabetically, thus cutting out the guesswork involved in form-based database searches. MOA permitted data drawn from their collections database to be used for this test.
This first iteration was demonstrated to members from the co-developers. Within minutes, museum staff and community members were able to use the system and provide valuable feedback. Watching elders who rarely had used a computer connect with their cultural heritage, some of which they had never seen before, was remarkable. This experimental engagement also alleviated SG concerns by demonstrating the technical feasibility of the project.

Following the summer project, the student developers were hired for the entire project. They brought the concept of developing the RRN using an “agile” approach to the SG. Agile software development is based on principles of teamwork, rapid iterations, constant communication, customer satisfaction, and working software. (For insight into the agile approach, see: http://agilemanifesto.org/). The RRN implementation of this approach included a sandbox-testing environment to ensure institutional partners, researchers, and students could participate actively in the development process. The SG perceived agile development as a better fit for collaborative work with communities. This was proven to be the case time after time during the course of development.

Partner Institutions

Twelve museums, including university, provincial, state, and national institutions, had submitted letters of potential interest in the RRN for the CFI grant application: the Royal British Columbia Museum, the Burke Museum, the Laboratory of Archaeology at UBC, the Glenbow Museum, the Royal Ontario Museum, the Canadian Museum of Civilization, the McCord Museum, the National Museum of Natural History, the National Museum of the American Indian, the American Museum of Natural History, the Pitt-Rivers Museum, and the Museum of Archaeology and Anthropology, University of Cambridge.

Geographic distance, perceived budget constraints, misplaced priorities, perceptions of capacity issues, and communication difficulties across time zones led to serious challenges in relationship building between the SG and these institutions. Teleconferences were attempted throughout the project but were only somewhat useful, given people’s busy schedules combined with multiple time zones. Later a website was established to aid in the distribution of documents. Again, it was only somewhat useful. Personal phone calls and e-mails proved to be a more effective communication strategy. The most effective communication method throughout the project was face-to-face discussion. However, the original budget contained funding for only one physical meeting of the partner institutions. The SG held off on this workshop until: (1) the University allowed the entire CFI project to proceed, (2) there was something concrete to demonstrate, and (3) a draft Framework Document was ready for circulation. The Framework Document was more than 30 single-space pages and contained information about governance, access, and terms of use. All pages were clearly marked “Draft for Discussion Only.” This draft was sent to all partners prior to the in-person workshop.

On the first morning of the workshop it immediately became clear that our strategy had been a mistake. Over the course of the morning, many of the points that Indigenous communities raise to demonstrate misplaced institutional authority and museums’ lack of attention to relationship-building were employed by staff from the partner museums to describe their sense of the SG. For
example, while the SG had created the Framework Document as a discussion draft, its completeness led some museum staff to question the use of the term “partners” for the institutions. Wouldn’t partners have been invited to contribute to either the conceptual framework or to the document itself? For some of the institutional representatives the nature of the collaboration and the established hierarchy was an issue. Why hadn’t they been asked to contribute to the establishment of the governance structure? Likewise the RRN prototype, while predominantly positively received, gained negative responses for focusing on MOA data and raised concerns that the project was MOA-centric. Salvaging the project can partially be attributed to the way we literally wiped the slate clean on the second day by throwing out the Framework Document and the agenda in preference for a day of dialogue on “Next Steps.” However, an equally important component lay in the fostering of these tentative and emerging relationships that took place during the first evening’s creek walk at Musqueam, followed by a delicious salmon dinner and a wicked after-dinner game of “Musqueam bingo.” By holding off on the face-to-face partner meeting, product had been placed ahead of process and dialogue.

The tensions and frictions (see Karp et al. 2006; Tsing 2005) from the different experiences, expectations, and goals of those involved in the project led to creative solutions. It was in the face-to-face workshops that the transformative nature of the project became visible as each group/participant felt empowered to voice opinions, as relationships developed and people saw their concerns listened to and then acted upon. This spirit of collaboration that began in that first workshop continued with the addition of two workshops, allocation of funds for the partner institutions, and creation of a simple MOU between the co-developers and the partner institutions outlining the purpose of the RRN and the required staff commitments during the development process. At launch in 2010, 11 of the original 12 institutions contributed data to the RRN.

The partners saw the opportunities presented by the RRN for developing relationships based on reciprocity with communities. Challenges were also identified. These included issues of capacity, staffing commitments, relationships, control, and funding.

### Relationships and Control

The partner institutions brought years of collaborative research and/or exhibit experience working with communities around the world to the RRN. It was therefore surprising to have several people allude to concerns over perceived power imbalances. Whether community or multi-vocal (Phillips 2003), most collaborative museum exhibits are dyadic in nature, while discussions dealing with the return of cultural belongings are almost always so. The institutions, including MOA, had less experience of working with multiple Indigenous communities with potentially divergent and/or competing interests. This was of special importance in BC in the contentious area of contemporary Canadian Land Claims. Two of the institutions, the Royal BC Museum and the Canadian Museum of Civilization, are part of the BC Treaty Process. Therefore, the collections they house are part of active negotiations. In addition, a potential power imbalance was noted in that the SG consisted of three representatives from First Nations organizations and only one from a museum. One observer commented *sotto voce* about the shoe finally being on the other foot. The fact that all of the institutions continued to participate in the
development demonstrated their willingness to experiment with new models of working and their commitment to shifting power relations.

Generally collaborative community/museum projects focus on community-specific materials, whereas the RRN mandate was Northwest Coast material culture. As a result, some institutions wondered if they should send information only about items with definite Musqueam, Stó:lō or Kwakwaka'wakw provenance. This way of regarding the RRN aligned with repatriation in that some people saw the RRN as a digital or virtual repatriation, and therefore viewed it as confined to items from the Indigenous communities represented by the RNN co-developers. At the same time, the SG heard that some First Nations communities wondered, “If our heritage appeared on the RRN would this mean that control over it was being given to MOA, Musqueam, Stó:lō, and U’mista?” These were serious concerns impacting issues of trust, authority, and control. With more than 190 First Nations bands in BC, would it be feasible for SG members to attend band council meetings and request band council resolutions supporting the RRN from each? The SG decided instead to approach the three First Nations umbrella political organizations within BC: the BC Assembly of First Nations, the Union of BC Indian Chiefs, and the First Nations Summit. Each passed a resolution stating that its members: (1) endorse and support the development of the Reciprocal Research Network (RRN) as a research tool to assist First Nations and museums to develop relationships and to access and share cultural information, and (2) encourage museums to provide the RRN with data culturally and historically significant to the First Nations of British Columbia.

These resolutions were important as a way of reaching out to local Indigenous communities in BC. They were also of assistance to the partner institutions in assuring different levels within the administration of wide support from BC First Nations for the RRN.

Control over data was expressed in multiple ways but could be divided into two: reliability and authenticity. Each institution had to overcome concerns over the reliability of their contributed data. All were aware that their records contain numerous gaps, omissions, and even errors. This is sometimes referred to as “messy” or “dirty” data. Providing general access to this made many institutional representatives uncomfortable. No matter how museums present information, the public sees institutional voice as having authority. Therefore, for a museum-sponsored site to allow errors, inconsistencies, and ancient terms that should be maintained with the record but seem pejorative today out into the public realm is problematic. Some institutions perceived the digital records as less accurate than other forms of records or as being incomplete when compared to their accession files. To the SG, these concerns were surprising as most of the institutional partners had already made their collections accessible online through their own websites. It was this concern with reliability of data that ostensibly led one institution to withdraw, explaining that while it wanted to continue, it currently did not have the staff capacity to check its data before they could be shared via the RRN. Other institutions chose to send only a subset of their data that had been “cleaned.” This issue of letting go of control over data is one that many museums are still struggling to resolve.

None of the members of the SG nor of the immediate RRN development team were involved with records management. They were, therefore, slow to understand concerns that some of the institutional partners raised in regard to authenticity as opposed to reliability. To facilitate the
user experience on the RRN, all records are displayed using the same layout. This makes comparisons, searching, and viewing simple for the user. However, this also alters the institution’s data. Sometimes these changes are as simple as reformatting, but in other cases data manipulation occurs (e.g., the splitting of terms when an institution uses the same field for material and techniques, whereas the RRN has a separate field for each). Given that the archival authenticity of a record is based on the understanding that the person/institution that is presented as having created the record did in fact do so and that no one has tampered with the data (http://www.archivists.org/glossary/term_details.asp?DefinitionKey=9), the RRN clearly disrupts the record’s authenticity. The software engineers, who participated in all the workshops, proposed a technical solution to successfully address this. They added a tab so that, in addition to the RRN record format, users can view the data as sent from the institution. They also added links from the record to the same item as displayed on the institution’s own website (where available). Administrators of the site can also see the mapping notes showing the data translations made by the RRN. This is merely one example of the benefit derived from using an agile development methodology and having the software engineers present at all meetings.

Finally, the RRN platform allows members to create their own “Projects.” Users select items based on their own criteria to put into their Project. In a Project, unlike in a physical museum exhibit, where cultural belongings can exist in only one physical space, users can reorder materials using their own classification systems. The creator of a Project also determines levels of access to that Project. The basic set of access criteria is: (1) all members of the RRN can see and participate in the project, (2) all members can see that the project exists but must ask to join, and (3) no one can see that the project exists unless invited. When this capacity was first demonstrated for the partners, they asked if this meant people could establish Projects to target pieces for repatriation without the museum’s knowledge. The simple answer was, “Yes.” The partners’ ability rapidly to accept this demonstrated the developing of relationships between the communities, the SG, and the partners.

Community Perspectives and Reciprocity

Gathering community feedback was a critical component of the project, as was building capacity within communities. Hiring consultants to carry out user testing in communities could not fulfill this goal. Once again, the budget was reworked and funds transferred to each First Nation co-developer to hire Community Liaison Researchers (CLRs). In addition, a CLR coordinator was added to the RRN development team. The CLRs worked with groups from youth to elders, gave demonstrations at home and across the province, tested new features, and provided ongoing feedback to the development team. They constantly questioned the project, their familiarity with the system enabling them to point out weaknesses and suggest modifications. The CLR coordinator liaised between the CLRs and the Development team to ensure a reciprocal flow of information.

The aim throughout the development process was to build a system that encouraged exploration, could foster trust, and could lead to the development of new relationships. Creative tensions existed between desires to keep the site simple and to have all the features and requirements requested by the multiple, overlapping user groups. There was also a very tight feedback loop in
the early stages where the developers would hear a request and implement the feature within a week or two. This did not translate as well later in the project when there were many features that had to work together. Management of this process fell to the CLR coordinator. Her job was to ensure that users continued to feel their contributions were important and that they understood the reasoning when a suggested change was not integrated into the system. The CLRs also attended the Partner Institution Workshops and gave presentations providing the museum with an opportunity to understand the impact and importance of the project for the co-developers’ communities.

The reciprocal nature of the RRN is a fundamental component of the system. Within the RRN this is achieved in several different ways. One of these is the ability of users to “Ask a Question” or enter “Shared Knowledge” about a piece. These entries are attached to the item’s record, and other users may respond. In addition, this knowledge is sent to the relevant institution, allowing it to contribute to the conversation and/or update its own databases. Can the ability to have conversations across knowledge communities actually lead to change in practice within institutions? Two examples from the development period of the RRN are discussed below. Both of these items are rattles and fall under the rubric of culturally sensitive material. Their inclusion in the RRN touches on issues of control, authority, and access.

Rattle A2100 from the MOA is defined by the institution as:

Description: Rattle made of five scallop shells in decreasing size (the four largest are pink-brown while the smallest is lighter in colour) hanging from a light brown wood hoop bound with brown string. History Of Use: Ceremonial rattle usually used during the Sxwayxwey (Coast Salish) or Xxwi Xxwi (Kwakwaka’wakw) dance. According to some Cowichan visitors who viewed this rattle in 1997, it is meant to be held in the right hand of a dancer. Culture: Northwest Coast. (www.rrncommunity.org/items/5113)

The Musqueam, Stó:lō and other Coast Salish communities practice a cleansing ritual called sxay̓ay̓əy [Sxwayxwey]. The regalia of the sxay̓ay̓əy dancers include pectin shell rattles. All sxay̓ay̓əy regalia are considered sacred, and many of those with the rights and privileges to sxay̓ay̓əy feel that they should not be put on display in museums. As a result, sxay̓ay̓əy regalia have been removed from most museums on the Northwest Coast. The Kwakwaka’wakw have a dance derived from, but entirely different from, the sxay̓ay̓əy that is called Xwi Xwi. The Xwi Xwi is not considered sacred, and Xwi Xwi masks and regalia are put on display, including at the U’mista Cultural Centre and at MOA.

This could be read as a simple binary equation: If MOA A2100 is Coast Salish, then it should not be on display, or in the case of a website, there should be no image; if MOA A2100 is Kwakwaka’wakw, then it can be on display, or in the case of a website, the image is permitted. However, in the case of MOA A2100, the only provenance information is the even more general term Northwest Coast. Therefore, a simple toggle switch does not work. Should this image be displayed or not? This led to a discussion among several of the CLRs, MOA staff and other RRN users. Here is part of the conversation as it appears on the RRN:
these shells are part of the regalia. Image should not be shown.
User: rrnworkshop 14 [CLR workshop]

This may depend on what culture this rattle is from. This is one of the difficult
issues faced by museums. In this case we are unclear which culture this rattle
belongs to as both cultures use rattles of this type and the records aren't clear
enough to be certain.
User: Sue Rowley [MOA staff]

rattle for sxweyxwy dancer.
User: Terry Point [Musqueam]

Just a personal comment on this. The Kwakwaka’wakw use this regalia as part of
a dance. It must be said that we should give reverence to the originating culture.
This was passed over through marriage and is a Salish item, which is sacred.
User: David Houghton [U’mista Cultural Society CLR]

yes it originated from coast salish and we should respect that its a [culturally]
sensitive item
User: Lawrence Isaac [U’mista Cultural Society CLR]

Unless the Museum is 100% sure of where this item comes from than [sic] it
should be assumed to be Sxwayxwey to be safe. This is part of the whole regalia
and as to protocols is not to be photographed or recorded.
User: Jody Felix [Musqueam Indian Band CLR]

Attached to MOA A2100’s RRN record, this discussion is visible to all RRN members. Did this
commentary result in any changes? Yes and no. At present, MOA’s database remains unchanged
with the image viewable (http://collection-online.moa.ubc.ca/collection-
online/search?keywords=A2100, accessed October 18, 2013). When the Kwakwaka’wakw
section of MOA’s Multiversity Galleries: Ways of Knowing Galleries exhibit was being
installed, A2100 was selected for display based on its condition. However, following the
discussion on the RRN, the curator chose to replace A2100 with a similar rattle with known
Kwakwaka’wakw provenance (Karen Duffek, personal communication with the author,
December 10, 2009).

In terms of the RRN development, these discussions were a concrete example of the project’s
engagement with concepts of cultural gatekeeping and active monitoring of data and discussions.
It was another rattle, Museum of Archaeology and Anthropology at the University of Cambridge
(MAA) 1934.1072, that provided a case study for discussion and policy formation at the final
RRN Partner Institution workshop held in March of 2010. This is a sxelməcəs rattle used in a
specific cleansing ceremony among certain Coast Salish groups. Its use is a privilege passed
down through families. Rattle MAA 1934.1072 is described in the MAA catalogue as:
**Description:** Rattle made from mountain-sheep horn with an incised design and strands of mountain goat wool cascading from the sides. As Emmons writes, “On one side is shown in full front face of the Thunderbird, very human, but the bird view indicated by the mouth on each side the two profiles. On the other side the double profile of the Thunderbird in the middle.”

**Context:** The original European tribal names and, where possible, current tribal names have both been given in separate GLT fields.; Emmons provided detailed information with the rattle in a letter, 04121934. “This is the original ceremonial rattle of the Salish people of the continental shore of British Columbia about the mouth of the Fraser River in the Musqueam Band and the Salish people of the eastern coast of Vancouver Island from Comox to Cowichan including the Comox Nanaimo and Cowichan bands. As I say this was the original proncative [sic] rattle of this people. The mountain sheep was and still is a habitant of the more inland mountains beyond the coast range, but in later years the hunting of the sheep was not carried on, so horn could not be obtained, when its place was taken by other materials such as cow's horn, sheet copper, brass and iron, and rattles of wood of any neighbouring tribes, all of which rattles were hung with the twisted strands of the wool of the Rocky Mountain goat. This decoration too was original with these Salish bands. They wore their ceremonial blankets of like strands of this wool. These rattles were rudely carved and in almost every case the Thunderbird was shown in full front view or profile. The rattle was used at death ceremonies, at potlatches and particularly when giving names to older children and for some old custom they pointed the rattle three times and at birth of child. The rattle was called Schl-mocok-Tux (rattle for hand), the goat's wool decoration Fai-He. Rattles made of the horn of Rocky Mt. sheep are undoubtedly the rarest kind of rattle on the continent. Judging from the colour, which is naturally white, this specimen is more than 100 years old.” Collected by: Emmons.Commander.G.T

**Culture:** Coast Salish

**Language:** Cowichan


When the sxelmax*x*cos rattle from Cambridge was added to the RRN, a Coast Salish community member noticed it and posted:

This item is a rattle used in a hereditary cleansing ceremony. Its use in traditional culture is restricted to specific use during its ceremonial use and is not for general public display.

As a member of one of the families with the right to use such a rattle, I have personal knowledge of the application for this item.

User: Victor Guerin [Museum community member]


In a later post on the same item Victor Guerin continued:
This may be only the start. Prior to the onset of cultural decline that ensued with the arrival of settler populations in our territories, there were literally dozens of the ceremonies known to our people as t’əχʷte:n. Today, there are only a few left in use. However, explorers and the collectors that travelled with them arrived at the time of first contact with Europeans. So, it’s very possible that examples of these sorts of objects from rites that have fallen into disuse will turn up in collections held by museums around the world. After all, even though the indigenous people of that period would not have likely parted with such treasured objects, it is known that epidemics from European diseases travelled over land from the east and devastated populations long before the arrival of the first explorers to this coast and many villages were left devoid of their populations.


The more than 40 participants at the March 2010 workshop included representatives from the partner institutions, the SG, the CLRs, co-developer community members, and the RRN development team. Anita Herle, curator at the MAA, brought the case of this rattle forward to the group, seeking advice on how to answer the inquiry and to explore the role of the RRN in moderating, arbitrating, or participating in the process.

In the case of the sxelməxʷcəs rattle, people familiar with Coast Salish cultures know it to be culturally sensitive, but how does a geographically distant institution without expertise in this area become aware of this? How can the institution assess the knowledge being shared on the RRN? Who has the authority to decide? Is this something that the RRN would do, through either a programming or personnel solution? A programming solution could simply block all images of items determined to be culturally sensitive. A personnel solution might involve a committee tasked with exploring the request and providing knowledgeable advice. Discussion on this topic ranged far and wide, touching on the nature of reciprocity, trust, power, and authority. The following paragraphs, phrased as a series of questions, represent the issues those present raised and discussed.

When RRN members add information to records, a copy of the comment is sent to the institution thus opening a channel for communication. When the University of Cambridge museum received the comment on MAA 1934.1072, staff contemplated how they might respond. Who is the sender of the message? Does he or she speak for him- or herself or for a broader group? Who could they turn to for further information? Could/should the RRN facilitate this or set up a committee to act as an arbiter/determinant?

Should the image appear on the RRN? If an artifact is generally known to be culturally sensitive, should the RRN simply filter out the image or the record? Keeping a list of culturally sensitive materials and automatically screening their images and or entries would be a simple solution. However, the classification of “culturally sensitive” is fluid, and an item’s designation may change over time.

In the original scope document, the RRN is viewed as a discovery tool to assist in research and in the development of relationships between Indigenous communities and institutions. If the
images and records were screened either automatically or by a committee, how would this impact the ability of community members to discover, identify, and comment on their heritage? One frequently mentioned method would be to have differential access levels to the data.4

This had been considered but eventually was abandoned due to the difficulties of monitoring a system containing records relevant to hundreds of different groups including but not limited to: colonially imposed band and tribal systems, hereditary leaderships, families, and societies that cross-cut band and clan systems. Who would determine the authorities for each member?

For the sxelmaxxw’s rattle at the MAA, the provenance is given as Coast Salish with a further attribution of Cowichan. Could the current Cowichan tribes be contacted and make a determination? In this case, however, Cowichan is actually a linguistic term employed in the late 19th/early 20th century anthropological literature encompassing a much larger area and number of groups than the current usage of the term.

As an inherited privilege, the right to the rattle might have passed to people living in different communities. How would it be possible to determine who is the appropriate authority for this particular rattle if the image is not available for viewing? Community members commented that the dialogue is more productive if the image is present. They also expressed the opinion that speed of action (a concern expressed by the partner institutions) was not as important as doing things correctly. Process and dialogue needed to proceed action. The CLRs wanted to know: What would the institution’s response be? Would the museum work towards repatriation of the piece? Would it work towards portraying a greater understanding of the people? They felt the creation of this reciprocal communication on the RRN could demonstrate respect and foster new relationships. Thus, the RRN could lead to the exchange of knowledge and the possibility for creative rather than reactive solutions.

As a result of these discussions, the partners and SG decided that the role of the RRN was that of a facilitator of conversations. Institutions retain control over the data they contribute and the RRN makes data available in ways that increases people’s ability to find and engage with it, with others, and with the contributing institutions. Any decision to designate an item as culturally sensitive/sacred and to remove its image/record from the RRN should therefore be determined through a conversation between the relevant community/communities and the institution.

This role of the RRN is clearly laid out in the MOU drafted by the workshop participants, guiding the first five years of the RRN from 2010 through 2015 (RRN 2010). Article 3, the Purpose Statement, reads:

3.1 The RRN links participating users and institutional collections. It provides an innovative, dynamic tool for interdisciplinary research as outlined in the CFI Grant. The RRN is intended to facilitate the reciprocal sharing of data and information regarding cultural objects and artifacts contributed by the Parties in digital or electronic form.

3.2 The physical exchange, transfer or repatriation of cultural objects and artifacts between or among Parties or any originating communities, or negotiations regarding the physical exchange, transfer or repatriation of cultural objects,
therefore do not fall within the scope, mandate or purpose of the RRN. [RRN 2010]

Conclusions

How are large-scale institutions and indigenous communities altered through collaborative digital projects? This question was posed at the After the Digital Return workshop held in Washington DC in January 2012. For the RRN, there were certainly a number of unanticipated outcomes that came about through the shifting nature of the relationships and of the perceived authority and power dynamics between the co-developers, partner institutions, CLRs, and development team. Hopefully, this paper has demonstrated the fundamental role of process and dialogue in the creation of the RRN.

Taking an agile approach to the software development and engaging continuously with the co-development communities led to a more flexible and robust technical system and a more reciprocal social partnership. The ability of participants to see within a relatively short time frame how their concerns were addressed promoted sharing and permitted people to make fundamental and challenging decisions. A concrete example is the discussion about the sxelmaxʷcs rattle, which assisted in steering the role of the RRN towards facilitation rather than gatekeeping.

The people involved in the project were certainly affected. Some had their current collaborative practices enhanced and reinforced. Others were exposed to working with institutions and communities for the first time and carry the impact of this with them. Institutional change at any of the partner institutions is difficult to gauge and might suggest hubris on the part of the RRN. For the co-developers, this project expanded their collaboration with museums. Originally, only the two co-developers that are cultural heritage institutions planned on contributing data to the RRN. As the RRN developed, both the SN/STC and the Musqueam Indian Band decided to contribute their collection records. This makes these materials widely available for the first time.

The partner workshops, transformed from the one envisioned to the three actually held, were where institutions and communities were humanized, tensions expressed, and solutions derived. The transformation of discussions from concerns over lack of inclusion at the first workshop to engaged discussions on culturally sensitive heritage and its inclusion on the RRN at the final workshop demonstrate the value of process and dialogue in building relationships and developing the network. Without the all-important face-to-face meetings and the active engagement of the attendees, the RRN would not be as successful.

“The network will expand in two ways: to include other partners in Northwest Coast research and to conduct research in other areas” (MOA 2001:2-4). These words are contained in the A Partnership of Peoples application. Since launch, the RRN continues to expand. There are now 21 institutions contributing data to the RRN with on-going exploration into different models of expansion and the addition of data from archives.
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Notes


2. For a recent case involving the removal of a ƛχayƛʷəy mask from a museum exhibit, see Griffin 2011.

3. RRN users select one of three Creative Commons licenses for any information that they share on the RRN. All quotations used in this paper were attributed with a license permitting non-
commercial use of the knowledge as long as attribution is given to the author and the words are not altered. For general background on such CC-BY-NC-ND licenses, see: http://creativecommons.org/licenses/by-nc-nd/3.0/, accessed August 12, 2013.

4. The RRN allows users to create different levels of access through “Projects.” However, for discussion of a community-based system with the ability to construct different levels of access, see Anderson and Christen this volume.

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THE FUTURE OF THE PUBLIC DOMAIN
Identifying the Commons in Information Law

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1. INTRODUCTION

Historians of intellectual property will look back at the later part of the twentieth century as a period of politicization and change. In particular they will look back at the 1980s (or thereabouts) as marking an important turning point in twentieth century intellectual property law. Prior to this, there had been little critical commentary on intellectual property; the predominant trend (since at least the 1940s) being the expansion of intellectual property rights. Here the primary role of both academics and policy makers was to determine the best way to protect new innovations: whether, for example, computer programs ought to be protected by copyright, patents, or by some sui generis form of protection. Motivated by the (almost) unchallenged expansion of intellectual property rights that had taken place for much of the twentieth century, the situation began to change in the 1980s as commentators began to raise concerns about the excesses of intellectual property and the problems that this posed, particularly for users. Commentators began to complain, for example, that intellectual property hampered free speech, undermined creativity, stifled scientific research, and restricted access to medicines. While initially concerned with the extension of copyright, commentators soon turned their attention to the excesses of patents, trademarks and other forms of intellectual property.1

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1. Eisenberg captured the expansion of intellectual property rights and some of the problems that this creates when she said that for many years biomedical research has flourished while investigators have drawn heavily upon discoveries that their predecessors have left in the public domain. Even if exclusive rights enhance private incentives to develop further research tools, they could do considerable damage to the research enterprise by inhibiting the effective utilization of existing ones. R. Eisenberg, ‘A Technology Policy Perspective on the NIH Gene Patenting Controversy’, 55 University of Pittsburgh Law Review 633-652 (1994), at p. 646.

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Another notable development that has taken place over the last twenty years has been the growing use of intellectual property to protect Indigenous creations. While there are a number of important differences between these developments and the expansion of intellectual property rights in other fields, there are also a number of similarities. One of these is that many of the problems associated with the general expansion of intellectual property rights have also been raised in relation to the increased use of intellectual property protection for Indigenous creations. In particular, concerns have been raised about the impact that the growing use of intellectual property protection for Indigenous creations might have for the public domain and thus for creativity more generally. Taking these developments as a starting point, this chapter will critically examine recent discussions about the relationship between Indigenous intellectual property and the public domain. After providing a brief overview of some of the ways in which intellectual property has been used to protect Indigenous creations, we then look at some of the criticisms that have been raised about the expansion of intellectual property to Indigenous knowledge.

In order to highlight some of the problems that arise when the public domain is applied to Indigenous creations, we compare the way that knowledge is organized and regulated in Western intellectual property law with the way knowledge is organized in Indigenous Communities (focusing on the Yolngu peoples of Northeastern Arnhem Land in Northern Australia). In the final section of the chapter we look at ways in which the public domain can be reconfigured to take account of, rather than undermine, Indigenous interests. While many of the comments that we make will be relevant to Indigenous Communities in many different countries, we will focus on Aboriginal and Torres Strait Islander Communities in Australia.

2. IP PROTECTION AND INDIGENOUS CREATIONS

There has been a lot of discussion in recent years about the possible benefits that intellectual property protection offers for Indigenous communities. A recent comment by the WIPO Secretariat captured the tone of these discussions when in denying that intellectual property protection commodifies traditional knowledge, the Secretariat said ‘to the contrary, one immediate consequence can be to empower [traditional knowledge] holders against the distorting use of elements of their identity, or against unauthorized commodification of their [traditional knowledge]. [Traditional knowledge] holders may, if they wish so, not only refrain from giving a commercial dimension to their [traditional knowledge], but they may also prevent others from doing so.’3 As a result, the Secretariat concluded that an intellectual property ‘regime will be of crucial interest for those [traditional knowledge] holders

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3. As Frow said, the public domain is seen as the space that remains after intellectual property rights have been exhausted. J. Frow, ‘Public Domain and Collective Rights in Culture’, 13 IPJ 39-52 (1998). When returning to ‘first principles’ Litman said ‘the realm protected by copyright is privately owner; the unprotected realm is the public domain’. Litman, supra note 2, p. 1000.
4. Litman, supra note 2, p. 995.
5. As Litman notes, one of the problems with the negative definition is that ‘[p]rotectors of the public domain have found themselves on the defensive’; that is, they have to explain why copyright should not protect ‘ideas, facts, stock scenes, titles of characters’. Litman, supra note 2, p. 995.
7. WIPO/GRTKF/C/5/3, 6, para 23(a). For a general discussion see Litman, supra note 2, p. 968.
8. WIPO/GRTKF/C/5/3 Annex, 10, para 33. ‘The concept of the public domain is at the heart of the regimes of intellectual property which, in our society, regulate the public availability of information’. Frow, supra note 3.
9. WIPO/GRTKF/C/5/8, 14, para 34.
who have a legitimate aspiration of ‘commodifying’ their knowledge or at least certain parts of it if they choose to commercialize.”

There are a number of situations where intellectual property has been used in the exploitation of Indigenous technical, artistic and cultural creations in Australia. Indigenous artists in a number of Communities across Australia receive royalties for the uses that are made of their images protected by copyright. In some cases, the income stream that flows from the use of copyright works has been adapted to reflect Indigenous interests. For example, money received for the sale of prints depicting traditional stories which are produced by artists in Kubin, a Community based on Moa Island in the Torres Strait, is divided between the artist, the storyteller, and the Community. The traditional storyteller also decides whether or not and if so how the story is to be reproduced. The inclusion of the traditional custodian is an innovative way of ensuring that intellectual property is more closely aligned with Indigenous interests. Indigenous Communities have also begun to derive a share of income from inventions derived from or based on traditional knowledge or the use of biological resources on Indigenous land. For example, a number of bio-discovery agreements have been negotiated between Indigenous groups and research bodies. While the terms of these agreements differ from case to case, they often include milestone payments and a percentage of any royalties that flow from biological based innovations payable to the Community. Researchers working with Indigenous Communities in North Queensland have also begun to explore the possibility of local Communities using plant breeder’s rights to protect cultivars taken from wild plants traditionally used by Indigenous groups for food and materials.

Indigenous Communities have also used intellectual property laws to prevent the misuse and piracy of their artistic and cultural creations. This can be seen, for example, in Foster v Mountford where the law of confidential information was used to restrain the circulation of secret knowledge outside of an Indigenous Community. In particular, the Federal Court granted the Pitjantjata Council an ex parte injunction to restrain Rigby from publishing a book written by the famous anthropologist Mountford which described and analyzed the communal legends, spiritual secrets sacred sites, paintings, engravings, drawings and totemic geography of the Pitjantjatara people. The injunction was granted on the basis that the information had been disclosed in confidence to Mountford some 35 years earlier.

Indigenous artists have also turned to copyright law in an attempt to police the misuse of their creations. For example, in Yumbultu v Reserve Bank of Australia, Terry Yumbultu, an artist from Anhern Land in North Australia, brought a successful action against the Reserve Bank of Australia for reproducing an image of the

Morning Star Pole on the 1988 commemorative ten-dollar banknote. In turn, in Milgurrarru v Indofarm a group of Aboriginal artists brought a successful action against the defendants who had reproduced their artworks without permission on carpets manufactured overseas and imported them into Australia. In awarding damages for infringement of copyright, von Doussa J accepted that as Aboriginal law and custom would treat each of the applicants in the case equally it would be inappropriate to award separate judgments in favor of each of the applicants. Accordinly he agreed that the judgment should be awarded to the plaintiffs as a group. In assessing the damages to be awarded, von Doussa J accepted that the artists and their communities should be compensated for the personal and cultural hurt they had suffered as a result of the copying. Accordingly an amount for cultural harm was included in the overall assessment of damages for the copyright infringement.

The decision of Bulun Bulun v R & T Textiles offers another example where copyright law has been used to prevent inappropriate uses of Indigenous art. This case arose out of the importation and sale in Australia of printed clothing fabric that infringed the copyright in the artistic work known as ‘Magpie Geese and Water Lilies at the Waterhole’ that had been painted by Johnny Bulun Bulun, a member of the Ganalbingu Community from Anhern Land in northern Australia. In so far as this was a straightforward application of copyright law, the decision is relatively straightforward. What was noteworthy about the decision, however, was that the court held that Aboriginal artists may owe a fiduciary obligation to their community in relation to the exploitation of their artworks. While the Ganalbingu people were not involved in the creation of the work (at least in a way that is recognized by copyright law), nonetheless the court held that Bulun Bulun’s relationship with the Ganalbingu people gave rise to a fiduciary relationship. This was because Bulun Bulun’s use of ritual knowledge took place in accordance with community laws/customs and was predicated on trust and confidence. On this basis, the court held that equity imposed an obligation on the artist to preserve the integrity of the culture. If Bulun Bulun had not already brought the action, the court accepted that the Ganalbingu

10. Ibid.
12. The book was prefaced with a caveat that read: ‘Where Australian aborigines are concerned, and in areas where traditional Aboriginal religion is still significant, this book should be used only after consultation with local male religious leaders’. This helped the judge to find that the material was confidential.
14. There was a resolution of the claim between Yumbultu and the Reserve Bank, which unfortunately did not involve the Bank conceding to Yumbultu’s claim for conversion damages in relation to the bank notes. But it still involved a gesture of recognition by the Reserve Bank towards Yumbultu and the payment of some money. Thereafter litigation ensued between Yumbultu and his then former agent who had negotiated the arrangements for reproduction for the Morning Star Pole. The matter concluded unsuccessfully for Yumbultu in a judgment of the Federal Court which was concerned basically with whether there was sufficient permission given by Yumbultu to permit the agent in question to allow for the work to be reproduced on the bank note. French J. concluded in the case that there was a mistaken belief that the copyright regime could impose limitations on the use of the Pole similar to those which exist in Aboriginal law.
people would have been entitled in their own right to equitable remedies (such as a constructive trust) against the defendant.18

Indigenous groups have also used trademarks to protect their artistic creations. For example, a number of Indigenous art collectives have registered trademarks to protect their reputation. The certification marks registered by the National Indigenous Art Agency in 2000 are a well-known example of the use of trademarks to protect Indigenous art. These marks, which are known as the Labels of Authenticity, are used to distinguish authentic Indigenous artistic goods and services from other products on the market.19 The aim of these marks is to protect Communities against the growing number of non-Indigenous people who manufacture and sell Indigenous artefacts at the expense of Indigenous communities. Somewhat paradoxically, the relative success of recent copyright actions involving Indigenous art increased the need for the Labels.20 This was because in response to decisions enforcing Indigenous copyright, pirates have shifted their attention away from the copying of individual works to the reproduction of styles of works: a matter which was thought to be particularly well suited to an Indigenous certification mark. The Labels are meant to ensure that consumers are able to identify authentic cultural products. This, in turn, is meant to improve the economic benefits that flow to Indigenous people from the commercial use of their culture.21 The Labels are also intended to educate visitors and consumers about the different styles of Indigenous art from across Australia.22 A further aim of the Labels of Authenticity is to enhance consumer confidence in the Indigenous arts and culture industry. As consumers become familiar with the characteristics that the Labels of Authenticity certify, they will be able to make better-informed choices about the Indigenous goods and services they purchase.23

18. Indigenous artists have also utilized moral rights to protect their artistic creations. For example, a complaint was brought against the Olympic Museum in Lausanne who as part of its campaign to market the Sydney Olympics posted three Aboriginal artworks from the Balgo Community on its website. It also encouraged visitors to the site to download the images as wallpaper. After complaints were made, the artwork was removed from the website and money paid to the artists. A written letter of apology acknowledged the harm was also posted on the Museum’s website (but later taken down).

19. The use of an authenticity label to protect Indigenous artistic and cultural products is not unique to Australia. In an attempt to protect Indigenous Inuit artists from imitations, the Canadian Government registered the symbol of the igloo as a trademark distinguishing original Inuit art. The Canadian Government also initiated the Co-operative movement in the North in an attempt to market arts and crafts. The artists produced their works of art and brought it to the Co-op. Once this was done it was up to the Co-op to place the Iglo Tag on the artwork. Conversation with B. Pontle, Research Officer, Inuit Art Centre, Ottawa, Ontario, 22 July 1999.


22. Ibid, p. 5.

23. It was also hoped that that Indigenous art practices will be promoted by having community exhibitions and producing books and pamphlets about different cultural areas. See NIAA Discussion Paper, supra note 21, p. 5.

3. IMPACT OF EXTENDING IP PROTECTION TO INDIGENOUS CREATIONS

Many of the problems associated with the general expansion of intellectual property rights have also been raised in relation to the use of intellectual property rights to protect Indigenous creations. For example a number of commentators have argued that Indigenous knowledge should not be commodified as the subject matter of intellectual property, ‘nor should it be reduced and simplified to a set of economic rights’. In particular, it has been suggested that the application of intellectual property protection ‘could be seen to diminish the cultural and spiritual value of [traditional knowledge], or even worse, distort its essential nature and transform it into a tradable commodity’. It has also been suggested that intellectual property laws may, if wrongly applied, prove to be counterproductive, in so far as they ‘promote division amongst Indigenous peoples, legitimize the historic appropriation of traditional knowledge, and perpetuate legal uncertainty’. In a similar vein, commentators have also raised concerns about the impact that the translation of Indigenous art and authorship practices into Western categories may have for Indigenous cultural practices. Somewhat cryptically, it has also been said that there ‘is a point where a line must be drawn between the public domain and protected [intellectual property] … the realm of [intellectual property] protection should not be extended to a point where it becomes diffuse and legal certainty diluted’.

Concerns have also been raised about the impact that intellectual property rights over Indigenous creations might have upon the public domain and in so doing upon the process of creativity more generally. For example it has been suggested that the grant of intellectual property rights over Indigenous creations ‘may stifle the ability of indigenous and traditional persons, as well as non-indigenous and non-traditional persons, from creating and innovating based upon tradition’. It has also been suggested that intellectual property protection may have the “the effect 24. WIPO/GRTKF/IC/5/8, 12, para 30. Later, this is denied: “to identify certain IP rights (whether general IP rights or sui generis) as applicable to the protection of some aspects of TK does not diminish or reduce the TK itself, nor the cultural heritage that sustains it … the fact that IP rights may be applied to TK subject matter need not impact the way in which TK is created and used in the originating community.” Ibid, 13, para 32-33.


27. WIPO/GRTKF/IC/3/11 cited in WIPO/GRTKF/IC/3/3, Annex 2, 9-10, para 30. 28. “The public domain diminishes, leaving fewer works to build upon … The consequence is that these laws may freeze the culture in a historic moment, and deny traditional peoples a contemporary voice”. WIPO/GRTKF/IC/5/3, Annex 2, para 29. Similar concerns have also been raised about the chilling effect that prior informed consent and disclosure of geographic origin (for patent and plant breeders rights) may have upon biological research.

29. WIPO/GRTKF/IC/5/3, 6, para 23 (b). “[T]he public domain status of cultural heritage is also tied to its role as a source of creativity and innovation. Neither members of a cultural community nor
of casting [folklore] in concrete. Folklore may thus not be able to fully evolve and may risk its very existence, as it would lose one of its main features: its dynamics. The nature of these fears was summed up in the comment by WIPO that intellectual property protection for Indigenous creations could mean that:

‘neither members of the relevant cultural communities nor the cultural industries would be able to create and innovate based on cultural heritage if private property rights were to be established over it’. By overprotecting cultural expressions, the public domain diminishes, leaving fewer works to build upon… The consequence is that these laws may ‘freeze’ the culture in a historic moment, and deny traditional peoples a contemporary voice.’

Confronted with this potential erosion of the public domain, many commentators have adopted the familiar response of calling for a balance to be struck between the interests of rights holders and those of the public domain. This can be seen, for example, in comments by the WIPO Secretariat who said that while ‘an absolutely free and unregulated domain does not meet all needs of the indigenous and local communities’, nonetheless ‘the establishment, in a general way, of property rights over all forms of [traditional cultural expressions] currently in the public domain is not appropriate, neither as a matter of intellectual property policy nor cultural policy’. Instead, the Secretariat said that the central challenge was to address ‘the protection of [traditional cultural expressions] in ways that balance the concerns of users, existing third party rights and the public interest’. By ensuring that an appropriate balance was struck between these competing interests, this would mean that the interests of Indigenous communities would be respected while simultaneously ensuring that ‘members of cultural communities as well as others are free to create and innovate on the basis of their cultural traditions, and acquire and benefit from any [intellectual property] that may subsist in the creations and innovations’. While the Secretariat did not provide much guidance as to how this line was to be drawn, they did suggest that laws should exist that ensure that communities should be able to prevent uses outside of the community that falsely suggest a connection to community; or are derogatory, libellous, defamatory, offensive or fallacious uses, and uses of sacred or secret traditional cultural expressions. At the same time, the Secretariat said that any rights granted in traditional knowledge ‘must be subject to exceptions, such as use by third parties for academic or purely private purposes, or compulsory licences on grounds of public interest including circumstances of public health emergencies’.

While WIPO, the European Union, and many others are happy to plough this familiar furrow, others have adopted a more critical stance. In some cases, commentators have been critical of the public domain and the ideals that it embodies (or at least with the way the public domain is usually portrayed). In other cases the complaint is with a particular way of thinking about intellectual property that includes the public domain as one its key components, rather than with the public domain per se or with the extension of intellectual property rights. In order to be in a position to appreciate some of these problems, it may be helpful to pause and contrast the way knowledge is organized, classified and regulated within Indigenous communities with the way it is ordered within intellectual property law. However, rather than talking of Indigenous Communities in the abstract as if they were a standardized global entity, we will focus on the Yolnu peoples of Northeastern Arnhem Land in Northern Australia.

4. RECONFIGURING THE PUBLIC DOMAIN IN THE INTEREST OF INDIGENOUS CULTURES

In Yolnu culture, membership in a clan confers rights and obligations with respect to ownership of law and of mardayin (which is usually translated as customary law). Rights to mardayin form the basis of rights in paintings (as well songs, dances, painting, sacred objects and knowledge about technology and medicine). Paintings, which are both part of the ancestral inheritance of clans and representations of the events of the ancestral world, play an important role in Yolnu culture. Many of the artworks depict creation stories, and are closely connected to land (or country). We can get some sense of the important role that artworks play in Yolnu culture from the decision of Bulun Bulun v. R & T Textiles. As we mentioned above, the case centered on the artistic work known as ‘Magpie Geese and Water Lilies at the Waterhole’ which had been painted by Johnny Bulun Bulun, who is a member of the Ganalbingu people. The image of the waterhole depicted in the bark painting plays a significant role in Bulun Bulun’s Community, notably because it was the place where Bulun Bulun’s creator ancestor emerged. ‘Magpie Geese and Water

36. WIPO/GRTK/I/5/3/5, 58-3, para 137.
37. In a submission to WIPO the EU said that ‘the fact that folklore for the most part is in the public domain does not hamper its development – to the contrary it allows for new creations derived from or inspired by it at the hands of contemporary artists’. Cited in WIPO/GRTK/I/5/3, Annex 2, 9, para 27.
38. Ownership of mardayin is usually shared between clans in the same moiety; the members of each clan possessing rights to mardayin which overlaps with the sets of mardayin belonging to clan. Prox, supra note 3, p. 42.
Lilies at the Waterhole' is the painting of the story of the creation of the Ganalbingu people. Under Bulun Bulun's law and custom, the creator ancestor emerged from the waterhole creating both the Ganalbingu people and the landscape. The creator also gave Bulun Bulun's ancestors the land, language, ceremonies, songs and dances. Importantly, the creator ancestor granted the Ganalbingu people their land on the condition that they continue to perform, maintain, respect and protect these rituals, songs, dances and images. Bulun Bulun gave evidence that as traditional owner under Ganalbingu law he was both permitted and obliged under custom and law to paint the ancestral creation story. In his affidavit, Bulun Bulun said:

'The creation of artworks such as 'At the waterhole' is part of my responsibility in fulfilling the obligations I have as a traditional Aboriginal owner of Djulubinyamurr. I am permitted by my law to create this artwork but also it my duty and responsibility to create such works as part of my traditional Aboriginal land ownership obligation. A painting such as this is not separate from my rights in my land. It is part of my bundle of rights in the land which must be produced in accordance with Ganalbingu custom.'

Bulun Bulun's comments highlight the close connection that exists between Indigenous art and land. Paintings are at once an ancestral charter to the land, a map of the land, as well as a story of how that land, and the people connected to the land, were created. Bulun Bulun's remarks also remind us, as many commentators have noted in other contexts, that while the individual plays a pivotal role in Western intellectual property law, Indigenous law relies more on a collective model of ownership. Bulun Bulun's comments also give us a sense of the differences between the types of activities that are regulated under Indigenous law than under copyright law. Thus while copyright law recognizes the right to control reproduction and the right to communicate and issue copies of the work to the public, a number of different types of rights exist in relation to paintings in Yolngu culture.

41. This is reflected in the fact that paintings have been accepted in Australian courts as evidence of the boundaries of Aboriginal land.
44. As Frow said, the regulation of cultural rights in Indigenous societies is in many respects more 'fully developed than any other way of thinking about the social ownership of information' Frow, supra note 3, p. 40.
45. A number of different factors are taken into account when deciding whether paintings should be released to those who potentially have rights of access to them. First, a clan must strike a balance between losing control of its paintings and mandarlin through spreading knowledge of them too widely and losing knowledge of its paintings through failure to pass them on to succeeding generations. Second, a balance must be struck between maintaining control of its own painting and mandarlin - the unique inheritance of its members from the ancestral past and so central to its identity - and releasing paintings to other clans as part of the process of recognizing and perpetuating social and spiritual links with them. Finally, from the prospective of male initiation, the senior generations of a clan must strike a balance between releasing knowledge of paintings and authority over them to succeeding generations of initiates and maintaining the restrictedness of the knowledge as a means of exercising control over the system. These factors operate on three dimensions: control versus release of knowledge, the independence versus interdependence of clans, and the passage of knowledge from one generation to the next. Morphy, supra note 42, pp. 73-74.
46. Morphy, supra note 42, p. 58; Frow, supra note 3, pp. 42-43.
47. Frow, supra note 3, p. 45.
48. In many cases, intellectual property law attempts to shift information from the first to the second category. This is done on the basis that it is better for a party to be given a limited property right in the information, so long as the information can be used by third parties.
law, context and status play a much more prominent role in the Yolngu system.\textsuperscript{49} This can be seen, for example, in relation to The Morning Star Pole, which was at the center of the dispute in Yumbulul v Reserve Bank of Australia.\textsuperscript{50} The plaintiff in this case, Terry Yumbulul, was an artist from Arnhem Land in North Australia. The Morning Star Pole is a ceremonial work that is imbued in tribal lore with the power to take the spirits of the dead to the morning star, which will then return them to their ancestral home. Yumbulul was given authority to paint the Morning Star Pole from his clan. However, before Yumbulul could reproduce these images, he had to pass through various levels of initiation and revelatory ceremonies in which he was counseled as to the nature of the designs and their spiritual meanings.

While there are exceptions, the fate of information under most areas of intellectual property is relatively clear-cut and unambiguous. Moreover, although information is able to migrate from one category to another, it is not usually capable of being reattributed to its home category. For example, it is possible for information that is secret to be subsequently protected by intellectual property. It is also possible for this information to fall into the public domain. However, once information is in the public domain, it can no longer be treated as 'secret'. While the status of information under intellectual property is (relatively) clear-cut, the fate of information under Yolngu culture is more ambiguous. In part this is because the status of information depends on the context in which it is revealed and the status of the recipient. As Murphy said, 'the place of secrecy in the Yolngu system is, to say the least, ambiguous, in that the system in no sense depends on secrecy per se but on control of context where secrecy can be continually re-created.'\textsuperscript{51} Again, the Yumbulul decision provides us with a useful example of this. The Morning Star Pole, which had been reproduced on the ten-dollar note, had been sold to the Australian Museum in Sydney, where it had been placed on public display. The fact that the Pole had been displayed to the public did not, however, affect its status as a secret and sacred object. That is, while the Morning Star Pole had been on public display, nonetheless elements of the Pole remained 'secret'. In the same way in which a work can be made available to the public but still be protected by copyright law, the public display of the Morning Star Pole did not affect its status under customary law. This was because the intention of the display of the Pole was consistent with customary law which allows exhibitions in museums and galleries, so long as the purpose was to educate the wider population as to the nature of Indigenous culture.\textsuperscript{52}

49. This is because Yolngu art is part of a system of restricted knowledge in that 'not all people appear to have equal access to the knowledge contained within it', Secrecy intervenes 'to affect who can learn what'. Murphy, supra note 42, p. 75.
51. Murphy, supra note 42, at xiv.
52. The division of the Morning Star Pole into different domains in Indigenous law is similar to the way copyright law divides objects up into different parts. This is reflected in the familiar adage that while ideas in a book in the public domain are available to be used by anyone, the way these ideas are expressed is not.

Towards an Indigenous Public Domain?

Another important difference between intellectual property law and Indigenous customary law relates to the ideals and objectives that underpin the two regimes. In part, this is a consequence of the fact that they are premised on, and embody, a different aesthetic; there are differences, for example, in terms of the models of creation, the sources of creativity, and the assumptions made about why someone may create a work in the first place.\textsuperscript{53} There are also differences in terms of the activities and practices that are privileged and prioritized. One of the most important manifestations of this is in terms of the way information in the 'public domain' is viewed. As we mentioned above, the provision of a healthy and dynamic public domain is an important priority of the intellectual property system. The availability of public domain resources, which may be 'mined by any member of the public', is seen as to facilitate and promote creativity.\textsuperscript{54} While intellectual property law aims to ensure that information is placed in the public domain once existing rights are exhausted, in contrast 'Indigenous cultural systems are not built upon a principal of open access but are highly regulated and restricted: they are built upon secrecy as much as openness'. As well as making the imposition of intellectual property law onto Indigenous practices problematic, the Indigenous approach to 'public' information also goes against the grain of our expectation of what a public domain in information should look like.\textsuperscript{55}

The different approaches that are taken towards 'public' information also gives rise to a series of tensions when the public domain of Western legal systems comes into contact with Indigenous culture. This is reflected in the fact that historically, the application of public domain ideals has created a number of problems for Indigenous Communities. There is no reason why, if left unchanged, this would not continue to occur in the future. For example the idea that the duration of intellectual property rights should be limited (to promote and encourage creativity) poses problems for Communities that wish to protect traditional knowledge. The lack of protection over style means that a Belgian Company (trading as Australian Home Made Ice Cream) is able to use Aboriginal music, symbols and images as a part of its marketing strategy.\textsuperscript{56} It also means that non-Indigenous traders are able to sell 'Aboriginal' artefacts manufactured overseas and decorated by European backpackers with Indigenous style motifs and patterns to tourists. Biological resources collected in flagrant breach of local laws, rules and customs were often justified on the basis that such resources were part of the global commons, until they were manipulated or isolated by scientists in which case they fell within the remit of the intellectual property system. Many of the acts of biopiracy that have occurred in Australia (and elsewhere) have been carried out by academic scientists under the banner of 'academic

53. See R. Lettington and K. Nnadozie, 'A Review of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore at WIPO', Trade-Related Agenda, Development and Equity (Occasional Paper No. 12, South Centre, Dec 2003), para 74.
54. Littman, supra note 2, p. 974. See also WIPO/GRTXP/IC/53, Annex, 10, para 33.
55. Pron, supra note 3.
56. See www.homemadeicecream.com
freedom and not, as many presume, multinational corporations motivated by profit. There are also a number of situations where anthropologists and archaeologists have relied on public domain ideals to promote their own interest at the expense of Indigenous communities. In the same way as intellectual property owners have been criticized for promoting a romantic image of the author as an isolated genius, proponents of an Indigenous public domain can also be criticized for promoting a nostalgic, unrealistic view of the commons. Given this, it is not surprising that commentators have suggested that rather than seeing the public domain as a positive, productive space akin to the commons (res communes), a better parallel, from an Indigenous perspective, might be that of terra nullius. This is the idea of a land without people which was used by British colonial authorities to deny local Indigenous peoples in Australia any interest in land or country.

Given the differences that exist between the Indigenous aesthetic and that which underpins Western intellectual property law, and the ways in which public domain ideals have been used as tools of exploitation and colonization, it is not surprising that Indigenous groups have been critical of the public domain and the application of intellectual property to Indigenous creations. As Tobin said, the application of the occidental legal concept of the public domain as the defining factor in limiting rights of indigenous peoples to control the use of their traditional knowledge threatens to legitimize the historical unapproved and uncompensated expropriation of traditional knowledge. If we are to take Indigenous issues seriously it is clear that we need to reject proposals that simply attempt to balance private and public interests. Instead, what is required are innovative proposals and a healthy disregard for existing legal tradition, especially where tradition has fostered the historic expropriation of indigenous property. More specifically, it is necessary to reconfigure the public domain so that it supports and fosters, rather than undermines, Indigenous interests. That is, it is necessary to create and recognize the domains established under customary or indigenous law as new spaces within the legal landscape, rather than merely applying spatial configurations developed in other contexts to Indigenous creations.

This is not as novel as it first may appear. Indeed, a growing number of sympathetic commentators have begun to question the appropriateness of the way the public domain is configured in contemporary legal debates. It is increasingly common to read that there are many public domains rather than a single public domain. Commentators have also begun to question the neat distinction that is drawn between ‘public/open’ and ‘private/closed’.

For example, it has been said that the public sphere ‘spoken of respectfully in traditional science’ is ‘less than it appears, being in fact analogous in some ways to a limited-membership, shared-access common area than a truly wide-open, unclaimed space’. Questions have also been raised about the ideas that underpin the public domain, or at least the way these ideas are best achieved. Indeed, one of the notable trends in recent years is the way in which questions have been raised about whether the goals of the public domain are only to be achieved by providing unfettered access to information. This is reﬂected in the idea that restrictions placed on the dissemination and expression of information – such as trade mark protection over the phrase ‘free for educational use’ or a prohibition on the commercial use of shared biological materials – may protect the public domain and thus add to the quantity and quality of material that is ultimately available to the public.

This is also the case with the Creative Commons and Open Source projects that utilize copyright protection to promote public ends.

In thinking about how to reconfigure the public domain to take account of Indigenous spaces, it is important that we consider the processes by which these domains are to be recognized: a topic that has largely been ignored in debates about Indigenous intellectual property which tend to be preoccupied with the means of production and consumption. In developing these new spaces, one issue that needs to be considered is how and where the lines that must inevitably be drawn are to be configured. It is necessary to decide, for example, who is to beneﬁt from any new legal regime, from the scope and duration of protection, and so on. In an Australian context, this would mean deciding, for example, whether any new laws should extend to urban as distinct from traditional artists. It would also mean deciding the types of knowledge that might be protected. One response to problems of this nature is to adopt a neutral abstract language that largely transcends the need for boundary setting. This is the approach that is currently being favored by WIPO, which seems to be moving towards an unfair competition style law as the basis for a future Treaty on traditional knowledge. While this may offer a solution to the difﬁcult problems facing WIPO, it simply defers the question of boundary setting to the national level. In thinking about how these issues are to be resolved, it is important that that ‘indigenous and public domain’.

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57. Most examples of innovative beneﬁt sharing (at least in Queensland) have come from public sector organizations (such as the Australian Institute for Marine Science) or from multinational companies (such as Astrazeneca).


60. Tobin, supra note 55, p. 55.

61. Ibid. Tobin also argues that it is necessary to develop ‘new legal guidelines for deﬁning the boundaries between the private property rights of indigenous peoples over their traditional knowledge in the public domain’.


63. Cf. WIPO/GRT/BR/C1/5/3, Annex 2, 7-8, para 23 (admitting that the public domain ‘does not take account the private domains established by customary or indigenous law’).


65. Merges, supra note 54, p. 146.

66. For example, the US based Uniform Biotechnology Materials Transfer Agreements (UBMTA) places limitations on the use that can be made of research tools created with public funding. More speciﬁcally while it places few restrictions on non-proﬁt to non-proﬁt transfers, it prohibits transfers to organizations who intend to use the material for commercial ends. See Merges, supra note 54, p. 159.

67. Merges, supra note 64, p. 160.
local communities must be involved from the outset in establishing the parameters for any process to regulate their rights’. In particular, it is important that Communities play a role in deciding issues of definition, ambit, and content.68

A number of consequences flow from this. Ideally, it means that Indigenous communities, rather than State agencies or international organizations, should decide both the questions that potentially affect them, as well as how these questions are to be answered. That is, we should be wary of proposals that presume that once a State agency or an international organization has made the normative decision to support and protect Indigenous culture that the next step is for them to pose and answer a series of follow-up questions.69 The history of Indigenous interaction with Western institutions provides many examples where well-intentioned, well-meaning public agencies – whether State or Church based – made decisions on behalf of Indigenous Communities that ended up having adverse, negative consequences. Thus while we would agree that in thinking about how intellectual property law should be changed to accommodate Indigenous interests that a range of issues need to be resolved,70 we do not agree with the related presumption that it is for WIPO or some other State agency to answer these questions.71 Rather, these are matters that are best left to Indigenous Communities to resolve.72 To impose paternalistic schemas on Indigenous peoples would, as one commentator noted, ‘be conducive to what has been called the final colonization – colonization of the product of their intellectual effort’.73 Another consequence of this is that proposals, such as public domain statutes, *domains publics* or global Indigenous collecting societies, which require central (state based) mechanisms to police, collect and monitor the public domain, may not be appropriate.74

While it is important that Indigenous communities be given the opportunity to determine the rules that regulate and protect their culture, science and technology, at the same time it is important that we recognize the limits of local and customary laws. In particular, we need to accept that acts of piracy will be carried on outside the reach or jurisdiction of customary law. Here the challenge is to formulate a regime that enables local laws to articulate with national and international regimes. In turn, this requires a distinction to be drawn between those matters that can be left to Indigenous Communities to resolve and those issues that require a broader framework. It is also important that we recognize that many Indigenous communities have limited resources available to protect and enforce their rights.

One of the problems with many of the solutions that have been proposed to protect Indigenous art, science and technology is that they adopt a model of regulation that is inappropriate to the needs of Indigenous Communities. In part this is because most, if not all, of the proposed solutions tend to advocate reform of copyright, patents or moral rights, or the introduction of a *su generis* system that is modeled on these forms of intellectual property. The problem with many (but not all) of these proposals is that they require Indigenous Communities to expend limited resources in the policing of their rights.75 Another problem with these proposals is that they inevitably require a centralized agency to draw boundaries and to make decisions that are better left to Indigenous Communities to decide.76

One alternative that does not succumb to these problems as readily (although it does have a number of problems of its own) is for Indigenous creations to be protected via a regime modeled on the laws used to protect geographic designations.77 Geographical indications could be used in two ways. Firstly, it is possible for Indigenous creations to be protected as geographical indications of origin. While geographical indications are usually granted over agricultural products, they have been recognized for non-agricultural products (such as Swiss watches). Secondly, and more ambitiously, the regimes used to protect geographical indications could be used as a model for a *su generis* scheme to protect Indigenous knowledge. One advantage of using a law that is modeled on geographical indications is that it offers a way of ensuring that Indigenous law is incorporated into the legal regime used

68. Tobin, supra note 25, p. 59.
69. In looking at the approaches to defining core intellectual property concepts, WIPO focused on the relationship between international and national agencies: little or no attention was given to the role of local interests, WIPO/GRTKF/ICS/5, 17 ff.
70. For example, there might be a need to redefine the moment at which traditional knowledge is deemed to become part of the public domain, and therefore no longer subject to protection by Indigenous peoples’, Tobin, supra note 25, p. 56.
71. In looking at a possible *su generis* system WIPO set itself the task of: ‘to identify the general features of an adequate *su generis* system for the protection of traditional knowledge’ and also ‘to identify the elements of such a system which must be present in order to be effective’. To identify those elements the WIPO Secretariat said that ‘one has to provide responses to several essential questions to which any effective legal system for the protection of property rights must be able to respond satisfactorily’. WIPO/GRTKF/ICS/5, 47, para 117. These were: what is the policy objective of the protection; what is the subject matter; what criteria should this subject meet to be protected; who owns the rights; what are the rights; how are the rights acquired; how should the rights be administered and enforced; and how are the rights lost or how do they expire? WIPO/GRTKF/ICS/5, 47-57, para 118-146. The problem is not necessarily with the questions per se, but with the presumption that they need to be answered by a central agency: whether it be an international, regional or national organization.
72. Similar principals have been used in discussions about how to reform patent law to protect the scientific commons. As Merges said, when pursuing policy goals to promote scientific research we should ‘show respect for the internal rule of the scientific community’ that we ‘should look how the practice under scrutiny evolved in the community, and how it affects the overall functioning of the community, instead of bluntly requiring that science adhere to the naive baseline of total and immediate public dissemination’. Merges, supra note 64, p. 166.
73. Tobin, supra note 25, p. 63.
74. For criticisms, see Haight Farley, supra note 26, p. 49.
75. A notable exception being in relation to prior informed consent and disclosure of geographical origin as a condition for grant of patent and plant variety rights.
76. For example, WIPO said that it needed ‘to define the “communities” that would be entitled to special protection’, WIPO/GRTKF/ICS/5, Annex, 14, para 42 (d).
77. A number of different legal regimes have been used to regulate the name of products (and indirectly also the product itself) including indication of source, geographical indication of origin, and appellation of origin. Here, we have used the generic term geographical indication of origin as a shorthand for these different regimes. See further, L. Bentley and B. Sherman, Intellectual Property Law, Oxford, Oxford University Press, 2004, pp. 962-989.
to regulate Indigenous culture. In the same way in which collectives (such as the Parma Ham Consortium) set their own internal rules that dictate when and how the name of a product can be used, so too Customary law could set the parameters and determine who was to benefit from protection, as well as when and in what circumstances knowledge could be used by third parties.

Another advantage of using geographical indications of origin is that it provides a means of recognizing the connection to "place" or "country" that is so important for many Indigenous Communities. One of the features of geographical indications of origin is that it requires a connection between the product in question and the place from which it originates. Many of the regimes used to protect geographical indications of origin are based upon the idea that the protected product is an embodiment of the place from which it originates. Perhaps the most well-known geographical indication of origin is the notion of terroir, the French concept used to describe the characteristics or attributes of a place, resulting from the land, soil, geography, climate, human and seasonal influences which contribute to the unique characteristics of wine. Terroir is similar to, but not as broad a notion as, the Aboriginal idea of connection to place.99

Unlike many other forms of intellectual property protection, a law modelled on geographical indications recognizes collective rights. Often the parties will form collectives or more formal bodies, such as the well known French winegrowers association in Provence Comité Interprofessionnel des Vins Côtes de Provence,100 to protect their traditional aims and objectives. This form of association could be adapted to reflect the community-based approach to Indigenous traditional knowledge and culture. One of the advantages of this is that the rules or laws that govern Communities would largely be decided by the communities themselves, rather than imposed by outside parties. It could also be done in a way that allows Indigenous law to evolve and change over time. Yet another advantage of using geographical indications of origin as distinct from other forms of intellectual property as a model for protection is that it provides a means of protecting traditional knowledge (in the strict sense of the word). Indeed, one of the features of many of the regimes used to protect geographical indications of origin is that they are concerned with rewarding traditional cultural values and knowledge rather than promoting innovation per se, as is the case with most of the other forms of intellectual property. Another important advantage of geographical indication style protection over other forms of intellectual property is that there are no specific limitations on the period of protection.

There are a number of problems that would have to be overcome before geographical indications of origin could be used either directly as a form of protection or indirectly as a model for sui generis legislation. In particular, there would have to be a dramatic change of heart by policy makers in Australia and elsewhere (who seem to think of geographical indications of origin as a new form of European colonization). Given that the objects and knowledge that would be protected under these regimes usually span a number of different Indigenous Communities, it would also be necessary for Communities to decide amongst themselves issues such as who had authority to negotiate and how benefits were to be shared. Even if problems of this sort were overcome, we need to remind ourselves that geographical indications of origin can only ever provide a partial solution. If Indigenous knowledge and creations are to be properly protected, a raft of changes is required: both legislative and non-legislative, legal and extra-legal. A useful starting point must be to question the assumptions that we habitually bring to bare when thinking about intellectual property. One of these must be the way think about the public domain and the central role that it plays in most thinking about intellectual property law and policy.

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78. It has also been suggested that the 'principle of locality' should be applied to the protection of indigenous culture and IP rights: "the solution is to resolve any disputes over the acquisition and use of indigenous people's heritage according to the customary laws of the indigenous peoples concerned." E. Daes, 'Defending Indigenous peoples heritage' (February 2000), cited in WIPO/GRTK/19C/5/8, 42, para 105.


INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES

Legal Issues and Practical Options for Museums, Libraries and Archives

Written for the World Intellectual Property Organization (WIPO) by Molly Torsen and Jane Anderson
INTELLECTUAL PROPERTY
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TRADITIONAL CULTURES
Legal Issues and Practical Options
for Museums, Libraries and Archives

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December 2010
Traditional cultures embody exquisite and distinctive creativity and are of immense cultural, historical, spiritual and economic value to indigenous peoples and traditional communities the world over.

Defining the appropriate role of intellectual property (IP) in the protection, preservation and promotion of traditional cultural expressions (TCEs) is a priority for the World Intellectual Property Organization (WIPO), and is the subject of various normative and capacity-strengthening programs.

WIPO’s work is, partly, based upon the growing interests of indigenous peoples and traditional communities in owning, controlling and accessing documentation of their cultures held by museums, libraries and archives.

These institutions play an invaluable role in the preservation, safeguarding and promotion of collections of TCEs, such as photographs, sound recordings, films and manuscripts, which document communities’ lives, cultural expressions and knowledge systems.

Yet, collections of TCEs raise unique IP challenges and, in response, institutions and researchers in many countries are developing new frameworks for understanding the legal, cultural and ethical implications of caring for TCEs.

Through this shift, cultural institutions seek more direct and instrumental relationships with communities, actively engaging with the expertise of tradition-bearers, to foster new cross-cultural partnerships to enrich cultural work. Many museums, libraries and archives, and their professional associations, have established exemplary practices and protocols to deal with IP issues.

It is within this complex and sensitive context that this publication was prepared, in the framework of the WIPO Creative Heritage Project.

The publication presents an analysis of the legal questions and offers examples of institutional and community experiences in the development of good practices.

It uncovers the problems that may arise and their possible solution, and helps guide initiatives to build new relationships for the successful management of TCEs.

In addressing IP issues associated with managing access to, control over and use of TCEs in the world of cultural institutions, I hope that this publication also contributes to a greater understanding of the challenges and options for WIPO’s normative work on these issues.

Francis Gurry
Director General,
WIPO
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EXECUTIVE SUMMARY

Museums, libraries and archives carry collections of photographs, sound-recordings, films and manuscripts that document indigenous peoples’ and traditional communities’ lives, cultural expressions and knowledge systems.

A new awareness has emerged of indigenous peoples’ and traditional communities’ interests in owning, controlling and accessing this documentation.

Importantly, this has led to recognition that the management of access and use of collections raises a number of challenges for museums, libraries and archives. Often these challenges arise from the complex social, historical, cultural, legal and political conditions informing the collections of such institutions.

Managing access and use of collections inevitably implicates intellectual property (IP) law, policy and practice. Indeed, collections of traditional cultural expressions (TCEs) from indigenous peoples and traditional communities raise unique IP issues because of certain qualities that make them fundamentally different from other collections. The very nature of TCEs means that they occupy an ambiguous IP status. This can produce a myriad of tensions for institutions that hold this material. Further, according to current copyright and related rights law, rights in the materials embodying TCEs (e.g. “secondary” materials such as films, sound recordings, photographs or written documents) often do not belong to the creator or his community, but rather to the person or persons who “created” the secondary materials.

A central problem is that indigenous peoples and traditional communities remain legally disenfranchised from their TCEs, while at the same time seeing themselves as their legitimate custodians, owners and managers. Furthermore, there is at present no clear international legislative framework to provide guidance over the management, access and use of expressions and manifestations of “traditional” cultures.

In responding to such challenges, institutions in many countries are seeking to develop new frameworks for understanding the legal, cultural and ethical implications inherent in caring for ethnographic materials (and in preserving, promoting and protecting them). Cultural institutions seek more direct and instrumental relationships with indigenous peoples and traditional communities, actively engaging with the expertise of these tradition-bearers, to foster new cross-cultural partnerships that could both enrich cultural work and benefit the communities. Many museums, libraries and archives, and their professional associations, have established exemplary practices and protocols to deal with these issues. This publication seeks to identify and discuss some of these.

This is not always a comfortable discussion. Yet, it befits both indigenous and traditional communities and cultural institutions to step beyond this uneasiness in order to understand how best to protect, promote and provide stewardship for the rich cultural heritage that communities have shaped over millennia, and constantly shape and reshape. As many institutions have discovered, working with communities often provides invaluable information about the collections and their social and cultural meanings. By the same token, such relationships may benefit indigenous peoples and traditional communities.

It is within this complex and sensitive context that this publication seeks to prompt an open discussion on what problems may arise, what solutions are available and how new relationships between institutions and tradition-bearers can be established for the successful management of such valuable material.
For example, how can museums, libraries and archives respond to tradition-bearers as a user group? For their part, how can indigenous and traditional communities participate more directly in the recording, digitization and dissemination of their own cultural expressions, for safeguarding, promotional and income-generating purposes? How might museums, libraries and archives and tradition-bearers collaborate in this regard? And if they elect to do so, how might this new relationship be imagined and then translated into practice? While this publication is not designed to definitively answer such questions, Part III, Practices, Remedies and Options, illustrates a range of current projects that use these questions as points of departure for the development of new practices. This Part shows how such difficult issues can be addressed and how new practices are currently emerging.

The publication has been prepared as part of WIPO’s Creative Heritage Project. It draws on information gathered through surveys conducted in several cultural institutions from around the world by experts commissioned by WIPO, namely, Antonio Arantes, Vladia Borissova, Shubha Chaudhuri, Laurella Rincon, Martin Skrydstrup and Malia Talakai. It also builds on and complements traditional IP guides for museums, libraries and archives on more conventional IP issues, such as the WIPO Guide on Managing Intellectual Property for Museums. Indeed, this publication extends the prior body of publications into the context of the legal and ethical IP questions that arise for cultural institutions, specifically with a focus on collections comprising intangible cultural heritage and TCEs.

Part I, Setting the Scene, identifies the issues at stake, describes relevant basic concepts and lays out the complex policy debate surrounding these issues.

Part II, Intellectual Property and Traditional Cultural Expressions: Issues Specific to Museums, Libraries and Archives, explores the fundamental principles of copyright protection through the lens of TCEs, and provides an overview of other IP fields, including the laws of trademarks and geographical indications. It explicitly examines the precarious balance, established by IP law, between protecting the rights afforded to creators, including indigenous and traditional creators, and protecting the interests of the general public to benefit from and enjoy those endeavors.

As already noted, Part III then offers examples of institutional and community experiences in the development of good practices, and presents a selection of existing practices, protocols and guidelines. These existing practices, protocols and guidelines are captured in more detail in a searchable database established by WIPO. The surveys referred to above as well as this database complement the publication. Part III also explains risk management strategies and discusses resolution options where conflicts may arise, including alternative dispute resolution (ADR). A Glossary for purposes of this publication and Frequently Asked Questions round off the publication.

This publication does not attempt to advance particular approaches or impose certain solutions for the issues it raises. Rather, it is aimed at providing information to cultural institutions as well as indigenous and traditional communities on contemporary practices in light of current principles and laws and demonstrating the effects that those practices have had on TCEs and the peoples, communities and institutions who claim a relationship with them. It seeks to offer information – not only to help facilitate resolution of particular problems that all cultural institutions may face but also to provide evidence that relationship-building will assist all parties into the future.
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<td>TCEs</td>
<td>Traditional Cultural Expressions</td>
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<td>Abbreviation</td>
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<td>TK</td>
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<td>TKDL</td>
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<td>TLD</td>
<td>Top Level Domain</td>
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<td>TPM</td>
<td>Technological Protection Measure</td>
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<td>TRAMA</td>
<td>Traditional Music Archive of Sudan</td>
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<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>United States Patent and Trademark Office</td>
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<td>WCT</td>
<td>WIPO Copyright Treaty</td>
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<td>World Intellectual Property Organization</td>
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<td>WIPO Performances and Phonograms Treaty</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1. An Illustration: The Djalambu [Hollow Log] Ceremony

In 1963, a husband and wife team of researchers traveled to central Arnhem Land in the Northern Territory, Australia. In the process of their fieldwork, they recorded in film and sound recordings the important Djalambu [Hollow Log] ceremony. This ceremony represents one of the final acts in the Yirritja mourning rights – where the body is interned in the Djalambu [hollow log]. The recording of the ceremony featured Djäwa who was the leader of the Daygurrgurr Gupapuyngu people.

In 1997, one of Djäwa’s sons, Joe Neparrnga Gumbula composed a song called “Djiliwirri” for his band, Soft Sands. The song was about Joe’s homeland Djiliwirri – “a forest estate inherited from his father through the Gaykamangu yarrata patriline.” The song “alludes to the veiled core of hereditary sacredness held in perpetuity by the Daygurrgurr Gupapuyngu.”

In creating the video clip to accompany the song, Joe decided to inter-cut the present with the past, and to show images of his father from the 1963 Djalambu recording. As Joe explained, “that Djalambu ceremony was filmed in 1963 with my father [Djäwa] who, during that time, was the leader of the Daygurrgurr Gupapuyngu people. I called the [AIATSIS] archives in Canberra where they dubbed it for me from 16-mm to beta cam and then sent it over to Darwin where I was editing my video clip. I’ve got footage of the Djalambu from this old film, and added it to new technologies to show that that was the old time of Djalambu and that this is the new time of Djalambu. All the people who were in the film from 1963 are all gone. They’re all dead. So we, the people of this generation, have made another Djalambu film, which is also in the video.”

Joe’s video clip almost certainly infringed the copyright of the couple who recorded the ceremony in 1963. The couple made the films and sound recordings: they were the ones who owned the rights in these works and objects of related rights. Without their permission, taking parts of their protected materials to incorporate them into a video clip infringed copyright. Assuredly, Joe and the archive who supplied the film excerpts did not realize that they were violating the law when the recording was copied for use in the music video. Could this perhaps have been excused under an exception or limitation, such as Australian “fair-dealing”? Given that the video clip was to accompany a rock n’ roll song, a commercial work, such a use would probably not have fallen under any exception or limitation, despite the cultural dimensions of the situation.

The original Djalambu film (1963) is still very significant for Joe’s community; there are even suggestions about digitizing the film and putting it on the community’s website. The film itself is seen as educational;
when Djäwa allowed the recording to take place, it was understood that it could be used as a learning lesson for future generations. The community hence perceives the film as theirs.

Who then should be entitled to make decisions concerning the films and recordings? The researchers? The community? The archive?

In this case, the copyright owner, the wife, manages her rights in a strict manner. She fastidiously pursues any unauthorized use of her work. This presents considerable challenges for institutions that hold her work. She is reluctant to let communities reuse the material that she and her husband recorded, and it is often after extensive negotiation that copying permission is acquired. She has very firm ideas about who the material was made for, and who can access it – she has total control over the material.

This state of affairs obviously creates an acrimonious atmosphere in relations with indigenous communities as well as with the institution that holds the original films and recordings. It is onerous on the institution, in terms of time and labor, but may also be considered quite unfair to the community that wants to use material that represents them and their culture.

In such circumstance, how are negotiations to be conducted?

The challenge for indigenous peoples and traditional communities is that, in many instances, they are unable to make physical contact to negotiate with the copyright owner themselves, be it because of location and/or linguistic difficulties.

As to cultural institutions, because of the diversity of cultural material within their collections, the range of strategies that need to be developed to manage the material requires considered thought. Indigenous peoples and traditional communities want to access material so that it can be reinterpreted and new meanings made. However, how these meanings are to be created can contravene the copyright owners’ rights in the material. Indigenous peoples’ and traditional communities’ uses can also fall outside the copyright law’s exceptions and limitations, especially in cases where material is commercially valuable.

With changing technological environments and the evolution of copyright law to keep up with these changes, indigenous and traditional interests can sit awkwardly outside of the legal framework. The question is then: how are these seemingly conflicting rights and interests ever to be reconciled?

2. What is the Issue?

Contemporary negotiations over indigenous peoples’ and traditional communities’ rights and interests in their TCEs raise a number of challenges for museums, libraries, archives and other cultural institutions. Often these challenges arise from the complex social, historical, cultural, legal and political conditions informing the collections of such institutions. As the example of the Hollow Log film and recordings illustrates, these challenges can manifest in a variety of ways. Even in circumstances of consultation and negotiation, contests over the rights and responsibilities of cultural institutions to indigenous and traditional community collections can still emerge. This can be attributed to differing value systems and interpretations of history, unequal power relationships in relation to accessing collections, and changing legislative regimes governing ownership, control and use of cultural materials.
TCEs collections possess certain qualities that make them fundamentally different from other collections. Their management thus implies equally different issues.

For example, in the past, TCEs were often collected by researchers from outside of the traditional cultural context, without obtaining consent from the communities.

The collections built thereupon often contain secret, sacred or confidential material that may be subject to restricted use under customary laws and practices.

Moreover, the legal status of such TCEs under IP law is often unclear; for example, according to national IP laws, some may exist in the public domain, and thus be considered free to be used by anyone.

Lastly, while there is a lack of information available to indigenous peoples and traditional communities regarding the existence and location of collection items from their cultural heritage, they wish to be more directly involved in the decision-making processes related to the management of elements of their cultural heritage, which are held by museums, libraries and archives, whether it be in recording, exhibiting, presenting and/or representing their own cultures. Indigenous peoples and traditional communities may also wish to reconnect with those elements of their cultural heritage, allow greater access for children and the community as a whole, and revive the knowledge systems associated with these elements. Others may wish to regain full possession of their TCEs and bring them back into the community to be cared for within the cultural context.

Perhaps the biggest stumbling block for legally recognizing the communities’ rights and interests in this material is that, according to current IP laws, most of the rights in the TCE-derived materials are not legally owned by tradition-bearers at all, but rather by the person or persons who “created” the film, sound recording, photographs and manuscripts embodying these TCEs.

In other words, many tradition-bearers remain legally disenfranchised from documentation of their cultural heritage, while they see themselves as the legitimate custodians, owners and managers of that same material. This produces a myriad of tensions for institutions that hold collections of TCEs.

This publication seeks to provide information about the problems that may arise, the solutions available and the new relationships between institutions and tradition-bearers that can be established for the successful management of such valuable collections.

3. Building and Strengthening Relationships between Cultural Institutions and Indigenous Peoples and Traditional Communities

Changing political, economic and social environments over the past two or so decades have prompted certain re-evaluations of the role and function of cultural institutions, including importantly, re-assessment of the very nature of their collections of TCEs. This is not always a comfortable discussion and cultural institutions often find themselves in a precarious situation.

In certain circumstances, questions about access to and use of these collections have had to respond to changing notions of the public and to the rapid increase in new user groups. Indeed, cultural institutions have had to come to terms with new claims to the ownership of collections of TCEs, particularly those relating to indigenous peoples and traditional communities obtained in the past.
These claims often explicitly disclose the politics and historical circumstances that led to the development of the collections in the first place. Indeed, antiquated rationalities governing how peoples were observed, studied and documented often led to large scale accumulations of material related to their TCEs. Everything about the peoples, including songs, stories and artifacts (as well as human remains) was seen as freely available to collect, archive and exhibit. Often the inequalities of status affected the ability of the peoples recorded or studied to express their informed consent.

Many questions arise and need urgent consideration. For example: who owns these collections? To whom do the IP rights associated with these collections belong? How should the collections be accessed, managed and used now and into the future?

Over the past several decades, there has been a publicized absence of trust between indigenous and traditional communities and the cultural institutions that hold pieces of their cultural heritage. Indigenous peoples and traditional communities have not been recognized as rights holders or acknowledged as having legitimate relationships with the material within the collections of such cultural institutions. It benefits both indigenous and traditional communities and cultural institutions to step beyond this awkwardness in order to understand how to best protect, promote and provide stewardship for the rich cultural heritage that indigenous and traditional communities have shaped over millennia.

As many institutions have discovered, working with indigenous peoples and traditional communities can provide invaluable information about the collections. Indeed, tradition-bearers can provide contextual information and personal narratives regarding their accumulation, explain the alternative meanings embedded within them, and outline the access conditions that respect the indigenous or traditional community from which those materials derive, as well as those other users who are keen to learn and understand different cultures and cultural practices from them.

In responding to such difficult legal, cultural and political challenges, institutions in many countries are seeking to develop new frameworks for understanding the legal implications inherent in caring for ethnographic and cultural materials, including TCEs.

These initiatives recognize that there are different world-views of, aspirations and rationalizations for preservation and access. As part of an innovative strategy, it is clear that new agreements, regularly reviewed to ensure their relevance in light of changing law, could help to ensure appropriate policies. The challenge remains engaging in productive dialogue about these issues and building strategies that incorporate them within future management practices.

Cultural institutions would benefit from gaining a basic understanding of the communities whose materials are in their collections and from determining who may access the materials, under what circumstances, and whether the source community has specific preferences regarding the reproduction of their materials.

Just as communities are asserting themselves as legitimate rights holders who should be actively in control of how they are represented, several cultural institutions worldwide see themselves increasingly not as owners but as custodians of their collections. Through this shift, cultural institutions seek more direct relationships with indigenous and traditional communities, actively engaging with indigenous and traditional people with expertise, to foster new cross-cultural partnerships that could enrich cultural conservation work and benefit indigenous and traditional communities.
With this context in mind, it is useful to ask the following questions: How can museums, libraries and archives engage better with indigenous and traditional communities in the management of their TCE collections? For their part, can indigenous and traditional communities participate more directly in the recording, digitization and dissemination of their TCEs, for safeguarding, promotional and income-generating purposes? How might museums, libraries and archives collaborate with indigenous and traditional communities in this regard? And if they elect to do so, how might this new relationship be imagined and then translated into practice?

While this publication is not designed to definitively answer such questions, Part III illustrates a range of projects that use these questions as stepping stones for the development of new practices.

4. Exploring the Intellectual Property Dimension

There have been several academic studies, legal battles and commentary written about the validity of the ownership by a cultural institution, gallery or private individual of tangible objects or “pieces of the past.” There has been less analysis, however, of the intellectual component of TCEs, and especially of the IP dimension. The relationship between IP and TCEs is nuanced and complex. One of the elements of contestation over the intellectual aspects of TCEs today is the uncertainty over the intellectual ownership, control and use of collections held within cultural institutions.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples explicitly addresses these as urgent and legitimate issues in Articles 11, 12 and 31. Article 31 states:

Indigenous people 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 and protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

The 2007 Declaration also highlights that indigenous peoples have the right to access, practice and revitalize their cultural traditions. Article 12 (1) states:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

The United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is coordinating many initiatives aimed at the implementation of the Declaration on the Rights of Indigenous Peoples.
This brings us to complex questions associated with how TCEs are or should be protected by IP. TCEs occupy an ambiguous legal status; they may or may not benefit from one or several branches of IP protection. One difficulty in answering these questions is that no clear legislative framework exists to provide guidance over the management, access and use of TCEs.

As international IP law was born in a very specific cultural context, it does not recognize indigenous or traditional customary laws relating to the ownership and management of cultural knowledge and property.

As previously mentioned, the main obstacle for tradition-bearers in claiming ownership of cultural heritage and TCEs that reside within cultural institutions is that they are often not legally recognized as the rights holders. This means that they have limited capacity to argue and assert legal rights and interests in order to negotiate management frameworks that are culturally appropriate.

Many cultural institutions, at the turn of the 21st century, have developed protocols and procedures to protect the rights of tradition-bearers and source communities. There is a growing body of models on which cultural institutions may draw. However, this kind of “soft law” has all too often no real mechanism for enforcement.

To address the gaps in current IP law in relation to TCEs, improved processes for identifying problems in the management of TCEs by museums, libraries and archives must be developed. This includes the development of mutually-beneficial strategies and relationships between cultural institutions and indigenous and traditional communities. The fact that the law is unclear at present should not be an impediment to foster better, more respectful behaviors and practices.

As already noted, there is, as yet, no general international law or legislative framework for managing TCEs. This limbo has produced confusion in terms of how cultural institutions handle their collections, and engage with indigenous peoples and traditional communities, who assert themselves as legitimate rights holders. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was established in 2000 to fully investigate the extent of these issues.

There are differing sets of values and customs at play. For indigenous and traditional communities, TCEs have intrinsic value as vital elements of their cultural heritage and identity. They hence contribute to the conservation and promotion of cultural diversity.

TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners and custodians. TCEs can be economic resources that concretely contribute to providing livelihoods and easing poverty and socio-economic disadvantage for these communities, for example, through craft marketing. Indigenous and traditional communities are generally among the poorest and most disadvantaged in the world – concern for properly dealing with TCEs is not simply an ethical issue.

The rights and obligations that a community might assert in relation to a collection might not map easily onto IP definitions of who constitutes an “owner,” “author,” “creator” or a “user.” Such a disjuncture requires innovative and creative thinking, and importantly, presents an unprecedented opportunity to develop new equitable relationships that take into consideration past histories, legal gaps and future partnerships.
**WHAT ARE TCEs?**

There is no settled international definition of TCEs. However, many regional and national laws contain definitions, as do some international instruments. Indigenous and traditional communities often have their own definitions of what constitutes their cultural expressions. The Glossary contains a working description of TCEs for present purposes. TCEs may be seen as a sub-set of “traditional knowledge” – this term is also described in the Glossary. In a nutshell, TCEs may be understood in general as:

- handed down from one generation to another, either orally or by imitation;
- reflecting a community’s cultural and social identity;
- consisting of characteristic elements of a community’s heritage;
- made by “authors unknown” and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so;
- often created for spiritual and religious purposes; and,
- constantly evolving, developing and being recreated within the community.

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**Can intellectual property systems protect traditional cultural expressions?**

Although all communities may not necessarily adopt a proprietary approach to their TCEs, they nevertheless are opposed to the unauthorized use of their TCEs and do take offence at unauthorized use and all the more so when it is for commercial purposes or is derogatory in nature.

Existing IP measures can be useful to prevent such misuses and misappropriations, especially for the peoples and communities whose primary aims are to prevent the unauthorized use of their creative productions and to exploit their creative arts and contemporary adaptations of their TCEs in the marketplace.

The following are examples of possible protection, which are detailed further in Part II:

- Photographs, sound-recordings and films that document indigenous and traditional customary practices and knowledge are often protected under copyright and/or related rights law, and as such, provide an indirect form of protection for TCEs. These derivates of TCEs may benefit from existing rights and responsibilities in relation to access, use and reproduction.
- Contemporary expressions of traditional cultures are also protected by copyright, if they meet the required protection criteria.
- The Berne Convention for the Protection of Literary and Artistic Property (the Berne Convention), the pre-eminent international instrument on copyright, provides special protection at Article 15.4 for “unpublished” works of “unknown authors,” a provision added to the Convention specifically to address the protection of TCEs.
- Copyright’s resale right is also a potential option to share with the artists and their communities the proceeds from the resale by auction houses and galleries of indigenous and traditional works based on TCEs. Indeed, many indigenous artists’ works resell for greater amounts.
- Performances of TCEs are protected internationally by the WIPO Performances and Phonograms Treaty (WPPT).
- Copyright and special tailor-made protection also exists for compilations and databases of TCEs.
Certification and collective trademarks as well as labels of authenticity have also been used by indigenous communities in, for example, Tonga, Panama and New Zealand to curb the sale of fake traditional creative arts (sometimes called “fakelore”). Fiji, as well as other countries who may have similar initiatives, is working on the idea.

In spite of all this, the conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCEs but also as positively harmful, in some respects. First, IP rules exclude most TCEs as such from protection, relegating them to an unprotected “public domain.” Second, follow-on creations derived from TCEs may receive protection as “new” IP, giving the right owners (whoever they may be) exclusive rights to determine the conditions under which third parties (including the TCE-holding communities themselves) may use the TCE.

Furthermore, the types of rights provided by current IP law and the nature of the rights conferred do not reflect customary laws, values and protocols associated with TCEs; it is perhaps not possible for international IP law to reflect them, as they are often unique and subjective to communities, and vary from one community to the other.

As a result, many stakeholders call for new sui generis systems to protect TCEs, i.e., “special” or stand-alone systems which would address TCE issues particularly. Several countries and regional organizations have already put in place national and regional sui generis laws and measures. Most countries have done so within their copyright laws, following largely the Model Provisions, 1982. Others have elected to establish stand-alone IP-like laws and systems, such as the Philippines, Panama, Peru, Ghana, l’Organisation africaine de la propriété intellectuelle (OAPI), the Andean Community, South Pacific island countries and New Zealand, to name only a few.

In a nutshell, some countries are calling for a sui generis approach, while others consider that existing IP law offers many solutions and just needs a few changes, and then others consider that a mixture of sui generis mechanisms and existing IP law is the best approach. These options are discussed within the WIPO IGC, among other forums.

5. IP and TCEs – the Work of the World Intellectual Property Organization

The Intergovernmental Committee

The protection of TCEs and traditional knowledge (TK) against misappropriation and misuse is the subject of active policy development, norm-building and capacity-building programs at WIPO. Policy development and norm-building takes place within the IGC.

At the 2009 WIPO General Assembly, member states adopted a clearly defined work plan and terms of reference to guide the IGC’s work over the next two years. States agreed that the IGC would undertake negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments), which will ensure the effective protection of genetic resources (GRs), TK and TCEs. The decision also provided for intersessional meetings of working groups, in addition to the regular sessions of the IGC.

The negotiations build on the previous work of the IGC. The basis for text-based negotiations are the existing WIPO working documents on GRs, TK, and TCEs. The IGC is to submit to the 2011 General
Assembly the text (or texts) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The 2011 session of the General Assembly would then decide on convening a Diplomatic Conference.

Recent sessions of the IGC have examined draft principles and objectives that could shape sui generis instruments on TCEs and TK. This approach to protection could recognize, among other things, collective interests in TK and TCEs which are “characteristic” of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions.

These drafts include compliance with the principle of “free, prior and informed consent” (FPIC) and the recognition of indigenous peoples’ and traditional communities’ customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TCEs or TK, but accommodate this option, should communities wish to take it up. Similarly, prior registration or documentation of TCEs and TK is not a precondition for protection, but is optional.

The draft provisions on TCEs address exceptions and limitations to protection in similar ways to copyright law. Specifically, they provide that measures for the protection of TCEs should not apply to their use when that use includes making recordings or other reproductions for purposes of TCEs inclusion in an archive or an inventory for non-commercial cultural heritage safeguarding purposes. This provision would allow cultural professionals to make copies of TCEs during the course of archiving or record-keeping, and especially preservation.

Another useful provision of the draft provisions regards documentation. In addressing formalities, the provisions specify that, to the extent a TCE is registered by a community, any IP rights in such recording or fixation should vest in or be assigned to the community.

While the draft provisions have no formal status and constitute a contentious issue at the IGC, they illustrate some of the perspectives and approaches that are guiding work in this area, and could suggest possible frameworks for the protection of TCEs and TK against misappropriation and misuse. They are in fact being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes, including in other policy areas. For example, they have been used by the African Regional Intellectual Property Organization (ARIPO), the OAPI, countries in the Pacific region, members of the Association of Southeast Asian Nations (ASEAN) and countries in the Caribbean.
### The meaning of “protection”

**THE SMITHSONIAN INSTITUTION AND ITS GLOBAL SOUND PROJECT**

The Smithsonian Global Sound Project, an initiative of the Smithsonian Center for Folklife and Cultural Heritage, was launched in 2005, and aims to make traditional music globally available on the Internet. The collections that the project holds include the entire Smithsonian Folkways collection and content from partner archives including: the International Library of African Music (ILAM), in South Africa, the Archives and Research Center for Ethnomusicology of the American Institute for Indian Studies (ARCE), in India, and the Aga Khan Music Initiative for Central Asia of the Aga Khan Trust for Culture (Central Asia) and others still to come. The collaborating archives placed parts of their collections on the website, those parts for which permissions could be obtained, and to which free access could be given.

With its interactive features, the project has been dubbed “the ethnographic answer to iTunes.” In order to use a recording, as opposed to just downloading it, a “Licensing Request Form” needs to be filled. The condition, however, is that “licenses and permissions are granted on a case-by-case basis and are at the discretion of the Smithsonian Institution. A license fee may be assessed depending on the nature of the proposed use.” The Smithsonian Institution expressly prohibits the copying of any material (text and image files, audio and video clips) from the website, except for the purposes of “fair use” as defined by United States copyright law. The site claims that: “Royalties go to artists and institutions, and honor the intellectual property rights of composers, musicians, and producers.” In other words, the revenue earned from sales of downloads and subscriptions support the creation of new educational content and are shared with archival partners, who in turn pass on a portion of those revenues to artists and communities.

The work of WIPO concerns most directly the protection of TCEs in a legal sense, that is, protection of the creativity and distinctiveness inherent in TCEs against unauthorized or illegitimate use by third parties, including commercial misappropriation, misuse, misrepresentation and use that is derogatory or offensive. The goals of copyright protection, for example, are largely to promote further creativity, encourage public dissemination and enable the owner to control the commercial exploitation of the work.

It should be noted, however, that not all Member States of WIPO believe that TCEs should be “protected” in this IP law sense. Important questions, such as who should own the rights in TCEs, remain unanswered.

“Protection” in this IP sense is distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, but can complement them. Preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance and viability. Protection may thus include safeguarding against loss through archiving, documenting and recording. It may mean acknowledging and giving effect to the broader range of collective and individual rights that are linked to TCEs and their cultural and legal environment. Finally it may also mean building capacity to support traditional creativity and the communities and social structures that sustain and express them.

IP and TCEs – Context of misappropriations

Central questions that have occupied indigenous and traditional spokespeople and academics alike include: when is the use of a TCE legitimate cross-cultural borrowing and when is it “misappropriation”?55

Perhaps the most publicized example of this is the successful “Deep Forest” CD produced in 1992, which fused digital samples of music from Ghana, the Solomon Islands and African “pygmy” communities with “techno-house” dance rhythms.56 Large profits were made from sales of the record, with no returns to traditional musicians and no attribution. The music producers had gotten access to the music from a cultural heritage archive where ethnomusicologists who had recorded the music had deposited the recordings.

Another example is that of t-shirts depicting Australian indigenous rock art, whose production was halted following a letter by a cultural institution demanding to cease production on the basis of copyright infringement.57 Although the author of the rock art remained unknown and the age of the art was such that copyright was unlikely to subsist in the actual rock art, copyright did subsist in the drawings and photographs made in the late 1960s to 1970s by a researcher funded by the cultural institution: Eric Joseph Brandl. The making of the drawings and the taking of these photographs had indeed created new copyright rights which were enforceable against third parties. These drawings and photographs had been published by the cultural institution in 1973 in a book.58 Because images of the rock art sites are rare and because the site itself is restricted from public access, it was highly likely that the t-shirt manufacturers had copied the images of the rock paintings directly from this unique publication.59 The institution, together with Mr. Brandl’s widow, sent a letter to the company that made the t-shirts, which immediately agreed to cease production. The matter was settled after lengthy negotiations.

Another question that arises is who should benefit from the protection of TCEs? Indeed, the argument has been made that since much creativity is derivative, TCEs are the result of centuries-old cultural exchange, thus making the borders between what is owned by one cultural community, as opposed to another, difficult to determine. This also amplifies the challenge of identifying a single community of “owners,” for TCEs that are practiced by more than one cultural group.

There is validity to this questioning; however, the answers to these questions should take into account the significant relationship between TCEs, cultural practices and the way indigenous peoples and traditional communities have historically developed their understanding of the natural world.

Political power is of fundamental importance in terms of understanding how relationships were often established that disenfranchised and denigrated indigenous peoples and traditional communities, their lands and ways of being.60 The whole issue of TCEs cannot be understood outside the histories of colonization, dispossession and denials of sovereignty. Today, these histories produce urgent questions of identity, cultural maintenance and cultural survival. They also produce tensions because of different value systems, rationalities of knowledge use and cultural exchange. The process of acknowledging the significance of these histories and their relevance to contemporary TCEs is ongoing.
6. The objectives and nature of this publication

Through examples and analysis, this publication explores areas of cultural heritage and IP law and policy in order to elucidate questions and issues relating to the management of collections, documents, and recordings related to TCEs by museums, libraries, archives, and other cultural institutions. It explores the role, responsibilities, and range of activities of museums, libraries and archives which raise IP and TCEs considerations.

The publication lays out the IP issues that may arise when acquiring, preserving, displaying, communicating and re-using TCEs and cultural heritage materials.

The focus and structure is the interface between the preservation, protection, and promotion of TCEs, both tangible and intangible. Cultural institutions usually hold (i) tangible expressions (products of arts and handicrafts) and (ii) materializations (photographs, films, audio and audiovisual recordings, transcripts, descriptions) of tangible and intangible expressions and practices. Cultural institutions do not hold – as such – intangible TCEs; what they may do is invite communities to stage/enact intangible practices, expressions or representations on their premises.

WIPO has also recently published a Guide on Managing Intellectual Property for Museums, which provides an overview of IP issues particularly in relation to business opportunities for museums. Readers of the present publication are urged to consult this Guide. While it does not provide specific guidance for the treatment or stewardship of TCEs, it does address a range of practical situations and tasks that museum professionals face on a daily basis. The present publication extends this work specifically to address the legal and ethical IP issues associated with TCEs.

IP law establishes a balance between protecting the rights afforded to creators (in an effort to promote further their creativity) and protecting the interests of the public to benefit and learn from those endeavors (in an effort to advance, educate and inspire society as a whole).

The rights of tradition-bearers often sit uneasily within the balance struck by IP law. Indeed IP rights, as they exist now, were not designed with TCEs in mind. From a public policy perspective, IP laws generally do not take into account the needs, concerns, aspirations of indigenous peoples and traditional communities. Different legal jurisdictions throughout the world calibrate this balance differently and some do not recognize the IP rights of tradition-bearers at all.

There are now calls for the enhanced protection of TCEs at the international, regional and national levels. This has resulted in a complex policy debate, in which core concepts are being tested and analyzed. Policy objectives and modalities for achieving them are now emerging.

This publication does not attempt to advocate for particular approaches or impose particular solutions for the issues raised. Rather, it aims to provide information on current practices and their relation to IP principles and laws and to demonstrate the effects those practices have had on the traditional culture, communities, tradition-bearers and institutions who claim a relationship with them. It seeks not only to help facilitate the resolution of unique problems encountered by cultural institutions, but also to reveal that relationship-building is key for the management of TCEs and may help all parties into the future.
In acknowledging the current gaps in the legal management of such collections, the function of this publication is to address a range of questions that cultural institutions are currently grappling with, in the management of their collections, namely:

- What are TCEs?
- What are the specific IP laws relating to cultural institutions and repositories of TCEs?
- What are the specific IP issues that arise when dealing with TCEs?
- What alternative practices in managing TCEs exist?
- What options are there if conflicts emerge?
- What are examples of good practices that could be useful to emulate?

This publication addresses copyright and related rights law, touches on trademark law as currently written and construed in a range of jurisdictions and references other relevant IP laws in the context of TCEs.

It draws parallels between the treatment of TCEs and other cultural goods, such as contemporary art. Building upon the empirical research and analysis undertaken by WIPO in the context of the Creative Heritage Project, the publication does not seek to codify practices nor suggest or create any normative or binding guidelines; rather it offers information on the policies and practices that are currently in place in an effort to promote discussion and encourage critical thought about IP and related options for the management of TCEs.

Indigenous peoples and traditional communities throughout the world may not have the same goals or objectives. Indeed, there is enormous diversity among tradition-bearers of all cultures in relation to customary laws as well as IP needs and expectations. To this end, the publication encourages reflection on how the expectations and aspirations of tradition-bearers for safeguarding and reconnecting with their cultural heritage can be acknowledged as legitimate and embraced within the cultural institution sector.
Part II explores the law of copyright and related rights, trademarks and geographical indications.

Copyright and related rights are the most relevant of IP areas affecting museums, archives, libraries and other cultural institutions. Once a creation is published, given or sold to others, it becomes de facto, if not always legally, possible for others to make uses of it: copyright is the right of an author to control the use of his works.

This section explores basic copyright and related rights concepts. It begins with an overview of legal fundamentals and then follows with an analysis of the issues that often arise with the stewardship and protection of TCEs.

As cultural institutions multiply and implement creative strategies to draw the public to their exhibitions, copyright issues become important. Firstly, cultural institutions are in the unique position of being both copyright owners (in their catalogs and CDs sold to the public, for example) and copyright users (in the paintings or sound recordings they reproduce to make such catalogs and CDs, for example). From a financial standpoint, cultural institutions may garner some proceeds from the proper use of copyright law.

Trademarks and domain names are discussed in this part's second section as they are also relevant for the management of TCEs as well as for certain products and services offered by museums, libraries and archives.

Geographical indications are dealt with in the last section.

COPYRIGHT

International copyright protection does not exist per se. Copyright law is jurisdictional in nature and in scope. Many specific issues related to the copyright-TCE nexus are therefore jurisdiction-specific. While some are similar to others, there are many disparities among national laws that need to be highlighted.

The foundation of the Anglo-American copyright law began in 1710 with the Statute of Anne, while Continental European copyright law is often credited to the French Revolution at the end of the 1700s.

Regardless of origins, most countries are party to the Berne Convention, thereby forming the Berne Union. The Berne Convention establishes minimum standards of protection between signatory States.

Article 5(1) lays out the principle of “national treatment” whereby an author's rights are respected in another country of the Berne Union as though the author were a national of that country. For example,
works by Turkish authors are protected by Swiss copyright in Switzerland, and vice versa, because both Turkey and Switzerland are signatories to the Berne Convention.

Likewise, many countries are members of the World Trade Organization (WTO) and are therefore bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The TRIPS Agreement sets minimum standards of protection for most forms of IP, which apply equally to all member states of the WTO.

In addition to the Berne Convention and the TRIPS Agreement, the WIPO Copyright Treaty (WCT) – concluded in 1996 – brings international copyright law into the digital age.

Additionally, there are regional and bilateral agreements; for example the Bangui Agreement of 1977 created the African Intellectual Property Organization (Organisation africaine de la propriété intellectuelle or OAPI). Some free trade agreements also include clauses on IP.

The Berne Convention addresses “literary and artistic works” which include “every production in the literary, scientific and artistic domain.” TCEs often comprise “productions in the literary, scientific and artistic domain” (for example, TCEs can manifest as art, music, drawings, or sculptures) and may therefore constitute subject matter of copyright protection.

When circumstances allow, the protection provided by copyright law can be appropriate for the needs and objectives of indigenous peoples and traditional communities.

Yet indigenous peoples and traditional communities are often not the copyright owners of much of the TCEs found in museums, libraries and archives, and therefore have had limited capacity to negotiate around issues of access, use, ownership of and control over these collections.

Copyright generally comprises economic and moral rights. A special category of rights adjacent to copyright is referred to as “related rights.”

**Overview of Key Points**

Copyright law is jurisdictional in nature and in scope. Many specific issues related to the copyright-TCE nexus are therefore jurisdiction-specific.

Tradition-bearers are often not the owners of the copyright and related rights in the recordings, films or manuscripts embodying their TCEs which they have not made themselves.

**1. Objects of Protection: What Does Copyright Protect and What Does it Not?**

The list of protectable material can vary from jurisdiction to jurisdiction. This is important precisely because some of the questions regarding protection for TCEs are specifically tied to what copyrightable subject matter is.

Generally, copyright protection extends to original literary (novels, poems, plays, newspapers, computer programs), scientific and artistic works (paintings, drawings, photographs, sculpture, architecture, advertisements), in any form of expression. Copyright laws may thus cover a range of works including, but not limited to, films, musical compositions, choreography, maps, etc.
Generally, copyright protection does not extend to functional aspects, formulaic or other non-original elements of works, such as colors, and techniques used to create a work, or what is sometimes referred to as a work’s “style.” Copyright permits the imitation of the non-original elements or underlying ideas and concepts of works, allowing for further cumulative creativity and innovation.

**Key Points**
- Copyright provides authors with exclusive rights with regard to their literary and artistic works.
- Copyright consists of both economic and, depending on the jurisdiction, moral rights.
- Copyright laws cover a range of works including, but not limited to, literary works (novels, poems, plays, newspapers, computer programs), films, musical compositions, choreography, maps, and artistic works (paintings, drawings, photographs, sculpture, architecture).

**Originality**

Copyright law requires that a work be *original* in order to be protected. The term is not defined in the relevant international treaties, nor is it generally defined in national laws. It is rather a matter left for interpretation and determination by the courts on a case by case basis.

In the civil law tradition, generally speaking, a work is original if it reflects or bears the mark of its creator’s personality and/or personal creative talent. In the common law tradition, generally speaking, a work is original if there is some degree of intellectual effort involved and if it has not been copied from someone else’s work. In common law jurisdictions (for example, in the United States of America), a relatively low level of creativity is required in order to meet the originality criterion.

In an artistic context, the originality of a work is often challenged when the degree of a creator’s contribution to a work is perceived as minimal. A classic example of this issue is Marcel Duchamp’s 1917 work *Fountain*, a “ready-made” porcelain urinal placed upside-down on a pedestal that the artist contributed to the first annual exhibition of the Society of Independent Artists. While art experts assert that this particular piece is the most influential modern art work of all time, it is debatable whether it is an original artwork for purposes of copyright protection, since the work merely consists of an already existing object.

What constitutes “originality” is also challenged in the realm of “appropriation art” or “cumulative creativity.” This may be illustrated by cases where a creator develops a work from using, “quoting” or building upon elements from an already existing work for the purposes of creating a “new” work. “These might include images, forms or styles from art history or popular culture, or materials and techniques from non-art contexts.” One example is the work of Cory Arcangel, who radically slowed down the videogame *Tetris®,* originally created in 1984 by Alexey Pajitnov, of the then Academy of Science of the United Soviet and Socialist Republics (USSR) in Moscow and claimed copyright in the new work.

“Originality” in the context of TCEs raises certain issues. Contemporary forms of TCEs made by current generations and inspired by or based upon preexisting indigenous or traditional art forms and practices can be protected as works, provided they are considered “original” under copyright law. These are also forms of adaptations, or “derivative works,” which are works based on one or more existing works. Examples include translations, motion picture versions of oral stories, and original reproductions of artworks.
While low thresholds for originality enable many artists to draw from their traditional artistic practices, it is also relatively easy for non-traditional and non-indigenous artists to produce knockoff works and argue that their products are original for purposes of copyright law.\(^80\) In other words, copyright law’s concept of originality does not distinguish between TCEs that are passed down within a community, as part of the conservation of culture, and the misappropriation of such TCEs by outsiders – both can be protected as original.

For an example of traditional art that was found to be protected by copyright, in a 1994 Australian case,\(^81\) carpets were produced for the high-end market. These carpets reproduced the artwork of several prominent indigenous Australian artists. The carpets were being imported into Australia from Vietnam and sold with tags that labeled them as “Aboriginal carpets.”\(^82\) Several carpets were direct copies of the original artworks, while others carried designs that had been significantly simplified and therefore were not direct copies. The Aboriginal artists argued that all of the carpets constituted copyright infringement. In arguing that the simplified carpets did not constitute original or derivative works, an additional argument was made that this copying was an infringement because it distorted the cultural meanings within the works.\(^83\) The court accepted this reasoning and found that, under Australian copyright law, all the carpets infringed the copyright of the Aboriginal artists in their works.

Furthermore, under certain Aboriginal customary laws, the right to create artworks incorporating cultural narratives resides with the traditional custodians, guardians or holders, who are recognized by their people or community. These traditional holders have the collective authority to determine who may use the art forms and in what context or manner: they know the associated customary laws, values and protocols, for which they are responsible. Australian copyright law, on the other hand, does not provide a framework for the incorporation of Aboriginal custodianship.

The court noted these specific cultural dimensions: that because the community also had important relationships with the artworks, its members too had suffered anger and distress from the infringement. As a result, the court developed a new remedy for cultural harm wherein the copyright owners’ injury and suffering was extended to include that experienced by their community.\(^84\)

This case is important because the judge took into account how the infringing works, because of the simplifications and alterations done by the infringer, had disrupted and damaged the significant cultural meanings and narratives held within the original works by the Aboriginal artists and their communities.\(^85\) This aspect is often referred to as “misuse” or “misappropriation” of TCEs and involves use which changes, distorts, reduces or inaccuracy reflects the customary meaning, values and protocols associated with TCEs.

This example also illustrates how existing laws may be able to protect TCEs and fit the cultural context, but also how differently each jurisdiction is likely to handle these cases.

Another case concerning originality and likely to impact the activities of cultural institutions is the American case of *Bridgeman Art Library, Ltd. v. Corel Corp.*\(^86\) In this case a court held that the photographic recreation of artworks in the public domain do not merit copyright protection. The court noted: “There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection… but “slavish copying,” although doubtless requiring technical skill and effort, does not qualify.”\(^87\) The argument was made in court that
such reproductions would be protected under United Kingdom law. However, the final opinion noted that mention should have been made of the 1869 Graves case.88 In this latter case, it was decided that:

\[
\text{The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of the statute.}^{89}
\]

The outcome of the Bridgeman case for United States of America copyright law is uncertain. It has been widely criticized and subsequent cases, even in the same jurisdictional district, do not necessarily seem to follow its precedent. Some have argued that Bridgeman’s attorney neglected to challenge the claim that a photograph was a “slavish copy,” and therefore not eligible for the same copyright protection as other creative works.90 There is still some question, therefore, whether cultural institutions are able to own the copyrights in their photographs of public domain artworks.91

The Bridgeman case does not reflect international trends, however. During a case study seminar at the University of London (Queen Mary’s College), an audience of arts professionals, IP attorneys, photographers and others reached the conclusion that the ruling should be reversed. Professor Adrian Sterling, Vice President of the British Copyright Council and author of World Copyright Law,92 noted that the ruling would continue to be debated.93

One French court argued that the task of creating a faithful reproduction of a fountain requires skill but does not constitute original authorship;94 another French court found that reconstituting a statue formerly at Versailles requires such a high level of proficiency and knowledge that the person who performs this must be an author;95 an Italian court has argued that art restoration requiring a particularly sensitive and complex activity should reward the restorer with copyright protection.96 In Switzerland, a recent case involving a 1997 journalistic photograph by Gisela Blau Guggenheim of Nazi-era documents supported a Bridgeman-like outcome. The photograph, taken and first published in Switzerland, was deemed by the Bundesgericht (the Swiss Supreme Court) to fall outside the scope of copyrightable protection due to its lack of originality.97

As concerns TCEs, photographic reproductions might or might not be copyrightable in and of themselves depending on the specifics of the reproductions and the process of their creation.

Many artworks in a cultural institution’s collection, whether in the public domain or not, can often only be professionally photographed by cultural institution employees or contractors and, as such, the cultural institution has the ability to control the dissemination of those images through licensing agreements, digital rights management or other means.98 This has been described as “curatorial control.”99

From a pragmatic perspective, cultural institutions will likely not lose all of the revenue they may earn from photographs of public domain art because professional publishers require high quality images, which can only be captured with a professional photographer’s expertise. So while the photographs may not be protected by copyright, the photographer will likely be able to sell them for their quality and fidelity to the original artwork, or TCE.
Copyright protection extends only to expressions of ideas, and not to ideas, procedures, or methods.

In order for a work to receive copyright protection, it must be original. The threshold for originality is usually not high. In the common law tradition, an author must contribute something creative; the work must exhibit more than mindless copying. In the civil law tradition, a work is original if it reflects or bears the mark of its creator's personality and/or personal creative talent.

The originality requirement poses unique issues for TCEs. TCEs may be based on preexisting works either as contemporary iterations or as closely resembling creative works that have existed and been transferred from generation to generation. In the latter case, whether a given TCE has achieved adequate originality for copyright protection can be unclear.

**Database Protection**

Originality is certainly the *sine qua non* of copyright protection. As such, despite their importance and the efforts deployed to build them, databases sometimes receive very limited protection under many current copyright laws because they are, or can be, a simple “unoriginal” compilation of material.

Under the Berne Convention and the TRIPS Agreement, databases constituting creative compilations enjoy protection under copyright as literary works. The term “creative” is not uniformly defined at the international level. For “creative” databases, it is generally the originality in arrangement or selection of material that is protected as a database, but never the material itself (which may be protected independently, and for which authorization is needed for inclusion into/use of the database).

Certainly, making an accurate and reliable database can be very costly and time-consuming, and some jurisdictions grant copyright protection based on the principle of the “sweat of the brow.” For example, in 1996, the European Union promulgated a Database Directive, granting *sui generis* protection to databases made in the EU and in other countries that offer comparable protection.

The owner of the rights in a database is generally the person who exerted his labor in compiling and organizing the information, not the people whose material (e.g., TCEs) are being documented in this way. Ownership of rights issues arise if the database is incorporating a variety of other copyrighted works, such as films, or photographs. There are also over-riding questions about ownership depending on: who funded the project; whether the content itself is separately owned; and, whether the database framework is itself independently owned by another party, such as a specific technology developer. Resolving these questions before the database-making begins is very important. Concerns over the ownership of genetic databases, especially ones that contain information collected from indigenous peoples and traditional communities, illustrate the range of issues that can and will emerge in the future.

Database protection is relevant to museum, library and archive professionals under a variety of circumstances. From image databases to invitation lists, cultural institutions “own” a great deal of valuable information.

In Belgium, a case explores some of the contours of databases and art history publication subsequent to Belgium’s implementation of the EU Database Directive. In *Art Research & Contact v. S. Boas*, the
plaintiff had collected and methodically arranged data regarding 530 sculptures in Brussels into a card system, in preparation for a book that the defendant was planning to publish. Before the book’s completion, however, the defendant and plaintiff mutually agreed to discontinue their business relationship. The defendant subsequently used parts of the database to write and publish the book. According to the Court of Appeal of Brussels in a 2000 decision, the plaintiff’s card system was protected by copyright, because the structure of the data compilation was the result of original selection and intellectual creation; the defendant was therefore found to have infringed the plaintiff’s copyright. The Belgian Supreme Court confirmed the Court of Appeal’s decision in 2001, but reiterated that, for noncreative databases, copyright protects merely the structure of the database, not the actual data itself.

Databases, registries and other forms of documentation are being considered as a mechanism to protect TCEs within the context of the negotiations taking place in WIPO’s IGC.

Some worry, however, that making such a database, depending on its funding and management, would unwisely allow access to the very TCEs they are trying to protect. The collection, recordal and dissemination of and research on indigenous peoples’ cultures raise multiple concerns for indigenous and traditional peoples. First, there is the possibility of breaches of confidentiality between ethnographers and informants (although professional codes of ethics proscribe these). Second, there is the possibility of the misrepresentation of indigenous and traditional cultures. Then, there can be the lack of access to documentary materials by the people about whom the research was conducted. And, finally, there is concern that much documentation of indigenous and traditional cultures is made, owned and commercialized by non-indigenous and non-traditional persons.\[106\]

Moreover, the digitization, dissemination and circulation of TCEs can be in direct antithesis to indigenous and traditional perspectives about how access to their collections is to be provided. In some cases, safeguarding efforts have unwittingly led to the unauthorized disclosure or commercial exploitation of culturally sensitive materials. Indeed, the informational content of an archive’s collections might be sacred or confidential and subject to restricted use under customary laws. For these sacred, spiritual or otherwise culturally significant TCEs, access by third parties can be considered inappropriate by some communities. The handling of secret and sacred materials is thus a source of particularly acute concern. However, as Maui Solomon, a New Zealand lawyer, puts it, creating databases may be an interesting option “if, in the appropriate circumstances, public access can be effectively controlled. For example, by the use of “silent files” in which only the knowledge holders themselves or a duly authorized agency has access to that information for purposes of assessing whether or not a misappropriation has or is likely to occur.”\[107\]

**Key Points**

- Databases occupy an unclear space in copyright law. Each jurisdiction deals with them differently. While originality is required to receive general copyright protection, creative compilations may receive some benefits of copyright protection.
- Determining ownership of both the database itself, and its contents, is important to do before initiating a project that creates a database of TCEs.
- Some regional efforts are currently underway to create TCE databases. Such databases may be protected by copyright or *sui generis* database law.
Copyright does not preclude others from using the ideas, systems, facts, concepts or information revealed in the author’s work. It pertains only to the literary, musical, graphic or artistic form in which the author expresses ideas, information or other intellectual concepts. Copyright enables the author to control the copying or reproduction of the form in which he has expressed himself. For example, anyone is free to create his own expression of the same ideas and concepts, or to make practical use of them, so long as they do not copy or adapt the original author’s form of expression. The division, or dichotomy, between “idea” and “expression” is sometimes difficult to apply in practice. Simply put, works that are comprised more of an idea than an expression of that idea, often fall outside the scope of copyright protection.

For example, French painter Georges Seurat’s method of pointillism painting was emulated by others. The technique consists in small distinct points of primary colors creating the impression of a wide selection of secondary and intermediate colors. While it is most often Seurat’s style or idea that places him in art history, rather than any particular painting or expression of that idea, copyright law only protects expressions of ideas. So while copyright could protect Seurat’s paintings, including the famous La grande jatte, copyright could not protect the idea of pointillism, and Seurat could therefore not keep others from imitating his technique through copyright law.

A recent example is found in the case Leigh v. Warner Bros. Inc., an American case about the protectability of a photograph. Leigh was a photographer whose picture of the “Bird Girl” statue in the Bonaventure Cemetery in Savannah, Georgia, USA, was featured on the cover of the book “Midnight in Garden of Good and Evil.” Warner Brothers made a film based on the book, and included another photographer’s images of the same statue in the film and in promotional material. Leigh sued Warner Brothers for copyright infringement; the issue concerned the protectability of certain elements of the photograph and whether the defendant infringed on those elements. The U.S. Court of Appeals for the Eleventh Circuit emphasized that copyright law does not protect ideas and thus found that the original photograph did not entitle Leigh to prevent Warner Brothers’ photograph of the same subject, in which Leigh had no rights. However the Court found that some elements of craft in Leigh’s photograph such as selection of lighting, shading, timing, angle and film were protectable expressions.

In the context of TCEs, the idea/expression dichotomy plays an important role, because the distinction is often less certain. In the “Carpets case,” it is clear that the indigenous artists were hoping to protect a range of intangible cultural elements that were also expressed in the artwork. Certainly, because the carpets misrepresented their works and did not respect the customary laws, values and protocols associated with them, the Aboriginal artists and their communities were offended.

Another reason is that the indigenous artworks are more than “artworks” in the western sense of the word. They are significant representations of important cultural stories, they are imbued with a diverse range of collective and often spiritual meanings, and their painting and display carries moral responsibilities.

What if the carpet manufacturers had learned the sacred stories upon which the artworks were based and thereafter created their own very different visual expressions of those stories on carpets? Such carpets could maybe constitute new copyright works, because their expression would be different from those made by the Aboriginal artists. One could argue, however, that an element of misuse or misrepresentation of the actual stories could still exist in this hypothetical scenario.
The problem of the idea/expression distinction in the context of TCEs is a recurring one. This tension also arises because there is no clear description, identification, let alone definition of what TCEs constitute: this is a necessarily open category that seeks to capture the diversity of indigenous and traditional cultural practices and expressions.

TCEs embody complex relationships between tangible and intangible elements, and these are not always easily translated into the language and logic of copyright law. As the International Publishers Association has noted in the negotiations on IP and TCEs within WIPO:

*The IPR system is a balanced system with clearly defined rights…. A presumption of freedom applies. For example: Idea/expression dichotomy of copyright. At the moment, expressions of culture are a relatively open concept that does not yet meet with the habitual rigor of clear definition and identification of what ought to be protected and what not.*

There could be cases where the style or method of creating indigenous or traditional works would be employed by persons from outside the cultural context. In such a situation, existing copyright protection would not be available, since these cases involve the copying of an idea, a style or the method of making the work, as opposed to copying the actual indigenous or traditional work, or expression of the idea, itself.

**KEY POINTS**

- The difference between an idea and the expression of that idea can be vague. No single rule can be clearly applied to represent a distinction between an idea and its specific expression. Such a distinction is made on a case-by-case basis.
- TCEs often straddle the idea/expression divide in that they embody beliefs, stories or thoughts (i.e., unprotected ideas under copyright law) that are quintessential to the culture; they oftentimes do not have one single, finite expression that overrides all other expressions of that idea.

**Fixation**

In some jurisdictions, protection will arise provided that such works are fixed in a tangible or material form that can be seen, heard or touched: this is referred to as the fixation requirement.

Copyright protection is available for both oral and written works. The Berne Convention explicitly leaves the choice open as to whether works should only be protected if they have been fixed in some material form. Neither the WCT nor the TRIPS Agreement mention fixation.

A work will be fixed when it is sufficiently permanent to be perceived, reproduced or communicated, i.e., when it has a form of expression. This form needs not necessarily be graphic. Indeed, it usually does not matter whether the work is fixed in words, numbers, pictures, or any other medium: the form, manner, or medium of fixation is irrelevant. It may thus be written down, recorded, represented in digital data or signals or otherwise reduced to material form.

Many national laws, particularly those of common law countries, do require fixation, because this may facilitate establishing the existence of the work and provide a clear and definite basis for rights. Conversely, many countries, in particular countries with a civil law tradition, in Africa, Latin America
(Brazil), and Europe (including Belgium, Spain, France, Switzerland, Italy and Germany)\textsuperscript{114} do not require fixation. These countries accord protection to a work as soon as it is in a form in which others can perceive it.

The fixation requirement, perhaps more than originality and the idea/expression dichotomy, raises some serious challenges in the protection of TCEs, and particularly of intangible TCEs, under the copyright laws that comprise this condition.

For instance, “the shamanic incantations, complex therapeutic rituals, including poetics, healing performances in song or musicotherapy, sand painting, and so on, could often take spontaneous turns and not be readily amenable to representation in a tangible form.”\textsuperscript{115} In many cases, it is impossible to separate TCEs “from the underlying and intangible symbolism, spiritualism and belief systems that fixation entails. A prayer, for example, when expressed in a written material, could be the subject of a copyright under the Berne Convention, Article 15(4)(a). Nonetheless fixation detracts from the deep, personal, emotive and spiritual power of prayer that is fully realized in the context of individual or group specificity, ecstasy, seeming spontaneous outbursts, or the like.”\textsuperscript{116}

**Key Points**

- Many, but not all jurisdictions require that a work must be fixed in a tangible or material form in order to receive copyright protection.
- Many TCEs would not meet the fixation criterion. Oral stories and dances, for example, could not, in such cases, be protected if not specifically “fixed” in material form.

**Adaptations**

Adaptations are works based upon one or several preexisting work(s) or upon material from the public domain. They include any form in which a work may be recast, transformed or adapted. These adaptations are sometimes referred to as “derivative works,” for they “derive” from preexisting works or unprotected material. The derivative work may in turn qualify for copyright protection if sufficiently original.

An author, or rights owner, has the exclusive right to control the making of adaptations of his protected work(s). A third party wishing to create a work based upon a protected work needs the authorization of the author of said protected work.

Even works derived from materials in the public domain can benefit from copyright protection, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their “re-packaging” in the form of digital enhancement or colorization, can sometimes result in a new distinct expression which is sufficiently “original.” For example, the script for a film based upon a well-known ancient work, such as Homer’s Odyssey, may be original.\textsuperscript{117} In addition, two very similar-looking works may both have had their basis in the same work or body of work that is in the public domain.

For this reason, a contemporary literary or artistic production derived from or inspired by traditional culture, or a particular TCE, that incorporates new elements or expressions may be considered a distinct, original work and can thus be protected by copyright.
However, the protection afforded to such derivative works vests only in the new material or aspects of the derivative work. This is sometimes referred to as “thin copyright.” This phrase is used to refer to the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are protected as copyright of another author or are in the public domain. The copyright or public domain status, as the case may be, of these preexisting elements or material is unaffected. The idea is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author’s rights.118

While a copyright owner’s exclusive rights normally include a right to authorize or prevent the adaptation of his work, this does not generally prevent other creators from being inspired by the work or from borrowing from it. Copyright supports the principle that new artists should build upon the works of others and it rewards creativity.

The challenge is to distinguish between the unlawful copying or unauthorized adaptation and legitimate inspiration or borrowing.

Discussions about a possible sui generis protection of TCEs touch on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate.119

As exceptions and limitations will differ within each context, Part III outlines a range of ongoing projects establishing good practices when working with indigenous and traditional communities around access and use of TCEs, both within institutional contexts and within traditional communities.

**KEY POINTS**

- Adaptations are works based on one or several preexisting work(s) but with enough original elements to create a newly copyrightable work. Under copyright law, the challenge is to differentiate between unauthorized adaptation and lawful inspiration or borrowing.
- TCEs could often be classified as derivative works since they are based on preexisting expressions. A potential problem with simply classifying every new iteration of a TCE as a derivative work is that it would not serve the purposes of a community and would allow each TCE iteration to eventually fall into the public domain and thus be available for use by anyone.

**The public domain**

The Berne Convention applies to “all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”120 “Public domain” is a sometimes confusing term that is not used uniformly. Some jurisdictions do not use the term “public domain” at all; Japan, for example, uses “copyright-free” for this concept.

Contrary to some current perceptions, a work is not in the public domain simply because it is accessible, for example, on the Internet. With the advent of the Internet, it became possible to “post” protected works freely and easily. Once such material is available online, it may be perfectly copied among thousands or even millions of computers very quickly and essentially without cost. This perhaps intensified an already established but incorrect belief that, if something is available through a free and open source, it must be in the public domain. The Internet actually holds an enormous amount of protected works. There is a big difference between “publicly accessible” and “public domain.”
Generally, the public domain consists of every intellectual product that was never or no longer is under IP protection. Its definition and usage can thus only be understood in relation to what is and what is not protected under IP laws.

The public domain is an important concept for cultural institutions to understand. This is because the materials in the public domain are free to be used by anyone for any purpose. Cultural institutions are free not only to reproduce material from the public domain on the Internet but also on commercial goods and for commercial purposes.

Institutions often have different strategies for managing public domain material. For example, the online “Webmuseum” attempts to limit access to digital reproductions of works of Swiss artist Paul Klee (1879-1940). To access a Paul Klee work online, the Internet user must certify that the work is in the public domain in the country and jurisdiction where it is about to be imported.121

Physical institutions with an online presence often select the artworks that they display digitally,122 or, if their websites provide a searchable database, they may simply not display works that are not in the public domain and/or for which they have not received permission to digitize or display online.123

The term “public domain” is most often used to refer to intellectual material in which no one can establish or maintain proprietary interests. As already discussed, this is problematic in relation to TCEs as many traditional communities maintain communal, familial, and/or clan rights, responsibilities and interests, but these are not necessarily recognized within legal frameworks that regulate and define “property” and “proprietary interest,” including the IP framework.124

Most TCEs that are not protected by a sui generis or other type of IP law are in the public domain and open to undifferentiated use (subject to potential related rights in their recording, performance, or broadcasting).

The concept of the public domain does not take into account the different rules established by customary laws and the function of TCEs within indigenous and traditional communities. Some communities have expressed concerned about the concept of the public domain in relation with their TCEs.125

For example, in Sardinia, Italy, different villages have distinctive ways of singing the multipart al tenore genre that is recognized both within the villages and by other villages as representing a specific village. Potential for exploitation by arrangers who take the “public domain” traditional music and arrange it for their own profit without recognition of the original is very present.

There are views, however, according to which the concept of the public domain offers possibilities for the ongoing protection and promulgation of TCEs.126 “It serves several of the objectives associated with the safeguarding and preservation of cultural heritage, and it is argued that the public domain character of cultural heritage is essential for its renewal and survival.”127

For example, literature that links TCEs with the broader cultural heritage debate often draws connections to such international instruments as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970);128 the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003); the UNESCO Convention on
the Promotion and Protection of the Diversity of Cultural Expressions (2005) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).129

Furthermore, there is a view that if TCEs were removed from the public domain, they would run the risk of not being able to “evolve and [would] risk [their] very existence as [they] would lose one of [their] main features: [their] dynamics.”130

KEY POINTS

- Material that is not covered by copyright, either because it does not meet the criteria for copyright protection or because its copyright term has expired, is said to belong to the “public domain.”
- Publicly “accessible” is not equivalent to public domain; in other words, being able to view a reproduction of a TCE on the Internet does not mean that the TCE is in the public domain (i.e., free of copyright).
- TCEs have a difficult relationship with the public domain; they neither fit neatly into the category of copyrighted works nor, arguably, should they necessarily be available and usable for any purpose. Indigenous peoples and traditional communities do not necessarily accept the notion of a public domain.

2. Authorship

Copyright law recognizes the “author” and “authorship” in ways different from which indigenous peoples or traditional communities might understand these notions. Indeed such notions are culturally specific; they emerged in Europe in the 17th and 18th century.131 They cannot necessarily be easily mapped onto indigenous or traditional understandings of cultural practice and cultural products.

For example, if a film is made of a traditional ceremony, the “author” is the person who makes the film. This understanding is often in direct antithesis to indigenous and traditional ones, where the “author” (if that term is used at all) may be an individual within the community who is responsible for the information contained within the ceremony or it may be a clan, as a whole, that has responsibility or authorship in the ceremony.

Under copyright, however, TCEs are often seen as works of “unknown authors.”132 This highlights the extent of missing information within TCE collections. Acquiring this missing information is difficult and not always possible. This is part of what makes these collections unique and sensitive.

This uneasy situation is due to the fact that, in the past, when TCEs were being recorded and documented by non-indigenous or non-traditional people for the purposes of study – either ethnographic, folkloric, anthropological, scientific, or sociological – very few names of individuals were noted down and the use of pseudonyms was common. This information was often seen as irrelevant.

It should be noted, though, that in the past 30 or 40 years, ethnographic collecting practices and protocols have evolved and improved. Release forms, permissions, and informant contact information sheets are now systematically obtained at the time of the collecting. Without these documents, most cultural institutions are unable to accept the collection, as they would be unable to provide researchers with access to the material.
Furthermore, certain attempts have been made to address the “authorless” nature of some works. Article 15(4) of the Berne Convention stipulates that countries may legislate to designate a competent authority to represent unknown authors in the case of “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union.”

For the management of TCEs, it should not be assumed that they are authorless. Many indigenous peoples and traditional communities know and can identify who the individual creator or maker of a particular TCE is or was, even long after he has passed away. For many of the very old TCEs, the author is still known by the community. There are some cases, nevertheless, where the particular expression can be distinctly recognized as coming from a certain people, community, or region, due to the particularities of the art form or the material used, but where the actual individual creator is unknown.

**Orphan works**

Under copyright law, “orphan works” are works whose right owner cannot be located or identified.

Some jurisdictions, such as Canada, have implemented legislation that creates a compulsory licensing scheme allowing for the use of published works to be issued by the national copyright authority on behalf of non locatable copyright owners.

The United States of America and the European Union are currently looking into similar legislation although there are several difficulties that need to be addressed, including a definition of “orphan work;” a defined threshold for the reasonable diligence that a hopeful user should use to search for an author; and the status of TCEs in this framework.

The European Commission has put together a high-level expert group on the issues of digital preservation, orphan works and out-of-print works to address some of these issues in the European context. For literary and audiovisual works, the group concluded that a solution to the orphan works issue is desirable, whether it be via legislation or non-legislative solutions, including dedicated databases concerning information on orphan works; improved inclusion of information on rights owners within digital material; and enhanced contractual practices.

Some specific proposals include:

- An in-depth investigation to identify the copyright owner before the work is considered “orphan”;
- Any reasonably diligent search should necessitate a high level of care;
- Anyone intending to exploit an orphan work would need to be able to demonstrate significant effort in tracing the copyright owner; and,
- The notion of diligent search should consider several elements: the type of orphan work, the type of exploitation envisaged, and the type of user.

**Orphan works in the TCE context**

The orphan works issue has a specific set of ramifications for TCEs. Due to the way indigenous peoples and traditional communities have historically been represented by outsiders, their TCEs have been understood as productions which never had an “author” or “performer” in the copyright and related rights sense and cannot, therefore, be “orphaned” as so defined in law. Without a specific author to
associate with a specific expression, TCEs would not be able to benefit from the protective regime put in place for orphan works.

An orphan work must first be considered copyright subject matter. It can be difficult to determine whether, for example, a cultural symbol, dance or handicraft is a TCE not protected by copyright or, alternatively, an orphan work, i.e., a work protected by copyright but whose right owner is unknown or cannot be located.

Moreover, orphan works legislation often allows for the public to access, change, display and otherwise use the works in question after a diligent search has been performed. This is likely to be problematic for many indigenous groups and traditional communities.

It may be possible to argue that a given copyright-protected TCE (be it a symbol, a narrative or a handicraft) is “orphaned” and therefore subject to a country’s legislation that addresses unidentifiable owners. From an institutional perspective, this could make TCE collections easier to manage. However, this would likely perpetuate institutional and governmental control over the collections – a problem that has meant that tradition-bearers have had trouble accessing and asserting their rights and interests in relation to the development of appropriate forms of management that the collections require.

While there are not yet many examples of how the orphan works issue collides with access, use and control of TCEs, it does raise specific concerns, and these should be kept in mind as countries implement orphan works and/or TCE legislation.\(^{135}\)

It may be useful to consider a risk-management approach for managing orphan works.\(^{136}\) Three key questions that a risk management policy may consider include what steps cultural institutions should take to identify a copyright owner; what steps it should take to contact that person or entity; and what happens if it is not possible to identify or locate the copyright owner.

**Key Points**

- An “orphan work” can be described as a copyrighted work whose copyright owner is unknown or not locatable. Some jurisdictions are currently considering implementing legislation that would allow the public to use these works once a reasonable search for the copyright owner has been undertaken.
- TCEs, whose nature is often not to have one author but rather to be attributable to a cultural group, could potentially be adversely affected by “orphan works” legislation: a potential user could claim that, after a diligent search, he could not locate the copyright owner and could therefore use the TCE for whatever purpose he chooses.
3. Duration of Protection

A central tenet of the copyright system is that the term of protection is not indefinite; works ultimately enter the public domain. The Berne Convention and the TRIPS Agreement stipulate 50 years post mortem auctoris (after the death of the author) as a minimum period for protection, although countries are free to protect copyright for longer periods. In other words, any State signatory to the Berne Convention or the TRIPS Agreement must provide the “life + fifty” term of protection but is permitted to extend it. For example, Mexico permits one of the longest durations of copyright: copyright lasts for the life of an author plus 75 to 100 years, dependant upon an array of factors.

Moral rights also obey terms of protection, and this varies from country to country. They may be perpetual, have the same duration of economic rights, or end with the life of the author.

There are a few exceptions to this basic rule of duration. For example, royalty rights from use of the famous work “Peter Pan” subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause, and a proposal was put forward in 2003 in Australia to grant perpetual protection for the artwork of indigenous artist Albert Namatjira. These examples show that the central principle of limited duration, essential to the copyright balance, may, albeit very rarely, be twisted to accommodate certain specific situations.

Understanding the copyright duration equation is vital for all institutions working with 20th and 21st century artists and their works. Knowledge about whether a work is protected or has fallen into the public domain matters because artists will have a range of rights concerning, inter alia, the display, reproduction and, depending on the jurisdiction, arrangement of their artwork.

The determination of the status of a work (whether it is protected or in the public domain) requires research and calculation. Different jurisdictions have a range of specific duration “calculations.” These calculations often depend on the medium of the work, whether the applicable copyright act is retroactive, and whether the work is authored solely, in collaboration with others or under the auspices of an institution, among many other considerations. It is likely that a cultural professional will have to become familiar with the current national copyright law, with former laws that were in place at the time of a given work’s creation and/or publication and with laws of many other jurisdictions.

Given the intergenerational nature of TCEs, it is argued that no finite term would be appropriate for their protection. Many indigenous peoples and traditional communities would like to see indefinite or infinite protection for at least some expressions of their traditional cultures. Calls for indefinite protection have also been linked to calls for retroactive protection. Some tradition-bearers have expressly sought to enforce copyright protection for certain symbols and other TCEs. These protected manifestations of the TCEs will eventually fall into the public domain, unless special legislation is enacted, as in the above-mentioned cases of “Peter Pan” and Albert Namatjira. In the context of the WIPO negotiations, the Hokotehi Moriori Trust paid special attention to the question of term and pressed for an instrument that would provide for protection in perpetuity since TCEs “continue to be integral to the maintenance of the culture and identities of the indigenous peoples concerned.”
4. Economic and Moral Rights

Copyright laws vary from jurisdiction to jurisdiction. One of the most prominent differences is the degree to which copyright protects the economic and moral rights – if any – of an author.

Economic rights

The owner of copyright in a protected work may use the work as he wishes (to the extent that his rights do not conflict with those of others) and may exclude others from using it without his authorization.

The exclusive economic rights generally include the rights to, *inter alia*, copy or reproduce, (which sometimes include the right to distribute), adapt, perform in public, make a sound recording, broadcast, display and communicate to the public the work.

Exclusiveness is, however, limited. Certain uses may be made of the protected work without having to obtain the prior authorization of the copyright owner, sometimes for free, sometimes provided a fair or reasonable payment is made: these are referred to as exceptions and limitations, which will be dealt with later on in this section.

Moral rights

Depending on the jurisdiction, an author also enjoys certain moral rights, which are enshrined in Article 6bis of the Berne Convention. Moral rights generally include the right of attribution or paternity (the author has the right to claim authorship, to have his name stated or printed with the work), the right to the integrity of the work (the author has the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author’s honor or reputation), the right of publication (wherein the author is the sole judge as to when and whether the work may be made available to the public), and the right to withdraw or retract (also referred to as the right of renunciation). Moral rights may also include an author’s right to associate, or not, with specific products, services or causes, the right to remain anonymous, and the right to use a pseudonym.

It should be noted that moral rights, just like economic rights, only apply to protected works. Moral rights vest in the work’s author. In some jurisdictions, moral rights are inalienable, i.e., they cannot be
transferred to another person or legal entity; they remain with the author even when he has licensed or assigned his economic rights to a third party. However in some jurisdictions moral rights may be waived.

In some jurisdictions, moral rights are only applicable to certain categories of works. For instance, in the United States of America, only works of visual art (for example, paintings, drawings, print, sculptures, or photographs) may benefit from the rights of attribution and integrity.\(^{151}\)

Through moral rights, the author can impose limitations or requirements on what others, including cultural institutions, can do with the work. Even though cultural institutions may have physical ownership of a protected work, this procures insufficient legal grounds for several uses of said work. This can range from the way in which an artwork is presented; to separating an artwork from its intended whole;\(^ {152}\) to painting a sculpture a different color;\(^ {153}\) to removing a sculpture from the spot for which it was commissioned and where the artist meant it to remain.\(^ {154}\) As concerns TCEs, this could involve, for example, a sacred design being copied on a carpet, which people could walk on.

For cultural institutions, moral rights yield benefits and responsibilities. They promote artists’ authority over their own creations; nevertheless, ongoing care must be taken in relation to the use of a work in order not to breach an author’s moral rights.

In the TCEs context, the concept of moral rights (at least conceptually) has the potential to address concerns relating to cultural offense, misuse, and misrepresentations of TCEs and may be a means to ensure respect, recognition and protection of authenticity and integrity.\(^ {155}\)

In one case involving TCEs, moral rights have been invoked. In the context of the Sydney Olympic Games of 2000, the Olympic Museum in Lausanne posted on its website three Australian Aboriginal artworks, which were intended to be downloaded as wallpapers, without seeking permission from the artists. The artists considered this act offensive, given that the artworks were important cultural works which also related to their land knowledge. Upon hearing their complaints, the museum removed the artworks from the website and entered into negotiations regarding possible copyright and moral right infringements. These discussions culminated in a settlement agreement, which saw the artists receive money for the infringement as well as a letter of apology signed by President of the Olympic Museum Foundation, acknowledging the infringement and apologizing for cultural harm.\(^ {156}\)

When digitizing their collections, cultural institutions should bear in mind moral rights. For example, a digital copy of a work can be seen in a number of different formats on the Internet; universities, poster shops and enthusiastic travelers have captured famous paintings digitally. As can be expected, however, the intensity of pixels, color replication and general quality of images vary greatly. An author may object to a reproduction in poor quality, which would violate his right against distortion or derogatory treatment.

As far as TCEs are concerned, image quality may play an important role. It may be viewed as culturally offensive to display a TCE except as the most faithful reproduction or, conversely, except as a thumbnail so that certain spiritual symbols cannot be made out except upon an in-person visit or with permission of the relevant community. Generally, a thumbnail version of a TCE could not be authorized under an exception or limitation, since even the disclosure of the rough parameters of a TCE image is often enough to cause harm and/or damage. There is likely no single type of guideline that will work well for all cultures or all types of TCEs, therefore each cultural institution may need to develop its own management frameworks according to its collections.
In certain countries, this concept has been seen to work. For example, Section 28(3) of the Nigerian Copyright Act\(^\text{157}\) states that “in all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression utilized has been derived.” This provision essentially provides for recognition that the work derives from a collective or community context.

Despite the innovative nature of this law, the Nigerian experience has left a number of issues unsettled. The TCEs of different communities can be very similar; songs, crafts or paintings are often shared by or common to several of Nigeria’s regions, and identifying and attributing a TCE to a specific group can present a challenge.\(^\text{158}\) An additional difficulty is the extent to which some expressions, while they may resemble each other in appearance, actually have different cultural customary laws, functional values and significations in their associated communities. What is more, the Nigerian Copyright Commission has the sole right to authorize use of TCEs; there may thus be contexts where granting permission for use may be acceptable to one community but offensive to another.

Another example is that of the 2003 Australian Government Indigenous Communal Moral Rights (ICMR) Bill to protect the cultural interests of indigenous communities. ICMR was considered to be a possible tool for indigenous peoples to prevent derogatory treatment of works drawing on their traditions, customs and beliefs. The goal was to entitle indigenous peoples to “take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material,” and to give the peoples “legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.”\(^\text{159}\) Aspects of the proposed draft Bill were criticized by indigenous people and other interest groups. While the idea of the Bill remains active, it has not yet been passed.

**Key Points**

- Copyright laws provide economic and moral rights. The economic rights relate to the exclusive rights of prohibiting and authorizing use of their works. Moral rights relate to the non-economic, personal or artistic interest of the author in the work.
- Copyright owners have the right, *inter alia*, to control the reproduction of their works; the public performance of their works; the recording of their works; the communication to the public of their works; and the translation and adaption of their works.
- Some communities wish to claim and exercise IP in their TCEs to enable them to exploit them commercially. The copyright system is intended, in essence, to permit the commercial exploitation of creative works in as fair and balanced a manner as possible.
- Many TCEs are created primarily for spiritual and religious purposes and not to reach as broad a public as possible. These are often not meant to be exploited economically therefore economic rights might be completely inappropriate.
- Many indigenous peoples and traditional communities are interested in protecting the integrity and authenticity of their TCEs solely or in addition to the ability to profit economically from them. In such circumstances moral rights might be considered more important than economic rights.
Resale rights

Resale rights (droit de suite, in French) are a bundle of rights that allow an artist (or his heirs) to receive a percentage of the sale price of his work of art when it is resold by an art-market professional (auctioneer, gallery or other art dealer; private sales are usually excluded). The goal is to allow artists to reap financial benefits from the resale of their works as they increase in reputation and value.

Resale rights are provided at Article 14ter of the Berne Convention. They are recognized in some 50 countries, including many countries in Latin America and Africa. Switzerland and the United States of America, however, do not recognize resale rights, but the American State of California does.  

The resale right is usually limited to works of graphic art or plastic art such as, for example, pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs.

France was the first country to introduce such rights. “The French Government introduced a scheme to protect the right of resale in 1920, after controversy over artists living in poverty, while public auction houses were profiting from the resale of their artistic creations.”

The European Union issued a specific directive in 2001. This directive requires each EU member to enact legislation giving artists a right to a percentage, (calculated through a sliding scale), of the profit made on the resale of their works of art (graphic or plastic arts) for a period of their lifetime plus 70 years.

Resale royalties are potentially significant for indigenous and traditional artists because of the difficult economic conditions in which many indigenous peoples and traditional communities live. It is perceived as a sad and unfair irony that many traditional artists live in poverty, while their works are being resold for thousands of dollars at auctions and in galleries on the global art market.

For example, Tommy Watson is an Australian Aboriginal artist whose works are selling for significant sums of money. Watson’s 2006 painting Waltitjatt sold for $197,160 at a recent auction sale in Sydney. Watson travels between Irrunytja, a small community of 150 people, and Alice Springs, a regional center. Watson reportedly receives approximately $1000 per painting from a local art gallery.

Other examples include a Torres Strait Islander (Australia) drum sold for €818,400 at Christie’s Paris in 2006; this was a world auction record for a drum. A Blackfoot Beaded Hide Man’s wearing shirt sold at Sotheby’s New York for $800,000; indeed, “Sotheby’s October 2006 sale of American Indian art achieved a total of $7 million and…also set a new world’s record for the sale of a Native object…a Tsimshian face mask sold for $1.8 million. The sale was white-glove which means every lot was sold.”

Yet another example is the traditional potters of north Georgia, in the United States of America, which have been making unique “face jugs” for generations. A face jug that was made by deceased traditional artist Lanier Meaders would be worth many thousands of dollars today, an astronomical increase in value from when it was created in the 1950s.

In Australia, the debates have been particularly intense given the sharp upward shift in the value of Aboriginal artworks. In November 2008, the Australian Government introduced the Resale Royalty for Visual Artists Bill 2008 and legislation to introduce a resale royalty right scheme to ensure Australia’s visual
artists receive a portion of the proceeds from the resale of their works was passed by the Senate in
November 2009. Under the scheme, artists receive five per cent of the sale price when original works are
resold through the art market for $1000 or more. The resale royalty right applies to works by living artists
and for a period of 70 years after an artist's death. The scheme covers original works of art, such as a
painting, a collage, a drawing, a print, a sculpture, a ceramic, an item of glassware or a photograph.169
Under this scheme, indigenous artists will start receiving some return from the exponential growth in an
art industry that is wholly dependent upon them, but that provides limited economic return to the
individuals and communities who are the creators.

5. Exceptions and Limitations

Copyright regimes provide for exceptions and limitations to the exclusive rights of copyright owners that
allow for certain uses without the authorization of the copyright owner, either for free or against
payment. Examples of exceptions include: reproduction of a work for purely personal and private use of
the person making the copy; making quotations from a work; use of a work for purposes of reviewing,
criticizing or parodying it; and, reproduction of a work for the purposes of archival preservation. Further
examples include:

- copying – for the purposes of criticism, review, news reporting, research or private study;
- limited copying for particular educational purposes in specific circumstances;
- limited copying by librarians or archivists in specific circumstances; and
- recording a television program for the purpose of making a complaint or watching it at a more
  convenient time.

The list of permitted acts under copyright law varies from jurisdiction to jurisdiction though, and TCEs’
geographic location could be the decisive factor in determining whether a use is considered legal or not.

The United States of America, for example, has incorporated the formerly judge-made doctrine of “fair
use” in its Copyright Act.170 Whether a use is “fair” is tied to four factors,171 although the degree to
which one may rely on those factors or the weight which any single factor is given in a specific
circumstance are rarely, if ever, predictable. In litigation, once a plaintiff has proven that a defendant has
committed an infringing act, the defendant then bears the burden of proving that his copyright should
nonetheless be excused as a “fair use.”

A well-known American case, Rogers v. Koons,172 demonstrates that copyrighted works can not be so
closely mimicked or parodied that the original work loses its meaning. In this case, Jeff Koons, a famous
American artist, was found liable for copyright infringement as a result of creating a sculpture entitled
String of Puppies which recreated the plaintiff's photograph. The court stated that Koons’ sculpture
infringed the photographer's copyright because Koons copied his composition, poses and expressions.
The fair use defense failed as Koons had claimed his aim was to parody a type of culture in its entirety as opposed to the specific photograph.\textsuperscript{173}

In contrast to the US concept of fair use, United Kingdom law incorporates “fair dealing” in its copyright regime as a specific list of actions that are explicitly non-infringing.\textsuperscript{174} Other jurisdictions use other terms; Swaziland’s draft copyright law, for example, refers to “free use.”\textsuperscript{175}

Many, if not most, jurisdictions handle exceptions and limitations differently. In the civil law tradition, countries designate specific types of uses that are permitted. The European Community Information Society Directive of 2001\textsuperscript{176} provides a framework for exceptions and limitations.\textsuperscript{177} In France, for example, the Intellectual Property Code enumerates the specific circumstances under which authors must cede their rights to the public.\textsuperscript{178}

In some jurisdictions, exceptions are very limited. For example, until recently in Australia it was considered copyright infringement to copy, reproduce or adapt copyright material for personal or private use without permission. Only a very short menu of actions was allowed under Australian fair dealing, including review or criticism; research or study; news-reporting; and lawyers’ business.\textsuperscript{179} With new legislation in 2006, Australia added several private copying exceptions, making it no longer an infringement to: record a broadcast in order to watch or listen to at a more convenient time; make a copy of a sound recording for private and domestic use; and make a copy of a literary work, magazine, or newspaper article for private use.\textsuperscript{180} Australia now also has a special division of exceptions applying to artworks in public places (to allow photography, incidental filming, etc.) and statutory, compulsory licenses that allow use by schools, universities, and others on payment of a license fee.

As another example, in South Africa, reproduction of a literary or musical work is permitted for the purposes of research or study – or the personal or private use of – by the person using the work; for purposes of criticism or review of that work or of another work; and for the purpose of reporting current events in a newspaper, magazine or similar periodical or by means of broadcasting or in a cinematographic film.\textsuperscript{181}

\textit{Exceptions and limitations in the TCE context}

For TCEs, exceptions and limitations engender, again, a new set of issues. For the secret, sacred, spiritual and otherwise culturally-significant nature of TCEs, even use of a TCE as a teaching tool can be considered inappropriate. For certain indigenous peoples and traditional communities, any revelation of specific TCEs is punishable conduct under customary law.

For example, a college professor in New Mexico, United States of America, has been banished from Taos Pueblos by his own Native community for having written and published a paper about a spiritual tribal dance. His order of banishment from the community states that he “caused irreparable harm to the sensible nature of the religious activity through exploitation.”\textsuperscript{182} Under copyright law, the professor’s actions are acceptable: he was creating a new expression (his paper) from knowledge he had about a Native community. To the tribe whose dance was publicized and described without authorization, fair use was not the appropriate framework for judging appropriate use. The community itself had its own rules of access, use and dissemination and these were not followed, and the Professor was sanctioned.
In a cultural institution setting, with an emphasis on broadening the understanding and appreciation of culture, exceptions and limitations play an important but uncertain role for TCEs.

For example, the Division of Anthropology at the American Museum of Natural History in New York has created an access policy for the public that clearly takes into account the exceptions and limitations imposed by copyright law and that distinguishes uses that fall under such exceptions and limitations, and those that do not. The policy stresses that very limited photocopy orders can be handled by mail, and that any sustained engagement with their archival resources requires an on-site visit which requires permission from the curatorial staff. The Division further stipulates that permission to photocopy “is determined by the condition of the documentation and the nature of the individual project. Photocopied material is made available for research purposes only. Clearance for any other use, including publication, electronic transmission, general distribution or commercial use must be secured from the Division by submitting a written request to the Chairman.” With regard to photographing the collection, visitors may take photographs of the collections “for record purposes” for personal use only. Again, permission for any other use must be made via written request. It may be wondered why tradition-bearers are not consulted concerning such requests; in fact, in many cases, they are not the copyright owners.

At the Musée du Quai Branly in Paris, 3,500 artifacts in the permanent collection are presented “so as to highlight the historical depth of the cultures that produced them, and the many different meanings that the works themselves possess.” While the physical collection of these varied and culturally significant artifacts has been contentious, the positive and negative effects of providing an online presence also stir up IP questions with difficult answers. The museum’s “legal notes” webpage details the ways in which the images and text on the museum website may be used following France’s Intellectual Property Code. For indigenous and traditional communities who would prefer that their TCEs be exhibited in a different context – if at all – France’s copyright exceptions and limitations do not necessarily provide for such possibilities. But indigenous peoples and other tradition-bearers want to be involved in decisions about the appropriate ways of exhibiting works, and this includes questions about authorizing use, by whom and to whom.

Another example is that of the Colorado River Indian Tribes Library & Archive, founded in 1958. The Tribal Public Library/Archive serves as a research center for those wishing to study the culture and history of the four tribes of the reservation. The Tribal Archive has been delegated by the Tribal Council to preserve and maintain the culture and traditions of the Colorado River Indian Tribes. The Tribal Archive consists of original written documents, copies of documents, microfilm, photography, videotape and oral history tapes. Included is personal correspondence, federal government documents and works of historians, ethnologists and anthropologists. The Tribal Archive is accessible to tribal members only. Non-Tribal members have to file an application for the use of archival materials and must agree to abide by the rules governing the use of these. The rules are not made publicly accessible by the Archive. Director Amelia Flores applies a disclaimer to “problematic” acquisitions and “derogatory labeling” in the holdings of the Library/Archive, which states: *We do not endorse this publication.*

Cultural institutions are often endowed with the artworks or recordings of individuals and communities, some of whom are alive and contemporarily prominent, others are unknown or deceased. Whether a cultural institution may display, reproduce and/or make a profit from various types of reproductions of an artwork or recording depends on several factors, some of which are laid out below.
Exceptions and limitations are dealt with differently in the world and even within a single jurisdiction legal predictions are difficult if not impossible. Under such circumstances, it may be important for a cultural institution to develop a risk management strategy that takes into account the possible issues that may arise.

The extent to which the use of a work is allowed under an exception is an ongoing issue because there are no hard and fast rules. While direction can be taken from court decisions, these are often decided on the particulars of each case. From producing catalogs to making exhibition posters and event invitations, whether a copyrighted work can be made part of that new work without obtaining permission from the copyright owner is often questionable.

Cultural institutions holding the copyright in some of their works (especially those embodying TCEs) would benefit from understanding whether they can or should be charging licensing fees for third parties wanting to use images from their digital collections for “coffee table” books, textiles, in films and in other commercial products.

**Preservation, restoration and administrative uses of TCEs**

Many professionals at cultural institutions are responsible for archiving ethnographic images, audio and video recordings, or posting information on the Internet and, as such, need to be familiar with the good practices for archiving, digital imaging and scanning technology. New technology has collapsed the distinct acts of accessing a work, using a work and copying a work. For example, in the digital environment, it is not possible to access a digital image of a painting, or a sound recording, without making several copies of it because clicking on a webpage requires a computer’s random access memory (RAM) to make a copy of it and the source code in HTML (hypertext markup language) constitutes a copy as well. All these are covered under the limitation for temporary reproduction. This represents just one of several ways in which new technologies are challenging traditional copyright concepts.

Cultural professionals are requesting that a new specific exception be built into copyright law for purposes of preservation or restoration. Indeed, just as computers make several copies in their RAM in order that an image can be seen on a monitor screen, or a piece of music can be heard, or a video watched, so are several “incidental” copies made in the process of several administrative duties.

**Restoration**

Restoration can present an “originality” problem to the extent that reproducing an original work or object of related rights in carrying out one’s legitimate profession may create another protectable work. Certainly a restorer’s or media preservationist’s job requires skill, selection and creativity. The restored work that is the outcome of this labor often owes its success to a particular restorer or media preservationist. The very nature of his work, however, could be understood as copying the original work, as a new work is not being created and it usually falls short of the originality requirement for protection. As one pair of scholars noted: “[T]o recognize inpainting or replacement of losses as original artwork in itself and thereby encourage such practices in order to satisfy the requirements of copyright law, is dangerous and contrary to the interest of the profession and art.” While it has been suggested that the work of restorers and conservators constitutes “an original contribution by the conservator to the work itself,” it is not something that has been tested in the courts and is not common practice.
Preservation

Many jurisdictions tackle the issue of exceptions and limitations with regard to preservation. As the WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives states, national laws differ greatly and in nearly all respects, from their scope of applicable institutions to the specific activities encompassed.

The Copyright Act of Canada, for example, permits libraries to make copies of works under various circumstances for purposes of preserving or maintaining library collections. The United States of America Copyright Act allows archives, libraries and occasionally museums to make preservation copies, security copies, and copies for deposit in other research institutions.

A few laws allude to moral rights. The library exception in Mexico requires that a preservation copy may not alter the original work. The preservation statute of the Netherlands explicitly assures that the author retains certain moral rights.

The laws address the issue of digital media in several different ways, sometimes explicitly, and sometimes by implication. Many statutes do not mention the issue at all. In some countries, the statutes state clearly that digital copying is or is not permitted, and in those cases digital copying may be allowed only for some purposes, but not for others.

- Austria: Has a general provision for library copying, which explicitly allows digital copies in some cases;
- Canada: Allows copies of articles for research or private study, and the statute provides that the copy given to the user may not be in digital form;
- China: Allows some preservation copying in digital formats;
- Denmark: Has a separate statute governing the making of digital copies for library users. It permits digital copies of articles and other works, but subject to an extended collective license and the right of the owner to demand remuneration;
- United States of America: Explicitly allows digital copies for preservation and replacement, but the statute is silent on the prospect of digital copies for research or interlibrary loans.

In the TCE context, institutions sometimes complement existing law by adding additional guidelines which better serve the interests of indigenous peoples and traditional communities and suit the often sensitive nature of TCEs (examples of such guidelines are examined in Part III).

For example, the American Folklife Center (AFC) is currently working on issues of digital preservation and web access to its collections. “The growing number of digitized audio, video and image collections (photos as well as manuscripts) raises new questions about access and reproduction rights, e.g., the processing of photo and phono-duplication requests. Digital formats enhance and facilitate broad access, but may require the development of revised IP policies for use of the collections.”

A good example of the AFC reproducing a public domain collection is when, in 1982, the AFC received permission from the Omaha Tribal Council to transfer into a modern format a traditional music collection made in the 1890s. The original recordings were in the form of wax cylinders. In 1999, the AFC collaborated with the Omaha again to produce the online collection which, in addition to the digitized recordings also features recordings from the 1980s.
The Director of the AFC said that “[t]he key to the success of these two endeavors (the album and the online presentation) was close collaboration with the owners of the cultural materials…an attitude where showing respect, carefully listening to tribal concerns, working together toward common goals, and taking the time to do things properly was fundamental.” These achievements highlight the importance of collaboration, where indigenous and traditional thoughts, opinions and expertise are actively sought out, welcomed and incorporated into the decision-making processes. This is how new relationships are created, and how new frameworks for managing collections, their access and their reproduction can be developed.

**KEY POINTS**

- Copyright laws incorporate exceptions and limitations under which the public may use copyrighted material without the permission of the copyright owner. These exceptions and limitations are sometimes termed “fair use” or “fair dealing” in the common law tradition.
- Preserving cultural works presents some unique issues with regard to IP. Some cultural institution professionals are hoping that specific exceptions can be built into legislation insofar as they allow the making of administrative, back-up and/or archival copies of copyrighted works.
- Restoring cultural works runs into copyright’s originality requirement: it is unclear whether a restored cultural work is a new work for copyright purposes or if it is merely a form of copying from an older work – and therefore unprotected by copyright.
- Copyright exceptions do not always suit the needs of indigenous and traditional communities and their TCEs. The sacred, secret or otherwise sensitive nature of a given TCE may render it inappropriate for certain groups of people or under certain circumstances that would normally be acceptable under exceptions or limitations.
- The management of TCEs presents complications. Some cultural organizations that work with TCEs have, in tandem with the communities whose TCEs they steward, fashioned their own guidelines for access, control and management of the collections.

6. **Ownership, Transfers and Licensing of Copyright**

Physical possession or ownership of a physical work does not necessarily imply ownership of copyright. Various national laws state this explicitly.

**Ownership**

The principle of copyright ownership is important for cultural institutions wishing to reproduce material from their collections or wishing to alter it once they have purchased it and taken physical possession. If a cultural institution owns a physical protected artwork, or texts or sound or video recordings, but not the copyright in them, it may not make any use it wishes of said artwork or other material. For example, it may be permissible, under an exception or limitation, to have a photograph of such material reproduced in a magazine or in promotional pamphlets. But the same use would not be allowed for postcards to be sold in the shop. Similarly, an archive that holds original field recordings of traditional musicians may not produce a commercial recording of these without the consent of the artists.

Likewise, if a traditional song from an indigenous group or traditional community is transcribed by an anthropologist, the song is still owned by the group or community, even if it is the anthropologist who fixed it. As such, the analysis might be different for certain textual works that can exist absent the initial
fixation; for instance, a prayer could be taken from an academic article and put on a condolence card without the person who fixed the prayer having any underlying rights.

**First Ownership, Joint Ownership**

The author is generally the first owner of the copyright. Multiple national laws have some exceptions to the general rule, for example for works made by employees or commissioned works, where the copyright initially vests in the employer or commissioner, as the case may be.

Co-authors of a work are co-owners of the copyright in it. “Co-ownership may arise not only from co-authorship but from other relationships and transactions. For example, two or more persons may become co-owners […] if copyright is transferred to them jointly.”

**Crown or Government Copyright**

Another layer of complexity to questions of ownership is the copyright claim made by the government in its works, called “Crown copyright,” in the United Kingdom and several other Commonwealth countries such as Australia, New Zealand and Canada.

Conversely, other jurisdictions, including the United States of America, the Czech Republic, Germany and the Netherlands do not employ government-owned copyright mechanisms; generally, most works produced by government employees, in their capacities as such, are not protected under copyright law and are immediately available in the public domain.

Differences between governments that employ Crown copyright and those that do not could directly affect a multitude of works housed in a cultural institution. For example, if an employee of the British Government wrote an overview of an exhibition at the National Gallery in London, Crown copyright would subsist in that writing and the National Gallery would have to obtain permission to use that writing in promoting itself.

There are possible interesting implications for TCEs. In the Australian case *Yumbulul v. Reserve Bank of Australia*, Aboriginal artist Terry Yumbulul had given permission to the Aboriginal Artist Agency to license uses of his painting of his clan’s morning star pole, which has sacred meanings within the clan. Due to a misunderstanding about the intended use of the painting, the Agency granted permission to the Reserve Bank to use Mr. Yumbulul’s artwork on a commemorative banknote. Yumbulul claimed that the reproduction of his painting on the banknote constituted a copyright infringement. The case was ultimately dismissed since both the Agency and the Reserve Bank acted with proper legal authority. The banknote remains copyrighted by the Australian Reserve Bank, meaning the design is effected by Australia’s Crown and this particular iteration of the image is under the government’s copyright.

**Assignment**

Economic rights are in most jurisdictions capable of transfer (assignment or cession). An assignment or transfer need not grant the whole copyright; each right may be transferred and owned separately. An assignment changes ownership in the right from assignor to assignee.
Licensing

Licensing is a mechanism by which a copyright owner’s rights – all or part thereof – can be transferred for a limited or unlimited time, exclusively or nonexclusively, to another party. A license is just a consent, a permission, or clearance to use a work, on the terms specified by the licensor, who remains the owner.

Depending on the jurisdiction, copyright can be passed from the rights owner to someone else through a contract or by operation of the law, such as in a will or by intestate succession.\textsuperscript{213}

The non-profit organization Creative Commons\textsuperscript{214} is developing standardized licenses under the copyright regime for authors who would like to make their works more accessible than the current copyright regime initially provides for. A series of Creative Commons licenses gives creators some flexibility within current copyright regimes by giving them the option to pre-license an array of uses, for example, free access and even full reproduction in certain cases. Rather than claiming “all rights reserved,” the Creative Commons licenses allow authors to reserve “some rights.”

Creative Commons licenses are being adopted in many different contexts. For cultural institutions that own copyright in their collections and whose mission is to provide increased access to and circulation of information and knowledge, such licenses may be appealing. The extent to which Creative Commons licensing schemes offer new options for the better management of collections of TCEs deserves some attention.\textsuperscript{215}

It is certainly possible that for many contemporary traditional artists and communities making new works that incorporate TCEs, these licenses could offer flexibility. They could also address indigenous and traditional needs in relation to access, circulation and reproduction.

However, the interests of all tradition-bearers are not necessarily the same as those of the general “public” that emboldens the objectives of the Creative Commons movement. In a broad sense, the openness that the Creative Commons movement argues for is opposite to the control that many TCE creators desire.

A further challenge for TCEs and Creative Commons is the question of who might be able to speak on behalf of the community. If a user sees a TCE with a Creative Commons license, the assumption is that the user can trust the license. What if a different part of the community disagrees with the limitations placed on the use of the TCE? Creative Commons might not work as well with group rights as with individual rights.

There needs to be more awareness of where traditional needs differ, and where for instance, new alternatives for indigenous peoples and traditional communities and the TCE collections can be developed. TCE collections require sensitivity because of their nature, as well as the conditions of their accumulation and acquisition.

Tradition-bearers have the right to make decisions about what is available and how they are represented. In the past, this was rarely, if ever, a consideration. In our current moment, it is vital that indigenous and traditional perspectives are not only heard but treated with respect and legitimacy. There will be times when tradition-bearers’ needs run counter to liberal notions of open access and disclosure. Tradition-
bearers may ask for collections that are currently openly accessible to be restricted. It should be remembered that some indigenous peoples and traditional communities have only recently gained access to many collections that pertain to their families, clans, tribes and communities. These collections often hold sensitive and private information. Therefore tradition-bearers should be given adequate time, advice and authority to decide when and if public access should be allowed.

This will test the commitment that cultural institutions have to understanding the past and seeing how this past informs indigenous peoples’ and traditional communities’ current needs. Building new relationships that foster dialogue about what is at stake, and for whom, is vital for the successful management of such valuable material.

**Key Points**

- First ownership vests in the author. Although the author is often an individual or a legal entity, some jurisdictions allow for joint ownership of copyright. In the context of TCEs, it means that a collectivity of community could potentially be considered an author.
- A copyright owner has the option to give, grant or assign (sell) or license (loan) some or all of his copyright rights.
- A license may be exclusive, or sole, in which case the licensee is the only one that can have a licensing agreement with the licensor. Or a license may be non-exclusive, in which case the licensor may license his right to as many licensees as he wishes.
- Crown copyright applies to some Commonwealth jurisdictions; it protects copyrightable works made by the governments of these jurisdictions. Some jurisdictions employ the opposite strategy such that anything created by an employee of the federal government is automatically considered public domain material.
- Creative Commons offers standardized licenses based on the current copyright system. Important questions need to be asked about how indigenous and traditional community interests might be facilitated through these licenses.
- In certain circumstances, the interests of tradition-bearers actually run counter to arguments for greater access. Further, unless the tradition-bearers are involved in the decisions about what of their TCEs are made available for further access, there is the danger of replicating the historical marginalization of indigenous peoples’ and traditional communities’ rights to have a say in how their knowledge and cultural material is accessed and by whom.
- The politics of “sharing” knowledge needs to be carefully considered. Before a TCE is made more accessible, indigenous or traditional communities should be consulted and the implications of increased access fully explained. Questions about who will have access need to be asked. These questions recognize the historical treatment of indigenous peoples and traditional communities and their collections of TCEs. They aim to remedy this.
7. Related Rights

In addition to copyright, there are also rights “related to,” or considered “neighboring on,” copyright. These aim to provide protection to those who assist authors in communicating and disseminating their works to the public. They are generally more limited and of shorter duration than copyright’s economic rights. The three main ones are:

- rights of phonogram (sound recording) producers;
- rights of performers; and
- rights of broadcasting organizations.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations\textsuperscript{216} (1961) is the international instrument dealing with related rights.

The 1996 WIPO Performances and Phonograms Treaty\textsuperscript{217} (WPPT) complements the Rome Convention and updates the original concepts of related rights protection for new digital media.\textsuperscript{218} Importantly, it provides rights in performances of expressions of folklore. Article 2, at the definition for “performers,” states that they “are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore” (emphasis added). The WPPT grants performers both moral and economic rights, and these are set out in Articles 5 to 10 of the Convention.

Related rights, and the manner in which they are exercised, can be useful and significant for the protection of TCEs and may be able to meet the needs of indigenous peoples and traditional communities. The examples of TCEs that indigenous peoples and traditional communities wish to protect include traditional performances, such as dances and plays. For instance, in an oral culture, it is often through performances of songs, and chants or narration of stories that elements of traditional culture are passed within a community and between generations. Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Performers’ rights give the traditional performers the right to determine whether their performances should be fixed (e.g. recorded on tape, digitized), and how the fixation (e.g. recording) of the performance should be further disseminated and used.

Moreover, it has been suggested that the protection of performances of expressions of folklore might, indirectly, provide adequate protection for the expressions of folklore themselves. This is probably a fair expectation, provided the performer is from the community that is the “holder” of the expression of folklore. If not, the expression may still receive indirect protection, but any benefits will not accrue to the community.

Also, for example, in the United Kingdom, an oral history recording would create not only a performance right but a literary right for anyone speaking on the recording.\textsuperscript{219} Any such rights created give both economic as well as moral rights in most European Union Member States.

There are however some aspects of the protection of performers’ rights that are less advantageous from the perspective of indigenous peoples and traditional communities. Perhaps chief among them may be that the WPPT does not extend to the visual part of performances. Only the aural parts are protected, that
is, parts that may be perceived by the human ear. This would appear to seriously limit the usefulness of the WPPT in so far as TCEs are concerned. Work continues on the development of an instrument for the protection of audiovisual performances.

The relevance of related rights for museums, libraries and archives depends on their collection and specific activities.

For example, the Alutiiq Museum in Kodiak, Alaska, has film and audio recordings of the Alutiiq language, interviews with elders, recordings of various events in the Alutiiq community, archaeological excavations, and media presentations on Alutiiq heritage projects. The Museum understands the diverse interests involved in the several stages of recording, copying and preserving these materials. In most jurisdictions, related rights will belong to the institution that produced, commissioned or funded the recording rather than in the persons who were recorded. The difference between the rights or interests of a TCE holder or his community and those of the “recorder” should be taken into account at all these various stages.

Another specific example where related rights are relevant to TCEs is in music recording and/or archiving. The Traditional Music Archive (TRAMA) is a research and documentation center in Sudan focusing on the collecting, documentation, preservation and dissemination of traditional music and folklore. TRAMA signs consent forms with tribal representatives of each group it represents before any performance is recorded. In its archive, approximately 4000 recordings are being considered for digitization for preservation and dissemination purposes. TRAMA works with tribal representatives to make and sell recordings and shares the financial benefits with them.

**KEY POINTS**
- Related rights provide protection of phonograms (sound recordings); broadcasts; and performances.
- Related rights are also specifically applicable to performances of expressions of folklore under the WPPT; this is the only specific mention of TCEs in WIPO’s binding international treaties.

8. The Internet and Digitization

The Internet and the widespread use of computers have created an unprecedented platform for the dissemination and viewing of a wide range of cultural content in a very accessible, comprehensive and easy-to-use format.

Many indigenous or traditional artworks, as well as video and audio recordings of TCEs, can be digitally reproduced in a high-resolution format and disseminated via the Internet. This, essentially, albeit arguably, replicates the experience of viewing the original.

Many cultural institutions offer at least a portion of their collections online in some viewable format. This often ties directly to most institutions’ mission of public education and the promotion of their own exhibitions or collections. Making parts of collections available, when appropriate, meets both public expectations and the concerns of the community from which the collection was drawn. A recent American Study on the Internet’s Impact on Museums and Libraries indicates that the Internet is not replacing in-person visits and, indeed, may increase onsite use.
Libraries, archives and museums are grappling with the time, effort, expense and policy considerations inherent in digitizing their collections for the Internet or for a DVD or CD-ROM.

Cultural institutions are choosing various formats for disseminating their collections digitally. Some have digitized their own collections and manage image usage themselves. The Frick Collection in New York, for example, has digitized the majority of its collection and provides a searchable visual catalog online. El Greco’s *Purification of the Temple*, for instance, is viewable as a thumbnail and as a “zoomable” image. On its Permissions link, it specifies:

>This Web site and its contents, including images and text are copyright © 1998-2005 The Frick Collection. This site is for personal, educational, non-commercial use only and may not be reproduced in any form without the express permission of The Frick Collection.

Russia’s State Hermitage Museum in St. Petersburg has a similar interface for viewing its digital collection. Thumbnail and zoomable “full-size” images are available online. A different El Greco painting, *Saints Peter and Paul*, is viewable online in much the same format as the one that is physically found in the museum. The museum’s “image use policy” simply states that reproduction of the images requires written permission from the Hermitage Museum and that all the images have been watermarked for protection.

Cultural institutions can try to limit infringements of the rights of protected works by using various forms of digital rights management (DRM), such as watermarking. DRM is a term often used in conjunction with “technological protection measures” (TPM). Both are employed to prevent copyrighted works from being accessed or used except under conditions set by the copyright owner.

Other cultural institutions have assigned or licensed copyright in their collections’ images to third party image banks, such as Corbis Corporation or Getty Images. For example, the Brooklyn Museum of Art, Russia’s State Hermitage Museum, the National Gallery in London and the American Indian Nations Arts and Cultural Organization have all entered into contracts with Corbis to license images of their collections.

Some cultural institutions have large holdings of works still under copyright. One such museum is the Museu d’Art Contemporani de Barcelona in Spain, where thumbnails of a sampling of protected paintings are available online. There is no copyright policy available on the museum’s website. The Australian Museum of Contemporary Art and the Museum of Contemporary Canadian Art offer similar online material. New York’s Museum of Modern Art (MoMA) has a slightly more accessible and complete online interface for its permanent collection. For example, high resolution images are offered and are available in a printable format. Additionally, MoMA outsources its licensing and permissions to a third party and explains its policy on its Image Permissions webpage.

As concerns online access to music, the Smithsonian Institution and its Global Sound Project is one example of how cultural institutions use the Internet for their musical and audiovisual collections. Another example is that of the Memorial University of Newfoundland. After examining a large collection of recordings by a single collector of Newfoundland TCEs, the archive posted the entire collection online for free access and download with a statement that if anyone found the materials objectionable, the University could take them down. So far there have been no such requests. There was, however, considerable effort to minimize risk. The heir of the collector was consulted and approval gained; it was determined that none of the material was indigenous; it was apparently all traditional or in the public...
domain; and it all seemed appropriate for public distribution (there were no personal narratives or embarrassing songs that seemed inappropriate for diffusion).

There is currently no universal Internet policy for cultural institutions’ dissemination of images or other works from their collections. This means that each cultural institution makes decisions based on its unique needs. The past director of the Whitney Museum of Art in New York suggests that “the way forward will likely be with a combination of free content and licensable, high-resolution multimedia content, which will have to be updated, open to categorized protocols that encourage end users to contribute to databases, and emphasize live features.”

The balance a cultural institution must strike is between its mission to engender public curiosity and to provide educational experiences through disseminating information, and protecting the interests of artists and the integrity of their works, as well as avoid misuses, by limiting the ways in which the public could access cultural materials in their collections. Given the diversity among museums’, libraries’, and archives’ collections and legal regimes, this balance is often achieved by considering factors specific to each institution. For example, institutions that hold collections of TCEs will need to make decisions that balance the “public interest” goals of the institution alongside those of the relevant tradition-bearer and/or custodians who hold legitimate perspectives about how the collection of cultural material that relates to their family, clan, community or collectivity is to be accessed and managed.

Cultural institutions making available online images of pieces in their collections without proper consultation with source communities run the risk of inadvertently displaying to the widest possible audience secret or sacred material that should not be publicly seen at all. This has happened on numerous occasions, and has served to further deepen the distrust many indigenous and traditional peoples have of collection-holding institutions. Source communities need to be involved in decisions to display images on the Internet.

For TCEs, digitization issues are not yet streamlined either internationally or domestically.

An example worthy of mention is the agreement between the Cline Library at Northern Arizona University and the Hopi Tribe. In 1991, the parties agreed that sensitive ceremonial images would not be reproduced (or digitized for Internet access) without written permission from the Hopi Cultural Preservation Office. Access is still provided onsite.

Also, at the American Folklife Center, there are continuous efforts to protect original recordings and to re-record them in more contemporary formats that have a better chance of maintaining quality integrity for a longer period of time. For example, the AFC has an agreement with Flickr, an image and video hosting website and image repository. Thousands of photographic images from the Farm Security Administration/Office of War Information are available to the public. “Each change in technology, however, has meant that the archive’s reissues have become almost as inaccessible as the original field recordings from which they were taken.” This creates a range of challenges, for which there are no easy answers. As a federal institution in the United States of America and part of the Library of Congress, the AFC does not retain copyright in its website. It also transfers the burden of identifying copyright owners to the users: the AFC website emphasizes that it is the researcher’s obligation to determine and satisfy the copyright and/or other restrictions that may exist with the material, and gain permissions if they want to copy them. While this approach shifts responsibility from the institution to the user, it is not clear how effective this is in terms of preventing unauthorized use of material.
In France, government organizations, such as the Musée du Quai Branly, do not automatically relinquish copyright and, as such, the content of the website vests either in the museum or in another copyright owner.\textsuperscript{239}

According to a recent study carried out by the United Kingdom Higher Education Digitization Service, no cultural institutions are fully recovering the costs of creating and managing a digital collection along with the storage and service provisions that inherently accompany them.\textsuperscript{240} Cultural institutions that understand the financial potential of their digital collections, and that bear in mind their mission to make their collections accessible, should assess whether they should digitize works, and formulate a rate scale that takes into account the different types of uses for such images, be they educational or commercial, or other.\textsuperscript{241}

**Key Points**

- New technologies have provided exciting possibilities for cultural institutions, as they can facilitate the further dissemination of their collections.
- Providing digital access to some collections, or part thereof, may increase footfalls in cultural institutions.
- Digitization and the Internet have also presented challenges for cultural institutions in that copyright law comes into play in reproducing cultural works, and an array of issues including moral rights, licensing schemes, DRM and administrative burdens are increased.
- Digitization, the Internet and their impact on TCEs form a relatively new area of concern. While some indigenous groups and traditional communities have begun using DRM to control degrees of access to information within databases, cultural institutions need to be mindful that this is by no means the norm. These increased possibilities for disseminating and circulating information may be a direct antithesis to indigenous and traditional perspectives about how access to their collections is to be provided.

9. Collective Management

Collective management organizations, or collecting societies, offer an efficient mechanism through which artists and authors can collect royalties on uses of their creations without having to monitor those uses themselves. Collecting societies take on many forms; some are organized through private agreement; others are mandated by national legislation. They can apply to several creative formats or just a few; for example, some collecting societies deal solely with visual reproductions of two-dimensional art while others deal with music. A common business model for a collecting society consists of the society’s right to grant non-exclusive licenses in a work, to collect royalties based on that license, and to distribute those royalties to the artists. Collecting societies also often enter into reciprocal agreements with other collecting societies and negotiate fees for blanket licenses.\textsuperscript{242}

Some cultural institutions are digitizing and managing their own collections in ways that replicate the function of collecting societies.\textsuperscript{243} In such cases, it is important to have mechanisms in place for the administration of materials and collections. Other institutions outsource this management duty to organizations whose expertise is licensing images and music for commercial use.\textsuperscript{244}

The International Federation of Reproduction Rights Organizations (IFRRO) works to internationally increase the lawful use of text and image-based copyright works and to eliminate unauthorized copying.
by promoting efficient collective management of rights to complement creators’ and publishers’ own activities. In 2008 it issued a statement on TK and TCEs, stressing its commitment to “assisting communities in developing frameworks furthering cultural and academic progress and stimulating incentives for investing in cultural and creative industries and practical implementation *inter alia* through RROs.”

Sámikopija, the Sámi Reproduction Rights Organization, is a reproduction rights organization that represents Sámi rights owners in Norway, Sweden, Finland and the Russian Federation. According to its website, Sámikopija has started working with the issue of indigenous peoples’ TK related to copyright, and made this an independent project in its activities. There is also a proposal to the Nordic Sámi Convention where the protection of TK and TCEs is included.

In Australia, there are calls for greater infrastructure to support and defend indigenous cultural and IP rights based on a collective management model. One idea is the establishment of a National Indigenous Cultural Authority to facilitate consent and payment of royalties, to develop standards of appropriate use to guard cultural integrity, and to enforce rights, including moral rights. “While it is important to have rights, it is also important to establish mechanisms by which to assert them. To administer rights and protect them, it is necessary to set up indigenous cultural infrastructure – administrative processes and persons in authority who can act, negotiate and hold collectively rights to culture. […] A National Indigenous Cultural Authority can provide leadership and administer rights either directly or by establishing a rights clearance framework for indigenous cultural and IP rights. […] It [also] has a role to assist users make contact and identify relevant indigenous owners.”

**Key Points**

- Collective management streamlines royalty collection for copyright owners. Depending on the copyrighted media and the jurisdiction, collecting societies have reciprocal relationships with each other and direct their payments to foreign societies and to their own domestic shareholders according to these contracts.
- Collective management could offer an interesting opportunity for TCEs. Norway’s reprographic rights organization, for example, includes its indigenous communities both in the management and monetary proceeds of royalty collection.
TRADEMARKS, GEOGRAPHICAL INDICATIONS AND DOMAIN NAMES

1. Trademarks

As opposed to copyright, trademark protection functions mainly in the context of business transactions. Where concerns arise about protection against commercial misuse of TCEs, unfair competition law may also provide a practical response to the needs and expectations of traditional communities. While it certainly benefits trademark owners who trade on the goodwill they have established in their mark, it also benefits consumers and aims at protecting them from purchasing goods or services that do not meet the expectations they associate with a given mark.

Museums, libraries and archives are well-positioned to use trademark law in an effort to attract potential exhibition viewers and potential gift shop buyers to their premises. Branding is often a viable and potentially lucrative option. A cultural institution logo or name has the ability to communicate quality, exclusivity and a range of other thoughts the public associates with brand names.

The list of items that could be protected by trademark law includes the cultural institution's name, any associated names, such as the affiliated café or a weekly publication. Some examples include the Grand Louvre au Japon, an independent organization in Japan created to strengthen links between the French museum Le Louvre and the Japanese public, SAFE: Design Takes on Risk, the name of a blockbuster exhibition at the Museum of Modern Art in New York in 2005, and SFMOMA, the acronym for the San Francisco Museum of Modern Art.

Also, the New York Public Library publishes its own range of products. Its logo on the cover or spine of the book associates the library with certain artists or authors and the quality of the book becomes a reflection of the institution.

Another example of cultural institutions using trademarks is at social events. Aside from the actual invitations themselves, the ensuing photographs, social diary write-ups and other residual word-of-mouth links a cultural institution with a variety of things: from celebrity patronage to “party favors” from renowned designers.

Cultural institutions owning artwork or selling posters, ceramics or other derivative works based on artwork should be aware of the basic tenets of trademark law.

Trademarks around specific names have been developed. For example, the Picasso Estate administers the rights on the trademark “Picasso” and other IP rights such as the Picasso signature. The Estate has been involved in an array of lawsuits. Wisely, it has put together an informative website regarding how various entities should request and obtain permission for use of the Picasso name or signature. Recent case law involving the Picasso name includes a case brought by the Estate against DaimlerChrysler in a failed attempt to stop them from using the trademark “Picaro” on a car. Moreover, in 2002, the Estate successfully brought suit against the registrant of three domain names: www.fundacionpicass.com, www.museopicassomalag.com, and www.museopicassodemalaga.com.

TCEs have faced their share of challenges in the trademark area.
Trademarks may be used defensively (stopping the use of TCEs in unrelated commerce) and positively (promoting authentic works, goods and services).

The Zia sun symbol of the Zia Pueblo tribe in New Mexico is, to the tribe, its most sacred sign. “That’s what we pray through, the sun. Anything to do with religion...that’s what we use.” The symbol itself has been used as a logo or trademark “on everything from dishes and linens to motorcycles and portable toilets.” This situation was eventually addressed by the United States Patent and Trademark Office (USPTO) through a series of public hearings but no Federal law was put in place and no compensation scheme was set up in response to the call of the Zia Pueblo tribe. In a statement made at the hearing, Governor of Zia Pueblo, Amadeo Shije explains:

…the injury that my people have suffered from the disrespectful use of the Zia sun symbol has been very, very deep. The history of the European in this continent has been a long history of unauthorized taking. We are in the beginning of, I hope, a different frame mind. I do not see how the trademark office in good conscience can give a person, foreign to our nation, the right to use our symbol on a chemical fertilizer or a porta-pottie…Under the existing law, other governments in this country are protected from such an affront.

As John T. Solbakk of Sámikopiija puts it, today, many companies outside of Sápmi (Sámi land) mass produce duodji (handicrafts) or other culture-based products and market them as original Sámi, usually using a deceiving “indigenous peoples’ stamp” to promote them. In other words, anyone can commercially produce Sámi without asking the Sámis or Sámi organizations or institutions for permission. Sámi organizations have attempted to label approved Sámi handicraft products with a special trademark so that the consumer can differentiate these from imitations, but even this original Sámi trademark has been imitated.

To the extent that an eventual definition of TCEs would include words, signs, names and/or symbols, trademark owners have expressed concern that a sui generis law protecting TCEs would run into and possibly contradict trademark law as it exists. “Most countries’ trademark systems include a mechanism for managing conflicts between trademarks with a level of international uniformity.” Trademark laws remain national in nature although an international system does address the central management of trademark applications and registrations on an international scale for the parties to that system.

There are examples showing how the legal system as it currently stands, might not work to adequately protect indigenous and traditional interests. However, there are also examples that show how public scrutiny, which can engender bad publicity for the third party involved, can prompt the latter to alter its use of the trademark.

One such example is an attempt by a British company to register the word “Kikoi,” which is a Kiswahili word for a colorful wrap skirt worn by men and women living on the East coast of Africa. The Kenya Intellectual Property Institute, with the help of development charity Traidcraft Exchange and law firm Watson Burton, wrote a letter of complaint to Kikoy Company UK Limited, the company that had applied for the trademark. The company subsequently dropped the trademark application.

Another example involves the American cosmetics and beauty company Aveda Corporation. In 2002, Aveda released a range of skin care products under the name “Indigenous.” As part of the process of marketing the “Indigenous” line of products, Aveda also registered “Indigenous” as a trademark in a
number of jurisdictions including the United States of America, Canada and Australia. This provoked negative reactions from several indigenous groups. Following a range of lobbying and discussions, Aveda decided to drop the Indigenous product line and to discontinue using the trademark and the product line. As Aveda explained in a press release, “we are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources.”

Aveda has subsequently established some partnerships with indigenous groups in Australia and the Americas. For instance, it has formulated a specific benefit-sharing agreement between the Kutkabubba Aboriginal community in Australia and the exporter of a specific kind of sandalwood oil. The agreement that operates under an accreditation protocol pays the indigenous community for using their land and knowledge to source the sandalwood for Aveda’s products. In taking this course of action, Aveda was able to ameliorate a potentially damaging corporate image.

2. Geographical indications

The term “geographical indication” is defined in Article 22.1 of the TRIPS Agreement as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Some TCEs, such as handicrafts made using natural resources, may qualify as “goods” which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications.

For example, in Portugal, Madeira embroidery is protected as a geographical indication. In Mexico, the appellation of origin OLINALÁ is applied to lacquered wooden articles, such as chests and crates, made in the city of Olinalá, state of Guerrero. The artisans use wood from the endemic Aloe tree (Bursera aeloxylon) and natural raw materials such as insect fat and mineral powders. The appellation of origin, considered an element of the national heritage, belongs to the State. In the Russian Federation, a number of ancient products are protected with appellations of origin: Velikiy-Ustyug niello, Gorodets painting, Rostov enamel, Kargopol clay toys, and a Filimonov toy.

Just like trademarks, the protection of geographical indications is aimed at the protection of the goodwill and reputation of indigenous and traditional communities acting as tradespersons and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers. Geographical protection can continue indefinitely (subject to certain conditions).

3. Domain Names

Domain names raise new IP considerations which also affect all cultural institutions as well as indigenous and traditional communities. Having an Internet presence is often essential for cultural institutions for a variety of reasons, not the least of which includes mission statements with outreach or education goals. Indeed, museums, libraries and archives – with their wealth of diverse collections – make some of the world’s most educational and beautiful websites.
While an in-depth analysis of the Internet’s domain name system and history falls outside the scope of this publication, a few key concepts of domain name management are important for cultural institutions to note.

Cultural institutions have the option to register their domain names with top-level domains (TLDs), for example with “.com” or “.org.” They may also register their domain names with regional operators, the so-called “country code top level domains” (ccTLDs), such as “.ch” for Switzerland or “.fj” for Fiji and “.mx” for Mexico.

One example is www.tikanga.com, the website of an organization that acts as “a bridge between Maori artists, designers and performers and media organizations, advertising agencies, production companies and government organizations.” The word “tikanga” is Maori and means, generally, customs and traditions that have been handed down through the passage of time. The owners of www.tikanga.com engage in services that Maori people may find useful and in harmony with preserving cultural strength and identity.

Of particular interest to museums, since 2001, the TLD “.museum” may be used by museums, museums associations and museum professionals to register .museum Web sites and e-mail addresses. This makes it easy for users to recognize genuine museum activity on the Internet.

While the relevance of having a TLD dedicated to museums may have been criticized, and while the financial viability of the “.museum” namespace may not have reached expected self-sufficiency, the hope is that professional museum associations will provide “.museum” domain names directly to their members. It has been suggested that ICOM extend its services to play a more active role in the “.museum” domain space.

TCEs and related words and terms have at times been inappropriately used as domain names. For instance, indigenous community names have come up as domain names for dating services and even adult entertainment sites.

Different mechanisms provide efficient tools for indigenous and traditional communities that have rights in a trademark, to protect themselves against the use of their domain names in abuse of such rights.

A cost and time efficient contract-based dispute resolution system is available for parties involved in domain name disputes involving abusive registrations of domain names made in bad faith and which violate trademark rights. The WIPO-initiated Uniform Domain Name Dispute Resolution Policy (UDRP), adopted in 1999, provides an efficient administrative procedure for the resolution of such disputes while preserving court options. The UDRP applies to gTLDs such as “.com,” “.net,” “.org” and “.museum.” Many ccTLD operators also use the UDRP, or a close variation thereof. Of the four institutions providing UDRP dispute resolution services, a majority of domain name cases have been administered by the WIPO Arbitration and Mediation Center.

The UDRP system has been used by cultural institutions and by indigenous and traditional communities in numerous cases. For example, in Maori Television Service v. Damien Sampat, the Maori Television Service, which operates the Maori Television to revitalize Maori language and culture, obtained the transfer of the domain name <maitv.com> which had been used by a third party in bad faith and without rights or legitimate interests.
Another area of development is the introduction of internationalized (non-Latin script) domain names (IDNs), aimed at expanding the number of existing TLDs. Such DNS expansions represent opportunities for language and script possibilities, and reflect the diversity of languages, scripts, and cultural expressions inherent in a discussion of online cultural identity. They may provide new opportunities for museums, libraries and archives to further develop an active Internet presence. For example, the Musée du Louvre could apply for the TLD "louvre." But it may also present greater challenges in enforcing its IP rights thereon.

As more cultural institutions build unique online presences and as more information and imagery about culture becomes easily available, IP law will increasingly be engaged.

**Key Points**

- Trademarks may be relevant to the management of TCEs for cultural institutions. Trademarks are distinctive signs used to identify the source of origin of goods and/or services in the marketplace and to distinguish such goods and services from those of competitors.
- Trademarks may also serve as labels of authenticity, or certification and ensure the origin and genuineness of TCEs.
- Cultural institutions should fully understand the ramifications of using TCEs as logos or product identifiers.
- Geographical indications may be useful to protect TCEs that are specific to a particular region.
- Cultural institutions need to be sensitive to misusing culturally significant words as titles or domain names.
RISK MANAGEMENT STRATEGIES AND DISPUTE RESOLUTION

There is a range of strategies being developed to help build better relationships between cultural institutions, researchers and indigenous peoples and traditional communities. These strategies can all be understood as efforts to change objectionable attitudes and behaviors in the documentation of TCEs and it is hoped that they will lead to productive and valuable dialogue.

1. Risk Management Strategies

For cultural institutions, there is much to be gained from the development of risk management strategies regarding TCE collections. In this sense, a risk management strategy works to identify potential areas of conflict or concern, and in doing so, exposes issues that should be addressed at the outset (for example, prior to the creation of a new exhibition or to the digitization of a collection of TCEs).

Risk management strategies create awareness within a cultural institution: if and when a problem arises, solutions may quickly and effectively be implemented. These strategies seek to set out and balance the risks against the advantages of utilizing TCEs and create protocols to manage complaints if they arise. Risk management is a pro-active process that confronts the difficulties that such collections may potentially produce.

Risk-management strategies are especially useful in cases where owners or source communities for TCEs are unable to be identified and located. Experience shows that once a previously unknown work enters into different forms of circulation (for example on the Internet), previously un-contactable or unknown owners can emerge with a claim to the material. Under such circumstances, risk-management strategies can provide guidance to the cultural institution for an ethical and legal response. The development of such strategies also helps in identifying which material within the institution might constitute a high risk, and which material might present a much lower risk.

2. Dispute Resolution

As this publication has highlighted, accessing, controlling and protecting TCEs can be sensitive. This often affects relationships between indigenous peoples and traditional communities, on the one hand, and holders and users of TCEs, such as museums, archives and libraries, universities, industry, individuals and nation states, on the other hand.

Disputes between tradition-bearers and third party users of TCEs over ownership and control, access and benefit-sharing in TCEs have steadily increased in the last five years. These disputes are often complex, multi-dimensional and involve legal and non-legal components. Importantly they are not always commercial in nature, and can involve ethical, cultural, religious/spiritual and moral dimensions. For example, inappropriate use of a secret or sacred cultural artifact, symbol or design may not cause financial loss but can cause considerable spiritual offence.

Deciding how to resolve these disputes is often just as difficult as the dispute itself. Should parties go to court, attempt amicable resolution, try to reach a settlement through mediation or a final decision through arbitration? The following paragraphs lay out the various options available and present their characteristics.
Litigation

The history of collections of TCEs sometimes exerts pressure and produces conflict. In such circumstances, litigation is seldom an appropriate option, due to the limited legal rights that indigenous peoples and traditional communities actually have, and also because conflicts over TCEs often contain complex legal and non-legal dimensions.

Owing to the combination of elements that often constitute disputes over TCEs, remedy through litigation or court-based processes is not always possible or desirable. Such processes have the disadvantage of potentially further disenfranchising and alienating indigenous peoples and traditional communities as well as limiting the chance for productive resolution of the issues facing the parties.

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) refers to neutral out-of-court dispute resolution mechanisms that allow parties to resolve their differences in a time and cost-efficient manner with the assistance of one or more qualified and independent mediators, arbitrators or experts. ADR is normally consensual and can only be used if all parties agree to submit their dispute(s) to ADR.

ADR, such as mediation, arbitration and expert determination, offers a framework to address complex disputes concerning TCEs. This is already in practice in many collaborative relationships involving cultural institutions and indigenous peoples and traditional communities. For example, in Fiji a Native Lands and Title Tribunal adjudicates disputes arising from traditional land claims and title holders out-of-court in the traditional manner. The tribunal is made of independent indigenous Fijian customary experts who mostly are chiefs and other community members. The appointment of the secretariat however, is the responsibility of the Ministry of Indigenous Affairs.

With ADR, the parties themselves become responsible for whether and how the conflict is resolved. Also, legal norms are not necessarily the exclusive basis for decision-making. This is particularly important given the combination of legal and non-legal dimensions that characterize disputes over TCEs.

Types of ADR

- **Mediation.** Through this informal procedure, one or more mediators assist the parties in settling their disputes. The mediator cannot render a decision, but rather facilitates settlement between the parties by helping in identifying the parties’ interests in order to allow them to find a mutually acceptable solution. Mediation may be particularly appropriate in sensitive cases where no legal claim exists. Moral, ethical, historical and cultural elements can be considered in mediation and provide a basis for settlement.

- **Arbitration.** In arbitration, the parties submit their dispute to one or more arbitrators who issue a binding and final decision that is internationally enforceable. Of particular interest for disputes involving TCEs, the parties can ask the arbitrator to decide ex aequo et bono, i.e., on the basis of principles of fairness. In certain instances they can also agree on the application of customary law.

- **Expert Determination.** Through this procedure, one or more experts make a determination on a specific issue referred by the parties. For example, an expert could determine the authenticity of an indigenous or traditional song, or identify the origin of an indigenous or traditional design.
These procedures may also be combined with one another. For instance, the parties may first attempt to solve their difference through mediation and, where the dispute is not settled within a set time frame, it may then be followed by arbitration or expert determination.

Advantages of ADR

ADR processes hold many advantages\(^{283}\) such as:

- **Consideration of parties' interests and preservation of relationships.** ADR, in particular mediation, is less confrontational and can help parties preserve their long-term relationships and foster new relationships, by finding mutually agreeable solutions. It also helps to address the underlying interests of the parties, as well as their practical needs.

- **Recognition of different cultural backgrounds.** ADR processes have the capacity to fully explore grievances in ways that recognize different cultural value systems. Parties have the possibility to choose a qualified mediator, arbitrator or expert with particular knowledge of the different cultural backgrounds of the parties. Parties can even choose several intermediaries in one ADR process, each of which would be familiar with one of the parties' cultural backgrounds.

- **Solutions beyond what court-based processes may allow.** ADR, in particular mediation, enables parties to adopt creative and mutually acceptable solutions that are not necessarily dictated by a specific law. Formal recognition of custodianship and long-term loans are examples of such possible solutions.

- **Party autonomy and flexibility.** ADR allows all parties, including those who have historically been alienated from formal legal frameworks, to control the process in a flexible, time and cost-efficient way. Parties can select the intermediary; they can also tailor the process to fit their dispute, as well as agree on the applicable law, language and place of the proceedings.

- **Expertise.** ADR enables parties to choose mediators, arbitrators and experts that have direct experience and/or substantive expertise in relation to the issues at stake, in addition to dispute resolution experience.

- **Neutrality.** ADR is an international and neutral process where parties can choose a neutral intermediary, applicable law, language and place of proceedings. Hence ADR does not suffer from the possible national bias that may occur in litigation in national court.

- **Integration of customary law and practices.** ADR can be a forum in which customary laws, protocols, codes and ethos may be considered and applied, if the parties agree so, which may be interesting in certain cultural heritage disputes involving indigenous and traditional communities. Customary law could be considered in ADR proceedings at different levels, including on substance, procedure and remedies. Moreover, ADR provides a context where an indigenous or traditional community can be a party, it also permits the recognition of relationships of individuals vis-à-vis their indigenous or traditional community's interests and promotes informed decisions about the level of formality within the proceedings.

- **Possible confidentiality.** Lastly, in ADR, parties have the possibility to keep the proceedings and the result confidential, unless otherwise required by law. Parties can also agree to balance confidentiality with public interest requirements.

How to Use ADR in Practice?

ADR can be used if the parties agree to submit their dispute to ADR or if it is mandated by a competent court, established by law or treaty.

Consent to ADR may be obtained in a number of ways. For future disputes, parties may include ADR clauses in their contracts, such as in agreements on copyright assignment or license, loan, donation,
access and benefit sharing, or other type of agreement concerning the use of TCEs. For an existing dispute, parties may conclude an ADR submission agreement, providing that the particular dispute be submitted to a certain ADR procedure.

Typically, ADR providers, such as the WIPO Arbitration and Mediation Center, provide model ADR clauses and submission agreements that can be used by parties, with possible adaptations to fit each particular case.\textsuperscript{284}

Further, ADR pledges and policy statements by cultural institutions, libraries, archives and museums, or organization representing the interests of indigenous and traditional communities could enhance the consideration of ADR.

The following are an example of an adapted submission agreement and of a pledge for mediation in the cultural heritage sector:

\begin{boxedminipage}{\textwidth}
\textbf{Mediation Submission Agreement for Cultural Heritage Disputes:}
We, the undersigned parties, are facing a difference over cultural heritage which may raise highly complex, legal and non-legal, commercial and non-commercial, as well as ethical and moral issues. We consider that mediation may be an appropriate and effective means of resolving our difference. In particular, we believe that mediation will allow us to identify converging interests and enable us to amicably settle our difference in a responsible and sustainable manner.

We, the undersigned parties, therefore hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following difference/controversy/dispute:

[brief description of the difference/controversy/dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

\textbf{Model Pledge / Dispute Resolution Position Statement:}
We consider that differences and disputes with indigenous communities and their members in relation to cultural heritage and/or traditional knowledge can be highly complex and involve legal and non-legal, commercial and non-commercial, as well as ethical and moral components. We recognize that for such instances, there may be alternative methods of resolution that can be more appropriate and more effective than litigation. In particular, mediation procedures offer collaborative means to take account of the parties' interests and enable them to amicably settle their case in a responsible and sustainable manner.

We therefore subscribe to the following statements of principle on behalf of our institution:

When a difference or dispute arises between our institution and an indigenous community or indigenous individual, we are prepared to propose resolution of the issue through alternative dispute resolution (ADR) methods and in particular mediation.
\end{boxedminipage}

Such a pledge or position statement may be adapted and inserted for example as part of codes of ethics for cultural institutions and/or as a condition for membership to a cultural institution.
It may be advantageous for libraries, archives and museums to establish dispute resolution clauses within agreements, and as standard policy across the sector. Currently, ADR offers possibilities for resolving disputes in complex cultural areas, where not all of the problems have a clear legal definition. ADR provides a framework where parties can explain what is at stake and why this matters culturally. It allows space for the expression of different interpretations of access and control, and significantly, it does not further disenfranchise indigenous peoples and traditional communities from projects of reconciliation and cultural recognition.

**WIPO Arbitration and Mediation Center**

A number of public and private institutions provide different kinds of ADR services. One such institution is the WIPO Arbitration and Mediation Center (WIPO Center)\(^2\) which was created in 1994 as part of WIPO. This international dispute resolution provider is recognized as a neutral international forum that is especially appropriate for cross-border and cross-cultural disputes.

The WIPO Center provides WIPO mediation, (expedited) arbitration and expert determination rules, as well as model ADR clauses and submission agreements, which may be particularly appropriate in disputes involving TCEs. The WIPO Center also has a special list of mediators, arbitrators and experts with expertise in cultural heritage law and ADR experience.

In addition to the standard WIPO ADR procedures, WIPO also develops tailored ADR services, for example for the cultural heritage sector, including issues regarding indigenous peoples and traditional communities.
IP law itself offers a few options for the needs of tradition-bearers. While certainly there are a range of possibilities that can be strategically developed, generally speaking, for now, tradition-bearers have limited recognized and enforceable rights in relation to their cultural heritage material, and this affects the conditions for future access, control and ownership that can be negotiated.

Yet indigenous peoples and traditional communities do have legitimate interests in being part of decision-making processes around collections of TCEs. Although historically this was often not the case, current practices and responsibilities to maintain foundational principles of equality, freedom and justice requires that tradition-bearers and their opinions be heard and taken into account. Certainly the recent United Nations Declaration on the Rights of Indigenous Peoples reflects support for this position.

Much depends on the strengthening of communication and building of new relationships between practitioners within cultural institutions and indigenous peoples and traditional communities. Many solutions may reside in the development of mutually satisfying pathways for the future management of such incredibly important and valuable cultural material.

To begin the process of recognizing and respecting the rights and interests of indigenous peoples and traditional communities, it is important to develop meaningful and significant dialogue among all parties that are invested in maintaining, preserving and providing access to collections of TCEs. This means, where possible, that cultural institutions with collections of TCEs work directly with tradition-bearers, to collaboratively establish appropriate policy options for safeguarding, protecting and promoting TCEs.

Many museums, libraries, archives, and other institutions, as well as many indigenous and traditional communities, are actively developing, managing and maintaining multiple strategies concerning the safeguarding of, access to, and control over cultural heritage and TCEs, including valuable IP-related protocols, policies and practices. It is in all parties’ interest to create clarity around the use of TCEs. This gets to the heart of active collection management and facilitating easier onward use of the collections - the very raison d’être for the existence of cultural institutions.

This publication, therefore, includes a selection of examples of current and developing practices within cultural institutions, independent archives (particularly digital archives), indigenous and traditional communities and larger research bodies. There are of course many good ones which are not included due to the sheer volume this would take.

Most examples are drawn from empirical research conducted over the last few years by an international team of consultants employed by WIPO. They are derived from existing experiences, good practices, protocols and guidelines and therefore highlight some of the work being done around the world.
Currently, the resources that have been gathered and that complement this publication include:

- **surveys** of existing resources and practices. The surveys, each focusing on a specific geographic region, are the primary basis for this publication. The surveys provide a wealth of information that comprises institutional policies, personal perspectives from veteran professionals and the opinions and experiences of the indigenous peoples and traditional communities whose TCEs are the object of these findings.  
- a selection of short **case studies** drawn from the surveys. These case studies cover a broad range of illustrative examples.  
- a searchable **database** of existing IP-related protocols, policies and practices. This database responds to a widely-felt need for more empirical information on current experiences and practices concerning these issues.  

Some of these policies and practices are being developed to directly address the management of extant collections, while others are seeking to establish appropriate frameworks for the future management of in-coming collections. Indeed research with indigenous peoples and traditional communities is still actively occurring, and thus collections of traditional cultural material continue to accumulate. These 21st century collections are born digital (most often) and are collected at times by indigenous and traditional communities themselves. The most efficient and easiest time to create usage clarity around collections is at the point that they are created; obtaining permissions retrospectively is very time consuming, labor intensive and costly, not to mention ethically inappropriate.

The direct targets of the policies, protocols and practices vary, yet they all engage specific issues that arise in the development, production and circulation of TCEs. For instance, following the lead of ICOM, many museums have developed ethical guidelines that set minimum standards of professional practice within the institutions. Other ethnographic cultural institutions have developed specific ethical codes of conduct for researchers when working with indigenous peoples and traditional communities. Directly targeting researchers is important because they are generally the documentarians of the ethnographic materials that eventually libraries, museums and archives will manage and maintain custody over.

What is evident in these emergent practices and policies is the intention to create new and better ways of responding to the needs of tradition-bearers. Certainly there is no "one-size-fits-all" approach; there is a range of processes which are particular to each circumstance. For example, the assignment of rights created by the museum, library or archive to the community would potentially engender positive relationships and in return clear usage rights around the material would be the quid pro quo. In sharing information about these, it is hoped that they will provide a resource for developing new ideas and new possibilities and they may serve as a basis for further identifying IP-related "good practices" and guidelines.

The purpose of including them is to profile innovative initiatives underway and to suggest areas for further complementary work. While WIPO and its Member States do not necessarily endorse these protocols and guidelines, at this stage there is great interest in ascertaining their effectiveness and entering into productive conversations about what works, what does not, and why.
1. Good practices from Cultural Institutions – Research Ethics and Collection Policy

Cultural institutions face a range of issues in relation to the appropriate frameworks for managing TCEs. The IP dimension, which has been the focus here, is only one of several inter-related problems. How collections of TCEs are made, and by whom, as well as where they originate, affect how they are managed now and into the future, and with what IP implications. The answers to these questions help determine who legally “owns” the copyright, and what kind of uses of the material is possible and permissible.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is the world’s premier institution for information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples and is governed by an Indigenous Council. The Institute holds a priceless collection of films, photographs, video and audio recordings and the world’s largest collections of printed and other resource materials for Australian indigenous studies.

This Institute has pioneered unique policies for access and management of their Australian indigenous collections. These range from “Guidelines for Ethical Research in Indigenous Studies” to policies directed at specific types of collections, for instance audiovisual archives.

The Guidelines are used nationally and set the benchmark for all research that involves Aboriginal and Torres Strait Islander people in any discipline and increasingly within industry as well. Importantly, the Guidelines introduce national and international researchers to the unique needs and expectations that indigenous peoples may have in relation to research. It is significant that indigenous peoples have the right to be engaged as equal parties, with a say in the focus and direction of any research that involves them. The Guidelines encourage practices of prior informed consent and the negotiation of any IP rights prior to the commencement of research. This matters precisely because it sets the conditions for the future management of any material produced in the course of the research.

Many of the problems facing cultural institutions arise because past standards for ethnography did not treat indigenous peoples as legitimate and equal parties. These Guidelines seek to counter this historical practice by directly addressing researchers’ responsibilities prior to the commencement of any research involving and engaging with indigenous peoples.

Owing to its unique circumstances, the Institute recognizes that its holdings almost always contain complex IP dimensions. For example, indigenous claims to ownership to material (such as recordings and photographs that contain ceremonies, songs, stories or images of relatives) are seldom legally recognizable. Often decisions about reproduction and/or digitization need to be made on a case-by-case basis. While this can be time-consuming, it does mean that decisions often involve discussion and engagement with indigenous peoples and a thorough consideration of the information leading to the existence of the collection, the types of claims being made, and what the decisions will mean for the future management of the collection.

These negotiations really add value to the collection – with more knowledge about how to manage and make their collection accessible, the practitioners are in a much better position to respond to the needs of
all potential users of the collection. Some collections have special conditions associated with them, for instance some material is of a secret nature, and can only be viewed by authorized individuals or family groups, or other defined persons.

The Institute privileges indigenous perspectives about knowledge control, and wherever possible, it incorporates these into its management policies. In doing so, the Institute recognizes that there are cultural conflicts inherent within the collecting, archiving and preservation process and that there are times when the goal of public access conflicts with community and TK management strategies. In such circumstances, AIATSIS endeavors to accommodate indigenous perceptions and rationalities of control and access.

*Agence de Développement de la Culture Kanak - Centre Culturel Tjibaou*

The AIATSIS framework is akin to the one used at the *Agence de Développement de la Culture Kanak - Centre Culturel Tjibaou* in New Caledonia, where researchers enter into a trust agreement with the tradition-bearers; the parties determine a degree of access, from 0 to 5. At the 0 scale, the document may only be consulted by the person interviewed or his heirs.

*PIMA Code of Ethics for Pacific Museums and Cultural Centers*

The Pacific Islands Museums Association (PIMA) is a regional not-for-profit heritage organization whose aim is to safeguard, preserve and promote the heritage of the peoples of the Pacific Islands. PIMA’s mission is to: support Pacific museums and cultural centers to preserve the heritage of the Pacific Islands; involve local communities in heritage management; and develop regional cultural resource management policies and practices.

PIMA has developed a region-specific Code of Ethics to be used by museums and cultural centers in Pacific Member States. It includes, among other things, guiding principles which outline the underlying reputation and responsibilities of Pacific museums and cultural centers. For instance, it states that Pacific museums and cultural centers are “custodians of cultural resources held in trust for the original creators and for the benefit of the peoples and communities elsewhere” and they have the responsibility to “build and maintain relations with local communities and assist them to maintain and safeguard their intangible and tangible cultural heritage.” The aim of these guiding principles is to provide a framework for Pacific museums and cultural centers to work with communities in terms of providing access, monitoring research and assessing the significance of materials in relation to process, creators/owners and monetary value. The Code of Ethics seeks to guide Pacific museums and cultural centers towards good practices.

*ATSILIRN Protocols*

The Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN) is a professional support network that functions to “support Aboriginal and Torres Strait Islander peoples working in libraries and for those people servicing the information needs of those peoples.”

Since 1995, the ATSILIRN protocols have guided practice in the Australian library, archive and information sector in relation to the treatment, access and use of indigenous materials in collections, as well as the provision of services to indigenous Australians and their communities. The protocols were developed by professionals in the sector in close collaboration with indigenous Australians, and were endorsed and published by the Australian Library and Information Association (ALIA). IP issues were
addressed as one of eleven identified principles for practice. In 2004, the protocols were reviewed for currency and effectiveness and a number of issues identified as areas for further work. The need for additional digitization protocols also was identified by professionals. Furthermore, the need to instate indigenous issues at the national policy level to encourage nationally consistent and coordinated implementation of the principles of the ATSILIRN protocols was recommended in response to a decade of patchy implementation across the sector.

In 2007, National and State Libraries Australia (NSLA) published the National Policy Framework for Aboriginal and Torres Strait Islander Library Services and Collections. Principle 6 of this document addresses indigenous knowledge and cultural and IP rights. Further research was conducted in 2007 in three State libraries to investigate the challenges emerging in the digitization of Australian indigenous materials.

Uncertainty about how to deal with complicated IP issues emerge as a major challenge for the digitization of indigenous materials. Complex IP issues also emerge in indigenous communities that store digital copies of repatriated materials in their community databases. These databases increasingly form a central part of innovative remote indigenous library services. Some research on these issues has been done but further research for the development of practical guidelines in this area is also ongoing.

These responses from the Australian library and archives sector acknowledge indigenous Australian contest of control, access and use of indigenous cultural materials held in collecting institutions, where “the primary rights of the owners of a culture” are in contrast to “the interests of the authors and publishers of records, books and other documentary material that are protected by copyright law.” Research and experience in the Australian library sector highlights that establishing ways to accommodate Aboriginal and Torres Strait interests and rights in owning and controlling historical and contemporarily developed cultural information requires efforts at national policy and institutional practice levels and at the indigenous community level.

At the level of practice, negotiating these different interests requires more than simple interpretation or application of customary versus copyright law in relation to materials and collections. It requires workable processes that enable both professionals and indigenous peoples to accommodate each other’s interests with some certainty that transparent standards of best practice are being developed. The shared space is always likely to involve compromise and therefore always involves trust and goodwill. Developing workable processes, in turn, involves sustained research, development, and evaluation of practice across the sector and in communities. Any sustained implementation of indigenous protocols is likely to require practical processes to be time and cost efficient in this sector.

When it comes to digitization and the Internet, the Protocols recognize that IP and technology issues introduce new levels of complexity for the sustainable management of indigenous materials and pose challenges for both the library and information services profession and for indigenous communities. While the Protocols suggest that cultural institutions develop coordinated policy approaches, what these should be remains unclear because of the need for sustained research. More practical information about what works and what does not, what changes in approach and direction are needed, will help fill in the current information gaps. This longer-term research on practical experiences will be invaluable for cultural institutions around the world.
A Framework of Guidance for Building Good Digital Collections by NISO

The National Information Standards Organization (NISO)\textsuperscript{298} is a non-profit association accredited by the American National Standards Institute (ANSI),\textsuperscript{299} for the identification, development, maintenance, and publication of technical standards to manage information in the digital environment.\textsuperscript{300} It has developed a framework, which is aimed at cultural institutions and funding organizations. The framework has two objectives: “to provide: 1) an overview of some of the major components and activities involved in the creation of good digital collections, and 2) a framework for identifying, organizing and applying existing knowledge and resources to support the development of sound local practices for creating and managing good digital collections.”\textsuperscript{301}

Digital collection development often requires much more than just delivering information to the public through the use of modern technologies. The NISO framework has therefore outlined several principles on what constitutes “a good digital collection.” It argues that considerations should be given to the development of:

- a collection development policy before digitizing;
- a clear description of the collection;
- a sustainability plan for the continued usability of the collection;
- an accessibility strategy for users;
- an IP management plan; and
- standardized measures of collection usefulness.\textsuperscript{302}

Ideally, a digital collection should “fit into the larger context of significant related national and international digital (library) initiatives”\textsuperscript{303} which could help expand the utility of the digital collections and address the important issue of sustainability.\textsuperscript{304}

Museum policy of New Zealand’s bicultural Te Papa Tongarewa

Te Papa Tongarewa, the National Museum of New Zealand and Archives New Zealand have a very clear set of policies.\textsuperscript{305}

2. Good practices for Digital Archives – Protocols

With the range of new technologies available, many digital archives are being established. Some are being created as additional means for disseminating information and research materials held in cultural institutions. Others are established as new independent archives that are distinct from the traditional archive, museum or library.

The interest for digital archives arises from their capacity to vastly increase public access to collections. For many communities, the digital archive offers new opportunities to access TCEs that have historically been inaccessible. Much cultural material is held in institutions far from source communities and the costs associated with traveling have been prohibitive for many traditional and indigenous peoples.

All digital archives face complex questions regarding the management of IP. For independent archives, these questions take on greater weight as the actual framework and/or database being used to store and/or display content will also have IP dimensions. Programmers and database designers, as well as those
people who work on the archive may have certain IP rights – and these will vary depending on the involvement and employment contract that has been arranged. Additionally, the material that is imported into the archive will almost always have a complex range of ownership/copyright questions associated with it. New challenges arise when digital archive managers have limited access to IP information and expert advice. There is a danger that digital archives will unwittingly reproduce the messy and difficult IP situations currently found within cultural institutions.306

As digital archives provide new possibilities for accessing previously inaccessible collections, particularly by the traditional and indigenous communities from whence the material derives, it is no surprise that the last five years have seen an increase in their development. Best practices are still emerging. What is critical to consider is the range of inter-connected IP issues that will arise in the development of any digital archive that incorporates TCEs.

Digital archives with potentially vast public access must use sensitivity in the development of their frameworks, determine which material will be made available and establish levels of access that can be implemented. These three key areas require deliberation prior to the establishment of the digital archive. The essential challenge for digital archives remains the extent to which they can accommodate the desires and expectations of tradition-bearers about access and control within their governing frameworks. These frameworks need to be flexible and change to fit the needs of the indigenous or traditional community as these needs also change over time. Ongoing attention to the IP dimensions of the TCEs will help ensure that digital archives do not reproduce the problems and challenges currently experienced within cultural institutions more generally.

**Pacific and Regional Archive for Digital Sources in Endangered Cultures (PARADISEC)**

The potential IP problems related to digital archives management may be countered by utilizing advance agreements and protocols with the parties that are supplying cultural content for the archive.

For example, the Pacific and Regional Archive for Digital Sources in Endangered Cultures (PARADISEC)307 has developed specific forms and means of documenting the material stored digitally.308 It has Deposit forms for researchers who provide PARADISEC with material and it has Conditions of Access forms for those seeking access to material. The question of IP is not detailed in full – it comes under the language of “ownership” within the Deposit form – wherein it states:

**OWNERSHIP**

The term ownership refers to ownership of the physical copy of the material being lodged with PARADISEC. It is not a wider claim to the intellectual property or ownership of any traditional knowledge, mythology, personal information or expression which relates to or derives from other objects, individuals or communities contained within the material being lodged. If the material was written, photographed, drawn, recorded or filmed by you, then you are the creator and owner of the physical copy of the material, or if you have collected, found or inherited the material you are the owner of the physical copy of the material and therefore you or your delegate are in a legal position to enter this agreement.

While PARADISEC is pioneering a new kind of digital archive, attention to the IP dimensions of the project itself, and the material being incorporated into archive remains very important. A further complication, and one that needs a full discussion, is that much of the material being incorporated into the digital
archive has different copyright rights associated with it as the material comes from multiple copyright jurisdictions. This requires special attention, and in time, specific policies will need to be developed to manage the protection afforded to the various types of material within the archive.

**British Library Archival Sound Recordings**

The British Library has one of the largest sound archives in the world. It is currently digitizing and posting online sound recordings made by predominantly British ethnomusicologists of traditional music from all around the world. When complete, ethnographic field recordings of around 8,000 hours worth of material will be accessible on the Internet. While carrying out this digitization process, the British Library devised some wording to place alongside all of its recordings from its Archival Sound Recordings Project to properly address potential cultural sensitivities and the interests of the source communities of these recordings. In collaboration with WIPO, the British Library drafted the following statement with regards to ethical and permitted use of all recordings from their sound archive:

**ETHICAL AND PERMITTED USAGE OF RECORDINGS**

The following statement has been prepared together with the World Intellectual Property Organization.

The British Library has digitized these collections of recordings and made them available purely for the purposes of safeguarding them and for making them available for non-commercial research, study and private enjoyment. The collections include culturally sensitive materials, among them ethnographic sound recordings. These recordings should not be altered or used in ways that might be derogatory to the indigenous and local communities who are traditional custodians of the traditional music, lyrics, knowledge, stories, performances and other creative materials embodied in the sound recordings.

While the British Library, or contributors to its collections, may be the owner of intellectual property in the digitizations of the sound recordings and in the sound recordings themselves, the Library recognizes that broader rights and interests in intangible cultural heritage, including traditional music and other creative materials embodied in the sound recordings may, under national, customary and other laws, reside with the traditional custodians of such materials. Therefore the prior informed consent of the British Library and/or other contributing third parties, as well as the traditional custodians is required for the republication and commercial use of part or whole of these materials.

The British Library always seeks to take account of cultural sensitivities and any religious or other restrictions in the recordings it possesses and/or owns. Where possible, the location and date of the recording, the names of original performers and traditional custodians of the music, and the lyrics, knowledge, stories and performances embodied in the sound recordings have been identified. The Library takes considerable care not to distort or alter this underlying material in any derogatory way. In the event, however, that any community or community representative feels aggrieved by the digitization and making available of these materials, the British Library invites such community to contact it via the link below in order to resolve the matter amicably through mutual discussion.
Musée du Quai Branly: Conditions for Placing Material on the Internet

Created in 1996 and inaugurated in 2006, the Quai Branly Museum showcases representative cultural artifacts from the arts and civilizations of Africa, Asia, Oceania and the Americas. It is designed to serve as a forum for scientific and artistic dialogue, and has defined its mission as “participating in national and international efforts to preserve the tangible and intangible heritage of these societies.”

In addition to possibilities for display and study in the Museum’s public areas, the resource center and the documentation and archives center, the collections are also available online. The conditions for accessing online documents are set out on the Museum’s website. Generally, when material is placed online, all authors, subjects (persons represented in the documents) and other beneficiaries must be previously consulted and their rights negotiated. Such a procedure (that is materially impossible for collections of this scope) could have jeopardized online distribution. The Museum has therefore opted to place online, next to the digitized documents, a complaint form to show its good faith. Two forms are available for download in order to clear copyrights and rights for images: the Declaratory Note for authors and non-identified beneficiaries of the works distributed and the Authorization for the reproduction and representation of photography. The wording of these forms is the outcome of an internal brainstorming process on IP issues under the aegis of the museum’s Internet Committee, which brought together the departments for research, heritage and cultural development, as well as the legal unit. With these forms, the authors, subjects and beneficiaries may exercise their claim to the material on the website, as the museum sees fit, in accordance with the provisions of the French Code of Intellectual Property. At time of drafting, no complaints have been submitted via these forms. It should be noted however that this practice should be used with caution. It would sometimes be preferable to do a diligent search for potential right owners or other beneficiaries of protection prior to the online posting.

Archives and Research Centre for Ethnomusciology, American Institute of Indian Studies

The Archives and Research Centre for Ethnomusicology of the American Institute of Indian Studies (the ARCE) was established in India in 1982. Its principal objective was to create a centralized archive of recordings of Indian music and oral traditions for preservation and access in India. It was initially founded to bring to India collections held in archives and by individuals outside India. To date, the ARCE houses 194 collections voluntarily deposited, comprising about 13,000 hours of unpublished recordings.

From the very beginning ARCE used legal agreements and release forms. They were based on similar agreements used by folklife and ethnomusicology archives in the United States of America, but adapted to address certain specific Indian concerns. For example and very succinctly, there is a formal agreement for deposit which allows the depositor or designee to choose from three options – one that allows no access for a fixed amount of time, one that allows listening or viewing in ARCE premises and a third that allows copies to be allowed for research and teaching, with no permission to make further copies. In this latter case, the ARCE charges a reasonable technical fee for making the copy with the media supplied by the requestor. The forms are only “models” and their use has evolved over the years, by mutual consent of depositors and the ARCE.

Furthermore, ARCE participates in the Smithsonian Global Sound project. Permission for each digital sound recording track contributed by ARCE is obtained from the collector or depositor as well as from the performer, who is given an advance royalty for 125 downloads.
Currently, ARCE has embarked on a project called Archives and Community Partnership where the recordings, rights and revenue are being shared between ARCE and the communities.

3. Good Practices from Indigenous Peoples and Traditional Communities – Codes of Conduct and Protocols for Behavior

As indigenous and traditional communities are increasingly being recognized as having legitimate opinions about how TCEs and TCE collections should be managed, several of these communities are developing their own guidelines, codes of conduct and protocols. They are setting their own standards and safeguards for how research should be conducted, what IP rights will remain with the community and where permissions for use into the future will be required.

For many cultural institutions, problems arise because there is insufficient information about the source community, which hinders negotiations and consultations about the use of and possible access to TCEs by third parties. The policies and protocols that are being established by source communities directly seek to counter such problems.

These protocols also set a new platform for negotiating agreements and respectful exchanges between researchers, institutions and communities alike. Researchers negotiate directly with the communities; the outcomes of such negotiations are then passed on to cultural institutions, which can use them to establish correct management for the material. The information that is supplied is invaluable for the future management of these collections, as it provides the most direct guidance from the community itself.

**HOPI Community – HCPO Policy and Research**

The Hopi Community, located in Arizona, United States of America, has extensive experience with the unauthorized and illegitimate use of its cultural heritage. As a result of historic treatment of the Hopi people and culture, the Hopi now enforce strict controls about how outsiders are to behave when they are within Hopi communities.

For example, unless consent has been secured from the Hopi Cultural Preservation Office (HCPO), there is no recording of any kind allowed. This includes picture-taking, video recording, audio recording, sketching, and note-taking. Such forms of documentation are strictly prohibited especially during ceremonies. As the information provided for visitors explains, “publication of these observations and/or recordings is both exploitative and prohibited without prior consent from the Hopi Cultural Preservation Office.”

The need for such controls is described in the following way:

*Through the decades the intellectual property rights of Hopi have been violated for the benefit of many other, non-Hopi people that has proven to be detrimental. Expropriation comes in many forms. For example, numerous stories told to strangers have been published in books without the storytellers’ permission. After non-Hopis saw ceremonial dances, tape recorded copies of music were sold to outside sources. Clothing items of ceremonial dancers have been photographed without the dancers’ permission and sold. Choreography from ceremonial dances has been copied and performed in non-sacred settings. Even the pictures of the ceremonies have been included in books without written permission. Designs from skilled Hopi potters have been*
duplicated by non-Hopis. Katsinas dolls have also been duplicated from Hopi dancers seen at Hopi. Although the Hopi believe the ceremonies are intended for the benefit of all people, they also believe benefits only result when ceremonies are properly performed and protected.  

These guidelines establish norms for behavior within the community by visitors and seek to inform non-Hopi people about the problems of the past, and how such actions have necessitated the current controls that the Hopi now observe. Again, IP issues rub shoulders with ethical frameworks of action.

To further help visitors and non-Hopi understand expected modes of conduct, the HCPO has developed a “Protocol for Research, Publications and Recordings.” This Protocol explains how the Hopi people would like their intellectual resources and TCEs to be used by others. Among other things, the Protocol states that prior informed consent is required for any project or activity involving Hopi intellectual resources; the use of recording devices is restricted; and, informants and subjects of a project or activity should be “justly compensated,” which could include “acknowledgement as author, co-author or contributor, royalties, copyright, patent, trademark, or other forms of compensation.”

In addition to the Protocol, the Hopi Tribe has been very active in related projects concerning the preservation and digitization of its cultural heritage. These projects are initiated in order to prevent any dissemination of knowledge and information without the prior informed consent of the Tribe. A good example is the Hopi Oral History Project which is recording the history and cultural traditions of the Hopi. Another project involves the preservation of the Hopi language, the Hopilavayi Project.

**Navajo Nation – Guidelines for Visitors**

In similar circumstances to the Hopi, the Navajo Nation has guidelines for behavior for visitors to the community. These also include restrictions on recording and documentation. Importantly, these guidelines are not about absolute restriction – rather, they are about setting standards, and establishing processes for dialogue and engagement. Importantly they emphasize that the people who are part of the Navajo Nation have the right to decide when and how documentation of the community takes place. Currently the Navajo Nation is implementing the *Navajo Nation Un-authorized Recording Act* 2007 (Legislation No. 0836-07).


IP law often falls short of meeting the needs of indigenous and traditional peoples in relation to the protection of TCEs. Nevertheless, a range of innovative strategies has been and is currently being crafted to respond to the substantive gaps within the current legislation. These strategies are not singularly IP focused. They engage with the diverse inter-relationships among researchers, indigenous peoples and traditional communities and cultural institutions. For instance, some strategies recognize that greater information about correct ways of behaving when visiting a community will directly affect which documentary practices are assumed to be appropriate.

These relationships are key to preserve and disseminate information in an environment furnished by diverse concepts of knowledge. They tend to be long-term, often lasting through and beyond the professional lifetimes of the specialists, indigenous and non-indigenous, concerned. An understanding of correct behavior is basic to the entire process. What is often missing is the formalization of this knowledge
in terms capable of being understood by non-specialists and translated into protocols that can work with and effectively influence the broader protocols of the institution.

The strategies reflect a change of approach and a realization that legislation alone is not enough: improved relationships are needed to enable new directions for to the successful documentation, collection, storage, management and dissemination of TCEs. Significantly, tradition-bearers have a central role in these discussions. Guidelines, codes of conduct and protocols offer new information about what is important to indigenous and traditional communities and how the management of collections can be improved. They are established with flexibility for each context.

Nonetheless a case-by-case approach may always be necessary to some extent, even in the presence of guidelines and protocols. Cultural institutions with a legal mandate to hold material “in trust for all” will always have to balance the obligation to reserve stored information for a particular originating group against the requirement not to discriminate among members of a plural population. Demographic dispersal, intermarriage, gradients from “more orthodox” to “less orthodox,” political factionalism, and the existence of specific religious or cultural groups with strong interests in certain material but memberships that do not coincide with the originating populations will always generate challenges for both cultural institutions and indigenous and traditional societies that seek a single, authoritative management path. Some cultural institutions have become keenly aware of these issues and have found creative collaborative solutions to issues that have seemed to defy standard approaches.

These examples show the range of good practices – particularly in institutional and independent research sites.

**Fiji’s Indigenous Affairs Ministry**

The then Ministry of Fijian Affairs, Culture and Heritage, now the Ministry of Indigenous Affairs and the Department of Culture and Heritage of Fiji has actively developed practical and policy measures to preserve and safeguard Fiji’s cultural heritage, with the aim to “strengthen the conservation, preservation, promotion and protection of all forms of cultural and natural heritage. These include intangible and tangible, movable and immovable heritage, and cultural industries.”

Guidelines and manuals have been published to advise researchers on how to conduct research involving Fiji’s cultural heritage. One example is the “Training Manual on Field Research Methodology Designed for Cultural Mapping Field Officers.” The manual contains information on the steps to take and issues to address when conducting research. The manual includes guidance on IP questions, based on the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) (the South Pacific Model Law) which WIPO assisted in drafting.

Another example is the “Recommended Guideline for Socio-Cultural Researchers when Undertaking Fieldwork in Cultural Settings.” This Guideline introduces socio-cultural researchers to ethical aspects of conducting anthropological research. Two main issues emphasized throughout the Guideline – both of which are related to IP issues – are the need for consent and awareness-raising.

The Guideline is part of the completed Framework for Research on Indigenous Fijians which was developed by the Institute of Fijian Language & Culture of the Ministry of Indigenous Affairs and currently in its consultative stage. The framework captures research as perceived by the local, culturally appropriate
research methodology, reciprocating the assistance rendered by the informants and locals during research, respect for local ethical principles when accessing TCEs, IP protection and the setting up of a formalized resource center and archive for collections. The Framework proposes to engage and work with all stakeholders, both government and non-government, to build general consensus on the need to safeguard the rights of indigenous Fijians in their TCEs. Simultaneously, it is the ultimate goal of the Framework to engage cultural and non-cultural institutions into appreciating indigenous knowledge systems, worldviews and minimize misuse of local customary practices, language and values.

While earlier arguments have concentrated at least against the idea of government institutionalization of documentation, collection and archiving of TCEs due to bureaucracy and related limitations, the Fiji initiative is a living example of how to reverse the often top-down approach and move towards more grassroots participation, involvement and inventiveness of the indigenous and traditional communities themselves. Since the communities are the owners of the TCEs, the government only acts as a facilitator of the databases.

The Vanuatu Cultural Centre

The Vanuatu Cultural Centre consists of a National Photo, Film and Sound Archive, a National Museum, a National Library and the National Cultural and Historic Sites Register. Its collections therefore include cultural artifacts, photographs, film and audiovisual recordings, information pertaining to cultural sites and other historical items. Furthermore, as part of its functions, it is responsible for managing and safeguarding the cultural heritage of Vanuatu. The Centre also provides for fieldwork projects and cultural research, in which the Centre collaborates with local communities in cultural heritage management.

From a policy and legal perspective, the Centre plays an active role at the national level. The Centre has taken policy and legal measures in response to growing concerns from local communities. For instance, the Centre has a Vanuatu Cultural Research Policy, which addresses certain important aspects to be considered before any research can commence. This includes, among other things, understanding Vanuatu’s “kastom.” Researchers must also respect “traditional copyright protocols” protected and enforceable under Vanuatu’s Copyright Act. The Policy further includes a “Research Agreement,” which needs to be completed and signed by the prospective researcher and the Cultural Centre.

Another measure developed by the Cultural Centre followed the intensification of the commercialization of the Nagol or Pentecost land dive ceremony. This ceremony had attracted the attention of many third parties, in particular commercial film crews and tour operators. The immense attraction of this unique TCE also caused the ceremony to be performed every Saturday in April and May of each year instead of the original once or twice a year. The tradition therefore risked becoming solely a “commercial attraction” with only very limited cultural significance. The traditional communities had consequently argued that the “commercial attraction and activities” (such as filming) distorted the traditional ceremony and that there also was a lack of transparency and fairness in the remuneration paid by the third parties to these communities.

In order to address this particular case, the Center started developing policies and legal measures, which include a moratorium on all filming of the ceremony, based on Section 6.2.i of the Vanuatu National Cultural Council Act, which confers the right to regulate filming by foreign companies in the country. This moratorium is an initiative of the Centre to persuade all parties involved to engage in the long-term process of developing a coordinated Management Plan for the tradition. The objectives are to preserve the
cultural meaning of the tradition, to secure the transmission of TCEs to future generations, and to promote the acknowledgement of customary owners through a distinct legal entity. In other words, besides safeguarding and preserving TCEs, the IP rights of customary owners would be made known and respected.

Reproduction Rights Organizations

Retaining copyright in a work is a struggle for all creators especially as new technologies enable the reproduction of infinite copies. Reproduction Rights Organizations (RROs) are in operation throughout the world to funnel royalties back to authors and artists. RROs generally also encourage the creation of new RROs; facilitate agreements between and on behalf of their members; and increase public awareness of copyright and the role of RROs in managing rights and fees.322

However, many uses that are acceptable for most copyrighted works sometimes conflict with appropriate uses of TCEs, as determined by the source community. There are a few specialized RROs established around the world that endeavor to cater to the specific needs of indigenous and traditional communities.

These RROs have the capacity to play an important role in advancing and advocating for the interests of tradition-bearers within specific areas of the market. The Aboriginal art market is one example. Specialized attention means that when there are instances that require different circumstances for reproduction and circulation of works, these can be monitored and addressed.

As far as strategy for protection and control is concerned, RROs appear to be far more consonant with the current situation of indigenous peoples and traditional communities in plural societies, national or transnational, than the “traditional” and “culture/community” protection approach.

One example is the Aboriginal Artists Agency in Australia:

*Aboriginal Artists Agency Limited is a non-profit organization. It was established in 1976 by the Australian Government through the Australian Council for the Arts and subsidised until 1986. Since then it has operated independent of any funding source; commissions of between 15-25% generate sufficient income for the company to be self-sustaining.*323

Another example is Sámikopija, the Sámi reproduction rights organization. One of Sámikopija’s most interesting facets is its transjurisdictional nature; it represents Sámi members in Finland, Sweden, Norway and Russia. Sámikopija has had a reciprocal agreement with Kopinor, the Norwegian RRO, since 1994, guaranteeing that Sámi rights owners receive one percent of the net remuneration Kopinor claims annually.324 An organization like Sámikopija is exceptional in that it represents indigenous interests across national political borders.
5. Standard Agreements, Consent Forms, Licenses and Undertakings

Some communities have put in place standard agreements and forms which any prospective user needs to sign.

License Form, Consent to Access to and Use of Historical Materials by DISA and Aluka

The Digital Innovation South Africa initiative of the University of Kwa-Zulu Natal (DISA)\(^{325}\) and the Aluka initiative of Ithaka Harbors, Inc. (Aluka)\(^{326}\) have launched projects intended to preserve “historical materials” in digital or electronic form and to make these available online “for scholarly, educational and other non-profit cultural purposes.”\(^{327}\) For this purpose, DISA and Aluka have developed a license form for custodians and/or rights owners to engage in a non-exclusive royalty-free license agreement with DISA and Aluka.

The agreement with interested custodians specifically provides DISA and Aluka with “access to the historical materials for the purpose of creating digital images”\(^{328}\) whereas any agreement concluded with the rights owners would entail providing DISA and Aluka with their permission to 1) create digital reproductions of the historical materials, 2) preserve the digital images in DISA archives, 3) modify or adapt the digital images for preservation, translation, quality control, delivery and other purposes, 4) distribute or make publicly available copies to DISA’s and Aluka’s authorized users for educational, scholarly and other non-profit cultural purposes, 5) distribute a limited number of the digital images in printed form, 6) make copies for loss of data purposes, and 7) use any technology and means for reproduction, archiving, modification and distribution purposes.\(^{329}\)

In any such agreement, consent given to DISA and Aluka is considered as non-exclusive and a possibility exists for the participating custodians and rights owners, upon their request, to be identified and acknowledged in relation to their materials on the DISA and Aluka websites.

The Laura Aboriginal Dance and Cultural Festival

A further example of how agreements have helped within the TCE context is in the Laura Aboriginal Dance and Cultural Festival, a biannual celebration of indigenous Australian song, dance and music.\(^{330}\)

The Laura Festival is the longest running continual Aboriginal cultural festival in Australia. In 1998 it was revealed that certain images of dancers from the Wik community were being reproduced commercially without permission. Photographs were available on CDs, postcards and other products. Since these images are only suitable for reproduction upon permission by those with appropriate cultural status, the reproductions were deemed to be culturally offensive.

Under Wik customary law, the right to control elements of a ceremony of performances rests with specific individuals, namely senior custodians or elders. Under Australian copyright law, like most copyright laws, the copyright in the images of the dancers vested in the photographer (who is the author for copyright purposes). Had the dancers known this, they would not have allowed any photography during the performance or would have reconsidered performing at the Festival.\(^{331}\) This highlights the need to provide information to tradition-bearers about the range of rights that may exist in a performance and, when a performance is documented, the performers themselves need access to IP information in order to make informed decisions.
Since 1998, the organizers of the Laura Festival have adopted a written agreement concerning all photography and filming at the Festival. The agreements contain terms requiring that consent be obtained from the performers and that certain conditions for control of commercial photography be followed. Approved photographers sign an agreement stating that any commercial photography will be undertaken only after consent of the performers is received.
Notes

1 For information on the Creative Heritage Project, see http://www.wipo.int/tk/en/folklore/culturalheritage/ (last accessed April 14, 2010)


4 This example was first published in J. Anderson, Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use, Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, American Library Association and The MacArthur Foundation Columbia University, New York, May 5-7 2005. Paper available at
http://correctingcourse.columbia.edu/program.html (last accessed February 22, 2010)


6 In particular, rural non-literate communities, minority groups and other tradition-bearers who do not have any understanding of the IP regime of the country in which they reside, often fail to understand the potential value of what they are giving away.

7 Although museums’, libraries’ and archives’ collections necessarily refer to past events, cultures are in a constant process of making and changing, unless the populations are extinguished. Hence new values and uses can be attributed to cultural testimonies of one’s own or another group’s culture.

8 Arguably, the central issues of rights go well beyond whether or not copyright to a book or photograph is still in effect.
United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 31. Although the Declaration has been adopted, it is not a legally binding document.


For example, in certain cases where TCEs have been documented and incorporated into, say a sound-recording or a film, TCEs can indirectly benefit from IP protection (the recording or film as such may be protected by copyright and/or related rights, but not the underlying TCE).

As we shall see in more detail in Part III, some cultural institutions have policies and even legal provisions in their constituting statutes, which relate to TCEs and relationships with indigenous and traditional communities. Moreover, there are legal frameworks in place in some jurisdictions.

For an academic account of the emergence of these issues see J. Anderson, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW Edward Elgar Press (2008).

In October 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. It defines cultural diversity as “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.” See www.unesco.org/culture/en/diversity/convention (last accessed February 26, 2010).

For the purposes of this publication, WIPO’s working description is used. It must be noted that “TCEs” is a term that has replaced, within WIPO, the controversial, albeit more concise, term “folklore.”

Despite its potential, IP has not been widely used to protect TCEs. As the Group of Countries of Latin America and the Caribbean pointed out in 2001, “the resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.” (Position Paper submitted to the IGC in 2001 by GRULAC (Group of Countries of Latin America and the Caribbean), WIPO/GRTKF/IC/1/5, Annex II, page 2.)


It should be noted that Creative New Zealand is no longer investing in managing and promoting toi iho™, a trademark denoting the quality and authenticity of Maori art. For more information, see http://www.toihot.com/ (last accessed February 26, 2010).

See generally WIPO, Consolidated Analysis, op. cit. note 30. It should be noted that some studies have shown, however, that even when outsiders know something is not authentic, they may purchase the cheaper “knockoff” item, rather than the more expensive “authentic” item. The issue is indeed far deeper than outsider awareness.
39 This type of system is used to either complement or substitute conventional IP regimes. It is characterized by an emphasis on communal rights, perpetual protection and the absence of the fixation requirement.
41 The Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000, establishes a registration system for TCEs. A special office has been created within the country’s IP office to approve the applications and maintain the register. The procedure before the IP office does not require the services of a lawyer and there are no application fees.
42 See the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999.
43 Under the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, “traditional owners” have the right to authorize or prevent, among others, the adaptation, transformation and modification of the protected TCEs. An external user must receive consent to make new derivative works (works based upon a TCE). Any IP rights in derivative works vest in the work’s author. However, if the work is used for commercial purposes, the rights-holder must share benefits with the traditional owners, acknowledge the source of the TCEs and respect moral rights in the TCEs.
45 Current drafts are published as WIPO Documents WIPO/GRTKF/IC/17/4 (TCEs) and WIPO/GRTKF/IC/17/5 (TK). Available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=20207 (last accessed November, 2010).
46 Communities that feel associated to (collections of) TCEs in some cases mainly have a historical relationship to them, while in other cases the values vested in the TCEs concerned are still claimed to be those of the community in question, that in many cases still are enacting elements of their intangible TCEs and/or producing elements of their traditional tangible TCEs.
47 See note 45.
48 Draft Provisions, article 5(i)(c)(vi). It should be noted that it is still debated whether it is in indigenous and traditional communities’ interests to make such recordings. It is argued that asking for prior informed consent is more consistent with customary law and may help build better relationships.
49 Draft Provisions, article 7(2)(a). This provision may still need to be analyzed to see whether this would constitute a permissible exception to copyright and related rights law under international law.
51 See http://www.smithsonianglobalsound.org/ (last accessed March 10, 2010)
52 The majority of the collection was originally issued on long playing (LP) recordings by Folkways Records of the International Library of African Music, and was already “preapproved” for Internet distribution. It was thought not to be desirable to place entire collections online.
53 B. Braiker; Newsweek; June 10, 2005.
55 For some examples of misappropriation, see Minding Culture, op. cit. note 30
57 See Minding Culture, op. cit. note 30, Case Study 6.
59 This was never admitted to by the manufacturers of the t-shirts.
It should be noted that inequality and oppression are not unique to the relationships between nations and indigenous peoples. The inequalities of social class, cultural hierarchy, ethnicity, and education also profoundly affect non-indigenous collections as well. Tangible expressions were and are usually produced within the communities (and usually collected by outsiders) and materializations of tangible and intangible expressions and practices used to be produced largely by outsiders. Tangible expressions may be documented, reproduced/copied and disseminated; materializations of intangible expressions may be copied and disseminated. All materials may be studied, written about, used and presented in information carriers of different types (books, brochures, websites, databases, etc.).

Precious examples of the enactment of traditional practices by and for the communities themselves while using objects held in museums can be found in Miriam Clavir, Preserving what is valued. museums, conservation, and First Nations, Univ. British Columbia Press, 2002.

WIPO Guide on Managing Intellectual Property for Museums, op. cit. note 3


Calls are being made to bring IP law up to speed with new cultural and economic realities, as a consequence of the process of decolonization. The balance will likely be reassessed given the changing cultural context of globalization.

See the United Nations Permanent Forum on Indigenous Issues for an indication of the diversity of Indigenous peoples histories, laws, concerns and expectations for justice. It should be noted that indigenous and traditional communities do not always speak in one voice. Communities that might be characterized by a distinct set of TCEs are not always homogeneous as to opinions, wishes and claims concerning the ownership, exploitation and other aspects of TCEs. Occasionally cultural institutions will have to deal with conflicting claims coming from a specific community. Moreover, within many once “traditional” communities, processes of individualization are rampant. This leads to situations in which individuals start claiming ownership – and rights – in specific TCEs that traditionally were considered as belonging to the whole community, or that are still being considered as such by some in the community.

See the Berne Convention, op. cit. note 31, As of February 26, 2010, 164 countries are contracting parties to the Berne Convention.

One should bear in mind the provision of Article 7(8) of the Berne Convention concerning duration, which is an exception to the principle of national treatment. Article 7(8) states that: “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.” This is the rule, unless a country specifically states that it applies national treatment.

The TRIPS Agreement is Annex1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco, April 15, 1994.

As of February 26, 2010, 153 countries are members of the WTO.

As of February 26, 2010, the WCT has 88 contracting parties.

J. Anderson, Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use, op. cit. note 6

Other branches of IP law may be more useful in protecting a work’s “style,” such as the common law tort of passing off. The tort of passing off protects the goodwill of a trader from a misrepresentation that causes damage to goodwill. It prevents one person from misrepresenting his goods or services as being the goods and services of another, and also prevents one person from holding out his goods or services as having some association or connection with another when this is not true. See Wikipedia entry for “Passing Off”: http://en.wikipedia.org/wiki/Passing_off (last accessed March 10, 2010).

It should be mentioned that originality in copyright does not mean the same thing as “novelty” as it is understood in patent law, which requires that the claimed subject matter was not disclosed before the date of filing (or date of priority) of the patent application.

See e.g., Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991) a decision from the US Supreme Court [The sine qua non of copyright is originality. However, the standard for creativity is extremely low. It only needs to possess a “spark” or “minimal degree” of creativity to be protected by copyright], and Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC 112 (15 May 2002) a decision of the Federal Court of Australia. [Common law historically granted copyright in directory and other “list” cases on the basis of sweat of the brow, irrespective of any “creative” element in arrangement/selection of the list.]


In the case of use of symbolic codes by members of a cultural community, a new utterance (song lyrics, drawing, weaving pattern, etc.) is accepted as legitimate and verisimilar because it follows the grammar of the cultural language (verbal, pictorial, musical, etc.); it is not necessarily based on a previous iteration, e.g., musical or choreographic improvisations and sung duels. It should be stressed however that the issue is not that the people making the knockoffs want IP protection in their works; it is that the traditional communities and indigenous peoples want to prevent the knockoffs even though the knockoffs do not copy the “expression” as defined by copyright law, but merely the idea.

M*, Payunka, Manika & Others v. Indofurn Pty Ltd, 30 IPR 209 often dubbed the “Carpets case.” The tags suggested that the works had been made with Aboriginal involvement, and that any royalties would be returned the communities involved. The court found that this was misleading conduct under the Trade Practices Act (1974).

In three of the carpets, determining direct copyright infringement was a little more difficult. See discussion in J. Anderson, LAW, KNOWLEDGE, CULTURE, op. cit. note 26.

Judge von Doussa relied upon Williams v. Settle [1960] 1 WLF 1072 at 1086-7. Part of the award was given in consideration of the personal hurt and cultural harm. The judge considered that the misuse of the artwork caused great upset and cultural harm to the artists. The court noted that the standing of the artist within his or her community could have been affected given the nature of the reproduction and the fact that the prior consent of the group was not sought or given. This was because, regardless of whether the artists authorized the reproduction of their artworks on carpets, they were responsible under Indigenous law for the transgression that had occurred. They were also liable to be punished for this transgression.

See Minding Culture, op. cit. note 30.


Id., at 196. The Bridgeman case specifically addressed photographs of two-dimensional public domain artwork; how it could apply in other artistic media is uncertain. The court made a strong distinction between technical skill and artistic originality. While producing quality photographs of artworks requires a high degree of skill, the court stated: “Elements of originality […] may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. […] As the Supreme Court indicated in Feist, “sweat of the brow” alone is not the “creative spark” which is the sine qua non of originality.” (36 F. Supp. 2d 191 (S.D.N.Y.), 196-97). This line of reasoning leaves a range of potential works that do not necessarily require skill but which are creative, unprotected. This could also have effects in the context of digital technology, including minimalistic art that demonstrates uniqueness and certainly a range of future art forms. Under the “sweat of the brow” doctrine, copyright should apply to creations, regardless of their originality, because of the difficulty and the expense of time, money or effort in producing them. The court’s dismissal of this doctrine is a uniquely American point of view; several European jurisdictions, for example, specifically provide copyright protection under this criterion.

(1869) LR 4 QB 715.

L.R. 4 Q.B. at 722. It should be noted that the state of the law in the United States of America is not entirely settled. Bridgeman was decided in 1999 in the Southern District for New York and is not necessarily followed by in other circuits or in New York itself. In 2000, SHL Imaging, Inc. v. Artisan House, Inc., 117 F.Supp.2d 301 (S.D.N.Y 2000) held that product photographs of mirrored picture frames were entitled to copyright protection noting that “[t]here is no uniform test to determine the copyright ability of photographs.” Id., at 309-310. Arguably, the definition of what constitutes a photograph has changed with digital technology.

A wide range of interested parties attended Who Owns This Image? Art Access, and the Public Domain after Bridgeman v. Corel, Public Panel Discussion cosponsored by the Art Law Committee of the New York City Bar Association, the College Art Association, ARTstor, Creative Commons and Art Resource, April 29, 2008.

The decision’s repercussions for museums, libraries and archives in the United States of America could be significant because some institutions have the potential to, or currently do, receive money for the reproductions of their slides or transparencies of public domain works. For example, the Library of Congress, with its partnership with Flickr, earns revenue from such activities. Also, the Frick Collection in New York has digitized its collection and made it available for viewing on the Internet. The majority of artworks in its collection are in the public domain. Yet, and running contrary to the Bridgeman decision, the Frick claims copyright ownership of all the images and text on the website. (See The Frick Collection and Frick Art Reference Library, available at http://www.frick.org/copyright/index.htm (last accessed March 10, 2010). There has been some academic discussions about suing such institutions for copyright misuse.)


France, Court of Appeals of Nîmes, judgment of July 15, 1997, Jurisdata 030467.


Digital rights management is used here as a generic term that could include watermarking or other technologically-controlled barriers to free access.

See Who Owns This Image?, op. cit. note 90.

Regardless of their originality, because of the difficulty in producing something, such as time, money or effort.

For an updated account of the Database Directive, see the Database Right File, maintained by the Institute for Information Law, Amsterdam, available at www.ivir.nl/files/database (last accessed March 10, 2010).


See WIPO, Consolidated Analysis, op. cit. note 30.

The Protection of Traditional Knowledge: Table of Written Comments on Revised Objectives and Principles, May 2007, WIPO Document WIPO/GRTKF/IC/11/5(b), Appendix at 4.27.

212 F.3d 1210 (11th Cir. 2000).

See “Carpets case”, op. cit. note 81.

IPA intervention at the Sixth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; Geneva, 16 March 2004.


See Berne Convention, Articles 2.1 and 2.2.

See, e.g., Copyright Act of the United States of America, Section 101 at “fixed” and Copyright Act of South Africa, Section 2(2).

See, e.g., Switzerland Federal Law on Copyright and Neighboring Rights of October 9, 1992, Art. 2(1). “A work shall enjoy copyright protection as soon as it is created, whether or not it has been fixed on a physical medium.” Id.


Ibid.


See, for example, Draft Provisions, Article 5.

See Berne Convention, op. cit. note 31, article 18(1).

The copyright duration may vary from country to country, thereby providing several dates of entry into the public domain. See http://www.ibiblio.org/wm/paint/auth/klee (last accessed March 10, 2010).

See, e.g., the Neue Pinakothek, Munich, available at http://www.pinakothek.de/neuepinakothek/sammlung/rundgang/rundgang_en.php (last accessed March 10, 2010). “The Neue Pinakothek always exhibits approximately 450 paintings from its collection of more than 4,500 paintings and 300 sculptures. You can see 100 highlights of the paintings currently on exhibit in our Internet website.”

For example, next to Luc Tuymans’s Lumumba, 2000, the associated graphic reads: Image not available.
The source of ambiguity of whether a TCE may or may not be in the public domain, as it is construed under IP law, is related to the tension between national IP laws and indigenous and traditional customary law.

See, e.g., *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481. The judge noted that the sacred character of the work copied and the criticism the artist received in his community were indicative of the poor fit that Australia’s copyright law provided for TCEs in the public domain.

See for example, WIPO Document WIPO/GRTKF/IC/3/11 “Expressions of Folklore—Document submitted by the European Community and its Member States”: “There is a point where a line must be drawn between the public domain and protected intellectual property. […] the realm of intellectual property protection should not be extended to a point where it becomes diffuse and legal certainty diluted.” One should distinguish, however, the notion of a community public domain from that of a general public domain, where non-community members can have access to TCEs.

See WIPO, Consolidated Analysis, op. cit. note 30.

Intervention of the European Community, WIPO/GRTKF/IC/3/11.


See the collection in the Smithsonian Global Sound that has unknown authors: http://www.smithsonianglobalsound.org/ (last accessed March 10, 2010).

Copyright Act of Canada, Art. 77


As of May 2008, the only enacted orphan works legislation are in Canada, the United Kingdom, Fiji, India, Japan and South Korea and there are no identifiable cases or disputes that deal directly with TCEs. All of these legislations provide for case-by-case analyses of a proposed compulsory licensing of an orphan work. Since 1990, the Copyright Board of Canada has issued 242 decisions regarding unlocatable copyright owners; see http://www.cb-cda.gc.ca/unlocatable-introuvables/index-e.html (last accessed April 14, 2010) for a list of applicants and decisions.

For example, this is proposed in Emily Hudson and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation*, The University of Melbourne, Melbourne Law School, February 2006, at 100.

See Annex II for some national terms of protection.


J.M. Barrie, the creator of Peter Pan, bequeathed the copyright and other intellectual property rights of Peter Pan to a London hospital. Under the current harmonized EU legislation, the copyright just expired on December 31, 2007. Thanks to special legislation, however (Copyright, Designs and Patents Act 1988 (UK), § 301), small sums of royalties will continue to accrue in Great Britain.


Canada’s Copyright Act, for example, has a specific provision for an exhibition right for copyright holders. See Article 3(1)(g) of the Copyright Act. Moral rights, discussed below, are stronger in some jurisdictions than others. The menu of benefits conferred to an artist through moral rights could include the manner in which his or her artwork is displayed.

In Ireland, literary works receive “life + fifty” while films receive “life + seventy.”

Most European Union countries made the extensions retroactive, temporarily bringing some works back into copyright.

In many jurisdictions, there are provisions for works of joint authorship. In the United Kingdom, for example, in the case of works made through a collaboration of two or more authors, where the contribution of each author is not distinct from that of the other authors, then the work is one of joint authorship and all of the authors jointly own the copyright. This means that, where the finished work does not exhibit distinct works from separate authors, but is seen or experienced as a whole piece, then a work of joint authorship would have been made. Some examples are the works of Gilbert and George or Lennon and McCartney.

In some jurisdictions, where a work was created by an employee, the employer will generally own the copyright unless otherwise provided for in a contract.
See Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options, WIPO/GRTKF/IC/6/3. See also The Protection of Traditional Cultural Expressions: Draft Gap Analysis, WIPO/GRTKF/IC/13/4(b) Rev.


See Annex II (List of copyright laws).

Through the right to withdraw or retract, the author can prevent further reproduction or distribution of his work. See, for example, French Intellectual Property Code, Art. L121-1.

See, for example of implementation of such rights, Canadian Copyright Act, S.C. 1997. c. 24, § 14.1.

United States of America Copyright Act, Section 106 A.

Bernard Buffet, a French artist, was asked to decorate a refrigerator to be put up for auction at a charity event. His composition, composed of six panels, was purchased and later dissembled into six separate works of art. Buffet brought action and won, based on his moral rights.

David Smith, a modernist sculptor, created a composition entitled 17 h’s, made from welded steel and covered with six coats of cadmium red paint. The dealer who owned the sculpture was approached by a collector who liked the composition but not the color. Without the artist’s knowledge or consent, the dealer sent the sculpture to a foundry, had it stripped, and then consummated the sale. See Patricia Failing, Artists Moral Rights in the United States before VARA/1990: An Introduction. The Committee on Intellectual Property of the College Art Association, Session Paper, February 2009, citing David Smith’s letters published in ARTS (June 1960). In 1981, artist Richard Serra installed his sculpture Tilted Arc in Federal Plaza in New York City; the artist created it specifically for that site. It had been commissioned by the Arts-in-Architecture Program of the U.S. General Services Administration. Tilted Arc is a curving wall of raw steel, 120 feet long and 12 feet high, which carved the space of the Federal Plaza in half. On March 15, 1989, during the night, federal workers cut Tilted Arc into three pieces, removed it from Federal Plaza, and carted it off to a scrap-metal yard. The artist brought suit but U.S. laws were, at least at the time, inadequate to protect Serra’s work. See Richard Serra, Writings and Interviews, at 193 (University of Chicago Press, 1994).

However the concept of group ownership of moral rights may raise additional challenges.

Laws of the Federation of Nigeria, 1990, Copyright Act, Ch. 68, Section 28(3).

See WIPO, Consolidated Analysis, op. cit. note 30, p.31

Adebambo Adewopo, Protection and Administration of Folklore in Nigeria, SCRIPT-ed, Vol. 3, Issue 1, March 2006. This reflects the problem of equating political boundaries and entities with cultural communities and owners of IP. Knowledge and practice linked to a TCE may be limited to members of a particular society, or they may be shared in broad general form or in particular forms by societies who otherwise consider themselves distinct. Indigenous and traditional communities often span more than one political polity and many are not interested in having their state’s government claim ownership over their TCEs.


Moreover, Recital 6 of the Preamble states that “The Berne Convention for the Protection of Literary and Artistic Works provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity. It follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 Phil Collins and Others (4), that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality.” J. MacDonald, Aboriginal Art Dealers Fight Back, The Art Newspaper, Issue 184, September 10, 2007.


Section 107 of the U.S. Copyright Act is the first attempt in American law to codify common law decisions which incorporated the fair use doctrine.

Factors listed in § 107 include the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. It is understood that both the list of potentially fair uses and the factors to be considered in determining fair uses are illustrative, not exhaustive and that § 107 is designed to offer guidance rather than formulate exact rules.

960 US.2d 301 (2d Cir. 1992).

The applicability of this case is now arguable, however, given a more recent Koons case in which the artist prevailed on a fair use defense. See Blanch v. Koons, 467 F.3d 244 (2006).


s29.—(1) Fair dealing with a literary, dramatic, musical work… for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement …

s30.—(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.

Swaziland, Copyright Bill of 2004, Art. 9.

Directive 2001/29/EC.

There is only one exception that is mandatory for EU member states to implement into their own national legislation: Article 5 on Exceptions and limitations, concerning temporary acts of reproduction that are part of a technological process. This provision states that: “1. Temporary acts of reproduction […] which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or; (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.”

Law No. 92-597 of July 1, 1992, on the Intellectual Property Code, as last amended by Law No. 97-283 of March 27, 1997. Art. L 122-5. Once a work has been published, the author cannot prevent:

1. Private family performances.
2. Copies for the private and personal use of the copier. This provision does not apply to works of art, computer programs (where a single safeguard copy is allowed, Art. L122-6-1-I) and databases.
3. In cases where the name of the author and the source are clearly indicated,
   a) Analyses and short citations justified by the critical, polemical, scientific or pedagogical nature of the work.
   b) Press reviews.
   c) Diffusion of public speeches as current news.
   d) Reproductions of works of art in catalogues for auctions in France (subject to regulatory restrictions).
4. Parody, pastiche and caricature, “taking into account the usage of the genre”.
5. Acts necessary to access a database within the limits of the agreed use.

Australia Copyright Act of 1968, Part 3, Division 3.

Copyright Amendment Act of 2006 (NO. 158, 2006).

South Africa Copyright Act, Section 12 (1).


Id., at “Archives,” Sections 2 and 3.

Id., at “Photography,” Section 1.


A. Riding, Paris Opens a Museum for Non-Western Art. The International Herald Tribune, June 21, 2006. “[S]hould objects that were not created as art be presented as art, isolated from their ethnographic context?” Id.

Legal Notes, Musée du Quai Branly, Utilisation Autorisée (authorized use), citing the Code de la propriété intellectuelle, Article L.122-5.

Decisions within an indigenous group or traditional community about what limitations should be put on the use of a TCE may vary by generation, by who is in power, by who has been paid, etc.

Moreover, in most traditional cultures, a tangible TCE is a version of a particular chain of expressions, which are all typologically and functionally similar. The issue of “reproduction” arises when, in a cultural institution, the TCE is literally reproduced. This copy is merely a reproduction of one sample of the entire chain. In such a case, as far as copyright law is concerned, the author may be identified. However such identification would not be correct from the viewpoint of indigenous and traditional communities.


See, conversely, a case deciding that art restoration requiring a particularly sensitive and complex activity should reward the restorer with copyright protection. (Trib. Bologna, decision of December 23, 1992, 1993 Il DIRITTO DI AUTORE 489, note 98 supra)


The statutory exceptions for libraries primarily address such issues as reproduction of copyrighted works for purposes of private research and study, preservation and replacement of materials, and document supply and interlibrary lending. Some countries have statutes on the “making available” of copyrighted works. For an overview, see Study on Copyright Limitations and Exceptions for Libraries and Archives, SCCR/17/2, available online at: http://www.wipo.int/edocs/mdocs/copyright/en/scr_17/scr_17_2.pdf (last accessed April 14, 2010). However, in most current copyright law a useful mechanism that regulates or supports such an important activity is yet to be developed. (G. Pessach, Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead, Journal of International Media and Entertainment Law, 2007.)

Section 30.1.

17 U.S.C. §108 (Limitations on exclusive rights: Reproduction by libraries and archives). The Digital Millennium Copyright Act (DMCA) makes more specifications in this vein, allowing up to three preservation copies in digital or analog format when the institution already has an original copy. The copy is solely for preservation, security or deposit within the institution. Generally, the nature and purpose of digital cultural preservation is a public benefit-oriented activity.

Study on Copyright Limitations and Exceptions for Libraries and Archives, SCCR/17/2.

See Skrydstrup, supra note 54 at 76.


For example, Section 202 of the United States of America Copyright Act states that: “Ownership of a copyright…is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object…does not of itself convey any rights in the copyrighted work embodied in the object…”

D. Vaver, Copyright Law, (Irwin Law, Toronto, 2000)

In the United Kingdom duration of Crown copyright varies depending on whether material is published or unpublished: published works are protected for 50 years from the date of publication while unpublished works are covered for 125 years from the date of creation.
Certain works are protected under *Letters Patent* – applicable to a small class of materials where the Crown claims the right to control reproduction outside normal law such as the King James Bible and the Book of Common Prayer. These kinds of works have perpetual copyright protection.

In Australia, the Government owns copyright in any work, film or sound recording made by or under the direction or control of the Government, and any work first published by or under its direction. (Australia Copyright Act of 1968, Part VII.) A current recommendation by the Australian Copyright Law Review Committee is that the Crown relinquishes its unique position of gaining copyright over material simply because it publishes first. (Copyright Law Review Committee, Crown Copyright Report, Jan. 2005, http://www.clrc.gov.au/agd/WWW/npwatchtch.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)-6+APRIL+full+version+crown+copyright.pdf (last accessed March 18, 2010).

In New Zealand, the Crown is the first owner of any copyright subsisting in any work created by a person who is employed or engaged by the Crown and covers works of the Queen, Ministers of the Crown, Offices of Parliament and other government departments. A term of 100 years applies to Crown copyright. (New Zealand Copyright Act of 1994, §§ 2(1), 26, 27.)

Works produced by employees of the United States of America government, in the performance of their official duties, are not eligible for copyright protection. U.S. Copyright Act, §§ 101, 105. § 105 states that “Copyright protection…is not available for any work of the United States of America Government, but the United States of America Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.” However, the AFC has many audio recordings of traditional musicians and singers that were collected by government workers for the Federal Writers Project in the 1930s. The fact that these recordings were made by government workers does not negate the IP Rights of the artists. So, at the AFC, any use of these recordings would still require the user to obtain permissions from the artists or the artists’ heirs. However, any original written work done by government employees would be “work for hire” and not covered by copyright (for the government employee). For example, an essay written about the field collecting trip would not be copyrighted.

Official works, such as legal regulations, decisions, public charters and collections of legal regulations, are not afforded copyright protection. Czech Republic Copyright Act, Art. 3(a).

Laws, ordinances, official decrees, notices, decisions, and official grounds of decisions shall not enjoy copyright protection. German Law on Copyright and Neighboring Rights, Art. 5(1).

No copyright subsists in laws, decrees, or ordinances issued by public authorities. The Netherlands Copyright Act of 1912, Art. 11.

See The Museum of Australian Currency Notes. The bottom note “depicts an Aboriginal youth, a Morning Star Pole and other designs includ(ed) from Aboriginal artworks commissioned by the Bank,” and is copyrighted to the Reserve Bank of Australia, available at http://www.rba.gov.au/Museum/Displays/1988_onwards_polymer_currency_notes/first_polymer.html (last accessed March 10, 2010). However, moral rights are usually inalienable or non-transferable. See for instance: France Intellectual Property Code, Art. L. 121-1. They may however sometimes be waived, although a mere assignment or license of copyright in a work does not, in and of itself, amount to a waiver of moral rights in the work.

See Creative Commons, About Creative Commons, available at http://creativecommons.org/about/ (last accessed March 10, 2010).


As of March 10, 2010 the WPPT has 86 parties. See http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last accessed April 14, 2010)

For example, the WPPT requires States parties to implement in their legislation measures to prevent the circumvention of technological protection measures (TPMs), such as encryption. It also requires them to prohibit the deliberate alteration or deletion of electronic digital rights management (DRM) information.


See http://alutiiqmuseum.org/ (last accessed April 14, 2010)


IMLS Announces Results of Study on the Internet’s Impact on Museums and Libraries, IMLS Announcements, March 6, 2008.
223 El Greco (Domenikos Theotokopoulos) (1541 - 1614), Purification of the Temple, c.1600, oil on canvas, 16 1/2 in. x 20 5/8 in. (41.91 cm x 52.39 cm), Henry Clay Frick Bequest, Accession number: 1909.1.66.
See http://www.frick.org/copyright/index.htm (last accessed March 10, 2010).

225 Sts. Peter and Paul, Greco, El., Oil on canvas. 121.5x105 cm, Spain. Between 1587 and 1592. Source of Entry: gift of P. P. Durnovo, St Petersburg. 1911.
See http://www.hermitagemuseum.org/html_En/00/hm0_7.html (last accessed March 10, 2010).

226 Digital watermarking is a technique that allows the addition of hidden copyright notices or other verification messages to digital audio, video, or image signals and documents, with the aim to deter unauthorized uses.


230 See http://www.mocca.ca (last accessed March 25, 2010).

231 See B. Milhazes, Succulent Eggplants 2006. Synthetic polymer paint on canvas, 74 ¾ x 96 1/2” Gift of Agnes Gund and Nina and Gordon Bunshaft Bequest Fund.


236 See http://www.loc.gov/rr/print/flickr_pilot.html (last accessed March 10, 2010).


241 A report similar to Tanner and Deegan, id., was undertaken in the United States of America. This study found that 99% of surveyed institutions charge less for educational use than for commercial use. See A Mellon Foundation Study: Reproduction Charging Models and Rights Policy for Digital Images in American Art Museums, http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf (last accessed April 14, 2010)

242 While an exhaustive list of collecting societies is beyond the scope of this publication, a few major organizations that are relevant for cultural professionals include: (1) The Design and Artists Copyright Society [DACS]: The United Kingdom’s copyright and collecting society for artists and visual creators; (2) Bild-Kunst, an organization providing copyright protection for artists, photographers and graphic designers in Germany; (3) Canadian Artists Representation Copyright Collective [CARCC], a copyright collective licensing and administering copyright for visual and media artists in Canada; (4) Artists Rights Society [ARS], a copyright, licensing and monitoring organization for visual artists in the United States of America; (5) ASCAP/BMI, a licensing organization for music in the United States of America; (6) Viscopy, collecting agency for artists in Australia; (7) the International Confederation of Societies of Authors and Composers (CISAC), an association of collecting societies.

243 See e.g., Guggenheim Museum, The Collection, Credits, available at http://www.guggenheimcollection.org/site/credits.html (last accessed on March 10, 2010).

244 The Museum of Modern Art, for example, has appointed Art Resource and Scala Group S.p.A as its representative for commercial reproduction of its images. See MoMA, About this Site, available at http://www.guggenheimcollection.org/site/credits.html (last accessed on March 10, 2010).


See http://www.moma.org/visit/calendar/exhibitions/106 (last accessed March 25, 2010).

“The trademarks, trade names, logos and service marks (‘Trademarks’) displayed on this Web site, including ‘SFMOMA,’ are Trademarks of SFMOMA.” http://www.sfmoma.org/pages/terms_of_use (last accessed April 14, 2010).

See http://www.thelibraryshop.org/ (last accessed March 11, 2010).


At the Morgan Library in New York, for example, members of the young patron group who attended a winter gala received a designer compact, designer bottle of perfume, designer bottle of shampoo and a paperback version of a then-recent biography of Pierpont Morgan’s life (1837-1913).


European Union First Chamber, Case C-361/04 P (Jan 12, 2006). It was argued that there was a risk of confusion with regard to the Picasso trademark which was licensed to the French car manufacturers PSA Peugeot-Citroën.

J. Auther, Use of Sacred Symbol Causes New Mexico Controversy, CNN.com, quoting Zia Pueblo tribe elder Ysidro Pino.


The Madrid System for the International Registration of Marks administered by the International Bureau of WIPO offers a trademark owner the possibility to have his trademark registered in several countries by simply filing one application directly with his own national or regional trademark office. For more information, see http://www.wipo.int/madrid/en (last accessed April 14, 2010). At the European Union level, OHIM is the agency responsible for registering trade marks and designs that are valid in all 27 countries of the EU; see http://oami.europa.eu/wps/nw/pages/index.en.do (last accessed March 19, 2010).


In this sense, “geographical indication” encompasses the term “appellation of origin” as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979 and as referred to in the Paris Convention. Another subject of IP protection is an “indication of source,” which is also referred to in the Paris Convention, and which refers to any expression or sign used to indicate that a product or service originates in a country, region, or specific place. The difference, it follows, between “geographical indication” as used in the TRIPS Agreement and “appellation of origin” as used in the Paris Convention, on the one hand, and “indication of source,” is that the former require a quality link between the product and its area of production, the latter not. The term “geographical indication” is often used to refer to both appellations of origin and indications of source. In order to take into account all existing forms of protection, this document uses the term “geographical indication” in its widest possible meaning.
In respect of geographical indications, States must, according to Article 22.2 of the TRIPS Agreement, provide legal means for “interested parties” to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good originates in a geographical area other than its true place of origin in a manner that misleads the public and any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention. Under Article 22.3, States may refuse or invalidate the registration of trademarks which contain or consist of a geographical indication with respect to goods not originating in the territory indicated, if such use of the indication would mislead the public.

Niello is a black metallic alloy of sulfur, copper, silver, and usually lead, used as an inlay on engraved metal. It can be used for filling in designs cut from metal, from Wikipedia, http://en.wikipedia.org/wiki/Niello (last accessed March 11, 2010).

These examples are taken from WIPO, Consolidated Analysis, op. cit. note 30.

This is the case of many institutions’ see, for example: www.moma.org, (last accessed March 12, 2010), www.britishmuseum.org, (last accessed March 12, 2010) and www.hermitagemuseum.org (last accessed March 12, 2010).

For example, http://www.banq.qc.ca/ (last accessed March 12, 2010) or http://www.en.nationaalarchief.nl/ (last accessed March 12, 2010).


This TLD is administered and managed by the Museum Domain Management Association (MuseDoma), a nonprofit organization, through an agreement with the Internet Corporation for Assigned Names and Numbers (ICANN), an organization dedicated to the technical management of the Domain Name System (DNS).


Id., at 6.

More information on the WIPO Arbitration and Mediation Center’s UDRP services is available at: www.wipo.int/amc/en/domains/gtld/ (last accessed April 14, 2010)


WIPO model ADR clauses and submission agreements are available in different languages at: http://www.wipo.int/amc/en/clauses (last accessed April 14, 2010).

More information on the WIPO Center is available at: www.wipo.int/amc (last accessed April 14, 2010).


ICOM established its code of ethics in 2006. See: http://icom.museum/ethics.html (last accessed March 12, 2010). Also, it has established a Cross Cultural Taskforce in 1992.


See http://www.adck.nq/ (last accessed March 17, 2010).


Ibid.


Ibid., p. 1

Ibid., p. 2


Professor Martin Nakata, Director of Jumbunna Indigenous House of Learning at the University of Technology in Australia is pioneering this work. Nakata’s work is directed at how libraries can both respond to indigenous needs, and also deliver important services to communities. This collaborative research, which is foundational to the development of the National Policy Framework, places central importance on developing new partnerships where information needs, within communities and within institutions, can be met.


See http://www.niso.org/ (last accessed March 17, 2010).

See http://www.ansi.org/ (last accessed March 17, 2010).

See http://www.niso.org/about/ (last accessed March 17, 2010).


This is just one example. Most ethnographic digital archives today have similar protocols and forms.


This statement was drafted in early 2009. See http://sounds.bl.uk/TextPage.aspx?page=ethicalusage#permittedusage (last accessed March 17, 2010).


See http://www.quaibranly.fr/fileadmin/DS_conditions/Notice_d__clarative_des_auteurs_et_ayants_droit_non_identifi__s_des_oeuvres__diffus__es_01.pdf (last accessed March 17, 2010).

See http://www.quaibranly.fr/fileadmin/DS_conditions/Autorisation_de_reproduction_et_de_repr__sentation_de_photographies_01.pdf (last accessed March 17, 2010).


See http://www.nau.edu/~hcpo-p/ (last accessed March 25, 2010).

See http://hopi.org/visiting-hopi/ (last accessed March 25, 2010).


Information is available at http://www.navajonationcouncil.org/ (last accessed March 17, 2010).


See for instance point e in Stage 1, point d in Stage 3, point c in phase II and point e in phase III of the Recommended Guideline.

See for instance point h in Stage 1, point b in Stage 3, and point b in phase II.

See http://www.vanuatuculture.org (last accessed March 17, 2010).


“Kastom” is a pidgin word used to refer to traditional culture, including religion, economics, art and magic in the Pacific islands. In the policy, this is defined as indigenous knowledge and practices.


See http://www.vanuatuculture.org/documents/ResearchAgreement.doc (last accessed March 17, 2010).


See paper by Mr. Ralph Regenvanu, Director, Vanuatu Cultural Centre at WIPO’s 9th IGC session, http://www.vanuatuculture.org/documents/RegenvanuIGC2006.DOC (last accessed March 17, 2010).

This Section indicates the right to “acquire copyright” by the Vanuatu National Cultural Council, see WIPO Heritage Database for the Vanuatu National Cultural Act, 1988.


Aluka is an online digital library focusing on materials about Africa. See http://www.aluka.org/ (last accessed March 17, 2010).


Article 6bis states: (1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation; (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained; (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

The Eiffel Tower, FAQs, available at http://www.tour-eiffel.fr/teiffel/uk/pratique/faq/index.html. (last accessed March 17, 2010). “There are no restrictions on publishing a picture of the Tower by day. Photos taken at night when the lights are aglow are subjected to copyright laws, and fees for the right to publish must be paid to the SNTE.” Id.


Glossary

Archive. A place in which public records or other important historic documents are kept. (Oxford English Dictionary)

Assignment. An author may license or assign his copyright to another party. An assignment is a transfer of a property right. Under an assignment of copyright, the rights owner transfers one, some or all his rights. If all rights are assigned, the person to whom the rights are assigned becomes the new owner of copyright. In some jurisdictions, not all rights may be transferred, however. In France, for example, an author’s moral rights may never be given or sold to another party; they remain with the original author. In some of these countries, even economic rights are not transferable and may only be licensed, such as in Germany. See also “License,” “Owner.”

Authenticity. The quality of being authentic, or entitled to acceptance, […] as being what it professes in origin or authorship, as being genuine; genuineness. (Oxford English Dictionary)

Author. Under copyright law, an author is the creator of an original work, i.e., an original intellectual creation. As such, an author can be – among other things – a writer, a film director, a sculptor, a choreographer or a music composer; the author may be an individual or a legal entity. In most jurisdictions, copyright protection comes into existence automatically upon the creation by an author of an original work. The author is not required to register his copyright. Some jurisdictions allow for joint ownership of copyright. In the context of TCEs, this means that a collectivity or community could potentially be considered an author. See “Collective rights.”

Collective Rights. Rights that are owned collectively by a group of persons or a community, for example, collective ownership of trademarks or joint ownership of copyright. In the context of TCEs, if protection is sought, it is often the case that the most appropriate entity in which the protection should inhere may be a group of people: a tribe or other collective. Some jurisdictions provide for this possibility in their laws. Ecuador, for example, in its Constitution, recognizes “collective IP rights” on communities’ ancestral knowledge (Art. 84); and its IP Law (No. 83 of 1989) establishes a sui generis system of collective intellectual rights of indigenous and traditional communities. A mixture of individual and collective customary rights and obligations may apply simultaneously to a work. Concerns have been raised by some indigenous peoples and traditional communities that existing copyright law does not recognize, provide for, or give legal effect to this “mixture” of individual and collective customary rights and obligations.

Contract. Generally, a contract is an agreement between two or more parties that creates obligations that are enforceable or otherwise recognizable at law.

Copyright. The term “copyright” (or sometimes “author’s rights”) refers to rights in relation to original artistic and literary works such as novels, writing, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. It protects the particular manner of expressing an idea. Copyright protection comes into existence automatically upon the creation by the author of an original work; the author is not required to register his copyright. The author of a work, the initial copyright owner, has a bundle of “exclusive rights” to do certain restricted acts in relation to his work. These may include: copying the work; publishing, issuing or selling copies of the work to the public; performing the work in public; playing the work in public; showing the work in public; broadcasting the work or including the work in a cable...
program service or digital media; making an adaptation of the work or doing any of the above activities in
relation to an adaptation; and authorizing any other person to do any of the restricted activities listed above.
For the purposes of the Publication, the term “creator” and “author” are used interchangeably, unless
otherwise specified.

Creator. See “Author”

Crown Copyright. Crown copyright is a form of copyright created through policy, contract, or legislation and used
by national governments of several Commonwealth jurisdictions. It provides special copyright rules for the
“Crown” (State entities). Crown copyright generally covers works which are produced by employees of the
Crown in the course of their duties. As such, most material authored by ministers and public officials of
Commonwealth countries is protected by Crown copyright. In some jurisdictions, Crown copyright may also
cover works commissioned by the Crown for governmental or policy purposes, such as private university
research publications commissioned and funded by the Crown.

Cultural Heritage. The term “cultural heritage” encompasses several main categories of heritage:
1. Cultural heritage:
   - Tangible cultural heritage: movable cultural heritage (paintings, sculptures, coins, manuscripts, etc.)
   - movable cultural heritage (monuments, archaeological sites, and so on)
   - underwater cultural heritage (shipwrecks, underwater ruins and cities and so on)
   - intangible cultural heritage (oral traditions, performing arts, rituals, and so on)
2. Natural heritage (natural sites with cultural aspects such as cultural landscapes, physical, biological or
   geological formations, and so on)
3. Heritage in the event of armed conflict.

Customary Law. A generic definition of “customary law” is “customs that are accepted as legal requirements or
obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic
system that they are treated as if they are laws.” (Black’s Law Dictionary) Indigenous and traditional
communities have developed and established, through generations and custom, rules, protocols, values and
principles, which are commonly/collectively understood and acknowledged as customary law and which may
apply to TCEs and how they are to be treated or cared for, used or practiced. It should be noted that the way
in which customary laws are embodied differ from one another. For instance, the laws could be codified,
written or oral, expressly articulated or implemented in traditional practices. Another important element is
whether these laws are actually "formally" recognized by and/or linked to the national legal systems of the
country in which a people or community resides. In the context of the works of WIPO’s IGC, the draft
provisions for TK and for TCEs indicate that any IP-related protection granted to TK and/or TCEs should be in
line with the customary laws and protocols of the relevant communities.

Derivative Work (or Adaptation). A derivative work, or adaptation, is a work based upon one or more preexisting
works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version,
abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A
work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole,
represent an original work of authorship, is also a derivative work. The use of TCEs to create derivative works
raises a number of policy issues, which are canvassed in this document.
**Digital Rights Management.** Digital Rights Management (“DRM”) is an umbrella term that refers to any technology used to control access and use of digital works. DRM is designed to control, monitor, and meter most uses of a digital work. Descriptively speaking, DRM is made up of two components: (1) a database containing information which identifies the content and right owners of a work and (2) a licensing arrangement that establishes the terms of use for the underlying work. DRM falls into two general categories: systems that utilize Technological Protection Measures (TPMs) and those that do not. More often than not DRM will rely on one or more TPMs. TPMs are technological methods or tools, or any kind of technology (device, product or process), intended to promote the authorized use of digital works. They may control (i.e., in most cases, prevent or restrict) access to, or uses (mainly copying) of these copyrighted works.

**Digitization.** Digitization is the process of representing an object, image, text or a recorded signal (usually an analog signal) in electronic form, especially in the form of binary digits. The term digitization is often used when diverse forms of information, including text, sound, images and moving images, are encoded in a single 0-1 binary code. Digitizing is the primary way of storing text, images and sounds in a form suitable for transmission and computer processing.

**Documentation.** The accumulation, classification, and dissemination of information; the material so collected. (Oxford English Dictionary)

**Domain Name.** Domain names are the human-friendly forms of Internet addresses, and are commonly used to find web sites. For example, the domain name wipo.int is used to locate the WIPO web site at http://www.wipo.int. By allowing the use of unique alphabetical addresses instead of numeric ones, domain names allow Internet users to more easily find and access web sites. The Internet Corporation for Assigned Names and Numbers (ICANN) has overall responsibility for managing the Domain Name System.

**Exceptions and Limitations.** Certain acts normally restricted by copyright may, in circumstances specified in the law, be done without the authorization of the copyright owner, for the benefit of society. These permitted acts fall under what are referred to as “exceptions” and “limitations.” Article 9(2) of the Berne Convention provides a three-step guidance for deciding exceptions: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

Article 13 of the TRIPS Agreement provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Article 10 of the WCT provides that “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

These three provisions reflect what is referred to as the “three-step test."332 There are two basic types of exceptions and limitations to copyright: (1) “free uses,” which are acts of exploitation of works which may be carried out without authorization and without an obligation to compensate the owner of rights for the use, and (2) “non-voluntary licenses,” under which the acts of exploitation may be carried out without authorization, but with the obligation to compensate the owner of rights.
Jurisdictions deal with exceptions and limitations differently. Civil law jurisdictions typically articulate a finite set of exceptions in their copyright laws, while common law jurisdictions typically describe the types of situations under which use of copyrighted works may be a “fair use,” or “fair dealing,” or similar concept, of those works.

Fixation. Fixation is the process or result of capturing a work or protected subject matter in a tangible or material medium. Typically in countries of the Anglo-American copyright system, fixation is a precondition for copyright protection. Fixation occurs, for example, when a live television broadcast is transmitted and simultaneously recorded on videotape. Fixation also occurs when a painting is completed or a song is recorded. Fixation is a problematic concept for TCEs since there is often no single manifestation of a TCE that would comprise the final “fixed” expression.

Good practices. Good practices include methods and techniques that have consistently shown results that are in some way superior to those achieved with other means, and which can be used as benchmarks. There is, however, no practice that is best for everyone or in every situation, and good practices tend to change over time depending on social, cultural and technological circumstances and advances. In the context of this Publication, the concept of good practices is important insofar as distinguishing them from norms or other rules. The Publication does not seek to impose standards or other obligations; it is meant to be a useful tool to describe the experiences and insights of institutions and organizations around the world in an effort to inform museums, libraries and archives of IP issues and options for the management of TCEs.

Intangible Cultural Heritage. “Intangible cultural heritage” is defined in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” The Convention also states that “intangible cultural heritage” is manifested inter alia in the following domains: a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; b) performing arts; c) social practices, rituals and festive events; d) knowledge and practices concerning nature and the universe; e) traditional craftsmanship.

Intellectual Property. Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP comprises of two categories: industrial property, which includes patents, trademarks, industrial designs, and geographical indications; and copyright and related rights. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

Library. An [...] institution or establishment, charged with the care of a collection of books, and the duty of rendering the books accessible to those who require to use them. (Oxford English Dictionary)

License. An author may license or assign his copyright to another entity. A license is an authorization given by the rights owner (licensor) to another (licensee) to perform a certain act in respect of the work concerned. Often, the licensee is authorized to use the work in exchange for an agreed fee or royalty. Such authorization is often prescribed in a formal licensing agreement. It is usually limited to a certain territory, for a limited period of time and for limited, specific uses.
Moral Rights. Moral rights are enshrined in the Berne Convention at Article 6bis. They are not incorporated in the TRIPS Agreement. National copyright laws handle moral rights quite differently. Moral rights generally include, *inter alia*, the right to be identified as the author or to claim authorship of a work (the right of attribution or paternity) and the right to object to derogatory treatment, distortion, mutilation or modification of their work (the right of integrity). In many jurisdictions, moral rights cannot be assigned or licensed to another person, although they may be waived. While moral rights are sometimes viewed by scholars as potentially appropriate to address some of the concerns expressed by indigenous peoples and traditional communities regarding the protection of TCEs, existing moral rights law only applies to those TCEs that are eligible for copyright protection. Under most laws, many TCEs do not meet the criteria for copyright protection and therefore currently do not benefit from moral rights.

Museum. A building or institution in which objects of historical, scientific, artistic, or cultural interest are preserved and exhibited. Also: the collection of objects held by such an institution. (Oxford English Dictionary)

Originality. Under copyright law, originality characterizes a work that it is its author's own intellectual creation, and is not copied from another work. In most copyright laws, a requirement for protection is that a copyrightable work exhibits a minimal level of originality; this threshold tends to be very low. For TCEs, which are often based on former works and whose validity is often dependant on faithful or near-faithful reproductions of past works, new iterations of a TCE may or may not be eligible for copyright protection, because of the originality requirement.

Owner. The rights owner is the person or entity to whom the IP rights belongs. In copyright law, the original (initial) owner is generally the author. If the author so chooses, he may assign or license his copyright to a third party. In Continental European law countries, moral rights are typically inalienable. (e.g., in France, moral rights inhere in the author only and cannot be transferred; in some of these countries, even economic rights are not transferable and may only be licensed, such as in Germany.) It is important to note that owning the physical manifestation of a work is different from owning the copyright in that work. For example, if an original oil painting is purchased, the purchaser can take home the painting but is not authorized to license an image of that painting to a cultural institution.

Patent. A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. In order to be patentable, an invention must fulfill three main conditions. It must be capable of industrial application. It must show an element of novelty, i.e., some new characteristic which is not known in the body of existing knowledge in its technical field (called “prior art”). The invention must show an inventive step which could not be deduced by a person with average knowledge of the technical field. Its subject matter must be accepted as “patentable” under law. In many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods, or methods for medical treatment (as opposed to medical products) are generally not patentable.

Perpetuity. The term ‘perpetuity’ is normally used in the context of IP to qualify a period of protection that lasts indefinitely. Copyright protection subsists in a creative work for a finite period of time. The Berne Convention requires that this period of time be no less than the life of the author plus fifty years beyond his death. National laws are free to provide for a longer period of time, but perpetual protection does not currently exist in national copyright laws. Many indigenous peoples and traditional communities are of the view that protection for TCEs should be perpetual, as this corresponds best to their needs and to the customary laws and values relating to most of their TCEs.
**Policy.** A policy is a program of actions or decisions adopted by a person, group, or government, or the set of principles on which they are based, which are oriented towards a long-term purpose or to a particular problem. Policies are sometimes but not always embodied in legislation and usually apply to a political entity (such as a country or any of its administrative subdivisions) as a whole.

**Preservation.** The action of preserving from damage, decay, or destruction; the fact of being preserved. (Oxford English Dictionary)

**Protocol** Protocol, as used in this Publication, generally refers to a code of conduct or a standard of behavior, often emanating from a community or institution, which is considered correct or desirable.

**Public Domain.** The public domain is the scope of material that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country, or since the conditions of protection are not fulfilled. The role, contours and boundaries of the public domain are under active discussion in several forums, including at WIPO. The role of the public domain is relevant to TCEs, as preexisting traditional culture as such and particular expressions thereof are generally not protected by current copyright laws and are treated, from the perspective of the IP system, as part of the public domain. To the extent that TCEs and knowledge systems are in the public domain they may be freely used by artists, writers, researchers, industry and any other user. Indigenous peoples and traditional communities contest that their cultural expressions and knowledge systems may be in the public domain. Yet, others argue that protecting such materials with IP-like rights would inappropriately restrict the public domain and therefore the ability of users to take advantage of it. This is a complex policy debate and there are diverse views.

**Publication.** “Publication” is a technical term in copyright law. One of the exclusive rights sometimes granted to an author is the right to publish his work. “Publication” generally means the making available of copies, with the consent of the author, in a quantity and manner that is suitable to satisfy the reasonable requirement of the public. The Berne Convention gives a definition of “published works” at Article 3(3). The exact definition of a “published” work depends on the jurisdiction. In some countries, for example Germany, works of visual art (such as sculptures) are considered to be published if they have been made permanently accessible to the general public (erecting a sculpture on public grounds, for example, would constitute publication in Germany). Australia, the United Kingdom and the United States of America generally require the distribution of copies as a prerequisite to consider a copyrighted work “published.”

**Sui generis.** Of one’s or its own kind; peculiar. (Oxford English Dictionary)

**Resale Right.** The resale right entitles artists (or their heirs) to a royalty based on the resale price of an original graphic or plastic work of art subsequent to the first sale or transfer by the artist, when art market professionals (such as an auctioneer, a gallery or any other art dealer) participate in the sale. The resale right, where it exists, forms an integral part of copyright and is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the economic situation of artists who benefit from successive exploitations of their works. The resale right model does have potential in terms of reducing inequities in relation to the resale of TCEs.

**Restoration.** The action, process, or result of restoring something (esp. a work of art or literature) to an unimpaired or perfect condition; renovation or reconstruction intended to restore something to its (supposed) original condition. (Oxford English Dictionary)
Subject Matter. This concept refers to what can be protected by IP. The type of IP protection that applies depends on the subject matter. Copyright, for example, covers original works, i.e., such subject matter as, inter alia, art, literature, computer programs and music. Patent law covers inventions that exhibit a certain threshold of novelty, among other criteria. A TCE’s subject matter, often comparable to subject matter covered by copyright and/or related rights law, is not always categorized as such. This has to do with the nature of TCEs and the inadequacy of copyright law’s structure for their protection. It should also be noted that some traditional healing rites, religious rights of passage and festival performances, for example, often encompass both potentially patentable TK and copyrightable TCEs.

See “Copyright”, “Patent”, “Trademark”.

Trademark. A trademark is a distinctive sign used to differentiate identical or similar goods and services offered by different producers or service providers. Trade marks can include words, logos, colors, sounds, smells – or any combination of these. Trademarks are a type of industrial property, protected by national intellectual property laws and international treaties. Trademark protection is territorial, but it is possible to apply for international protection under, for example, the Madrid System. Trademark protection for TCEs may be sought in some instances; it has the advantage of potential perpetual protection, as long as the trademark is “used.” Trademarks must be used in the context of trade (in business transactions), and therefore may not be appropriate for TCEs for which no commercial value is to be exploited.

Traditional Cultural Expressions / Expressions of Folklore. WIPO uses the terms “traditional cultural expressions” (TCEs) and “expressions of folklore” (EoF) to refer to tangible and intangible forms in which TK and cultural heritage are expressed, communicated, manifested and passed on within indigenous and traditional communities. These terms have replaced the term “folklore”, which had negative connotations. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms are used as interchangeable synonyms, and may be referred to simply as “TCEs.” The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws. Current discussions within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) use the following description of the term “traditional cultural expressions” (or “expressions of folklore”): “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- musical expressions, such as songs and instrumental music;
- expressions by action, such as dances, plays, ceremonies, rituals and other performances;
- whether or not reduced to a material form; and
- tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
  a) the products of creative intellectual activity, including individual and communal creativity;
  b) characteristic of a community’s cultural and social identity and cultural heritage; and
  c) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.
The specific choice of terms to denote the protected subject matter is usually determined at the national and regional levels.

**Work.** The kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.
FAQ

The below scenarios, information and general answers do not constitute legal advice but are meant to illustrate some common issues and provide some approaches to solving them.

1. What is the difference between copyright, trademarks and patents?

A **patent** for an invention is the grant of a property right to an inventor, for a finite period of time. Internationally, the requirements for and benefits from an issued patent vary but, generally, a patent must be new (original), non-obvious (there must be an inventive step in its creation that would not be obvious to someone in the profession or field), and the invention must be useful. Different jurisdictions describe the contours of these requirements differently but they tend to be fairly similar. Another jurisdictional difference can be patentable subject matter; for example, in some countries, patenting a life form falls outside the scope of subject matter allowed in the patent regime.

A **trademark** is a word, name, symbol or device which is used in business in conjunction with goods or services to indicate their source and to distinguish them from others. Trademarks are used to prevent other entities from using a confusingly similar mark.

**Copyright**, the form of intellectual property discussed most thoroughly in this publication, is a form of protection provided to the authors of original works including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. Copyright protects the form of expression rather than subject matter. The bundle of rights that accompanies copyright protection includes the right to authorize copies and derivative works. Depending on the jurisdiction, copyright includes moral rights which allow a copyright owner to exercise a type of “quality control” over his or her work regardless of physical possession.

2. If the museum owns the physical manifestation of an artwork, doesn’t that mean it can freely use or license the image?

No. Owning an artwork in its physical form is completely separate from owning copyright in that work. In many jurisdictions, it is presumed that copyright remains with the author or artist unless it is specifically assigned or granted to another entity. In the TCE context, many institutions have policies in place that promote prior informed consent to the reproduction, use and display of TCEs, depending on the wishes of the relevant community.
3. How does copyright law function on the international level? Our museum has a contemporary collection and we often exhibit contemporary art from other museums around the world. What do we need to know about other countries’ copyright laws?

While there is no such thing as international copyright law per se, there is an international copyright convention to which most countries are party, the Berne Convention. One of the foundational aspects of this convention is the “national treatment” concept whereby countries who are party to the convention must treat the work of nationals from other member countries the same as they treat the work of their own nationals.

That being said, inter-museum exhibitions are often covered by individual contracts and, as such, individual museums have the capacity to specify how copyright concerns should be handled. For example, if your museum, located in the Netherlands, is exhibiting the paintings of a French artist who has retained copyright in his works, and if your museum wants to produce exhibition posters to advertise the exhibition throughout Amsterdam, Dutch copyright law would apply to his paintings during the time his works are in the Netherlands absent some other bilateral agreement regarding traveling museum exhibitions and/or absent a contract between your two institutions specifying a different arrangement. Yet, the conditions upon which any cultural institution will loan its collection to another institution very often requires that any reproduction of any part of the collection be funneled through the originating institution. The British Library, for example, makes the following stipulations clear before any other institution borrows from it:

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**Photography, Filming and Reproduction**

- Images for reproduction can be obtained from British Library Imaging Services. The borrower should contact British Library Imaging Services regarding charges, licensing and copyright. Orders for reproductions/permissions should be made online.
- Filming is not permitted for commercial purposes.
- Permission to film for promotional or educational purposes must be sought, in advance, from the Loans Registrar.

**Publication right**

- Where an object has not been published and is then published or displayed to the public by the borrower, all publication rights will be assigned back to the British Library.

A standard contract in the United States on this issue might read

*The Exhibitor hereby agrees that the loan of the works under this Agreement is solely for purposes of exhibition and that no other uses shall be made of the work, such other uses including but not being limited to commercial exploitation, broadcasts, or other reproduction. The Exhibitor further agrees that the works shall be kept at the following location: ____________, and shall not be moved or displayed elsewhere without express, written consent.*
4. As a museum with both copyright-protected and public domain art, what do we need to know about moral rights?

Moral rights are an aspect of copyright law that can vary greatly from jurisdiction to jurisdiction. The strongest set of moral rights is found in France; some of the most watered-down are in the United States. Depending on the applicable law, therefore, moral rights apply to artworks that are covered by moral rights law at a given period in time. This would mean having to communicate with an artist or his heirs, estate or relevant copyright society when using the artwork in a manner that could call moral rights provisions into question. Moral rights can include the right of attribution to the artist, the right of integrity of the artwork, the right to use a pseudonym, and the right to remain anonymous, among others. Moral rights offenses have included painting a sculpture a different color, exhibiting an artwork in a different place than was initially specified (“site-specific” artwork), dismembering a multi-part artwork into several different pieces, and adding ribbons and wreaths to a sculpture at Christmas time. If your organization is working directly with a contemporary artist, a good starting point is to understand and implement his wishes for his artworks’ display and attribution.

5. Our museum is mounting an exhibition revolving around the theme of tribal tattoos. We’re putting together a stylish educational pamphlet to accompany the exhibition and we’d like to use a photograph that seems to still be under copyright but for which we cannot find any information as to who the photographer is. Can we still use the photograph?

Orphan works are a class of copyrightable works whose right owner is either unidentifiable or whose contact information cannot be ascertained. Currently, it will likely depend on your jurisdiction to know how to go about the appropriate procedure for dealing with this kind of work. Some jurisdictions are beginning the legislative process for making orphan works available to parties who, after a reasonably diligent search, are unable to locate an author or artist.

6. As a small museum with an important art collection but small physical building in a remote neighborhood, it seems wise and in line with our mission to digitize our collection. We are unable to incur many more costs than it would take to technically digitize our artworks, however, such as legal counsel. What is our best course of action?

While it is not the intent of this list of FAQs to give legal or business advice, the following are some factors to consider when making this decision:

1. Owning a physical art object does not entitle a museum to publish or copy it. These are separate IP rights. Before digitizing any artwork that is still under copyright, ensure that the museum also has permission to do so from the copyright owner, be that the artist, the artist’s estate or a collecting society.

2. Digitizing an entire collection is an expensive endeavor. Aside from technical IT expertise, it will be paramount to keep good records of the digitization process and will very unlikely be a one-time effort as acquisitions and de-accessioning are regular parts of most museums’ practice.
3. While the business-sense aspect of digitizing a collection falls outside the scope of this writing, some essential intellectual property aspects of digitizing a collection that should not be overlooked include:

**Artwork under Copyright**: Before photographing and/or digitizing a work, a museum should make certain that it is licensed to photograph and digitize that work. Authorizations should be obtained from the artist of the work that is the subject matter of the digitized photograph or from the artist’s estate or authorized copyright holder.

**Photographs under Copyright**: Digitizing an existing photograph is also a reproduction for purposes of copyright law and, as such, museums should ensure that they have the right to digitize the photograph. A museum can either hold the copyright in a photograph or it can obtain a license from the photographer (or the photographer’s estate or copyright agent.)

**Moral Rights**: Moral rights can be an issue when digitizing an artwork. If colorization is too different from the original or if any blurring or improper cropping occurs, for example, these rights may come into play. While it would be time consuming and cumbersome to verify with an artist or photographer each and every digital image, a museum can obtain a full or partial moral rights waiver for small deviations for digitization purposes or make other mutually agreed-upon arrangements with the artist or photographer.

7. **Under the rubric of digitizing a collection and/or having an online presence, what does my institution need to know about informing website viewers about copyright policy?**

Copyright law functions whether the public is informed or not. A bricks-and-mortar example of this is a vignette where there is a copyrighted book, a person, and a copy machine. An individual is expected to know, for example, that it is illegal to copy the entire book for a friend by means of the copy machine. Most books have copyright notices on the title page informing a potential reader what he or she can and cannot do with the book. Websites function much the same way although their digital nature renders copying much easier and inexpensive than using a copy machine. Websites handle the copyright notice in different ways. One example of a common type of notice is available at the National Galleries of Scotland Picture Library website:

The Picture Library manages an archive of more than 100,000 images of works in the National Galleries of Scotland’s collection and works on long-term loan. Any copying of our works must be properly authorised. We can provide assistance and grant the necessary permissions and licenses for commercial, editorial and scholarly use of these images.

Formats: Works are available as 5x4 inch colour transparencies, black and white prints, colour prints and a selection of works are available as digital files.

The Picture Library. National Galleries of Scotland. Dean Gallery, 73 Belford Road, Edinburgh EH4 3DS. Telephone: + 44 (0)131 624 6258 or 6260 Fax: + 44 (0)131 623 7135
Email: picture.library@nationalgalleries.org

A selection of the National Galleries of Scotland Collection can also be found at Online Collections.
We are members of the British Association of Picture Libraries and Agencies and partners in Images of Art and Culture, a collaborative marketing group for national cultural collections. A number of our images are also available to view through SCRAN (Scottish Cultural Resources Access Network). We also support the Picture Research Association.
The information is straightforward. It refers to copyright law only by indicating that copying must be authorized and then provides contact information so that a copier can find help. Another example of a copyright policy where the digitized collection contains possibly sensitive information is at the National Museum of the American Indian. While the Smithsonian webpage (used for all Smithsonian institutions, including the NMAI) is too long to cite in its entirety, it includes substantial explanations of what content is protected by IP laws, what fair use is, the limitations put on commercial use, how trademarks are used on the website, and how links to third party websites are used. It then goes on to disclaim warranties of merchantability, fitness and infringement for the text and images on the website and describes how downloading, printing or otherwise using website context is the sole responsibility of the website user and that said user warrants that he or she will limit use of the content to fair use. Furthermore, the copyright policy webpage has a FAQ section outlining image use in various scenarios from obtaining permission to using images in a school report.

As such, there is no single way to present copyright policy. To better educate your website’s viewers, a more complete policy is preferable to simply saying “all rights reserved,” or using other legal language that the public might not understand.

8. What are personality rights, publicity rights and privacy rights? Are they related to intellectual property? What does my institution need to know about them?

Privacy law does not fall under the rubric of IP law but the two do sometimes come up within the same situation. Like with any area of law, different jurisdictions address legal ideas differently. Broadly, however, personality rights are understood to be an umbrella term for publicity rights and privacy rights. A right of publicity is understood to operate similarly to a trademark: it is the right to keep one’s image and likeness from being commercially exploited without permission or compensation springing from an agreement. A privacy right – a vast and debated field of law in itself – is sometimes understood as the right to be left alone, sometimes takes on other characteristics but generally operates non-commercially.

Museums have come across these fields of law when, for example, selling derivative work gift shop items that include the likeness of an individual. The Museum of Contemporary Art in Los Angeles was selling an array of goods such as notecubes and t-shirts bearing the image of a photocollage by artist Barbara Kruger. The Kruger work includes a photograph by a third party showing the partially enlarged right eye of a woman overlain with the words “It’s a small world but not if you have to clean it.” The woman whose eye was used in the photograph – and then in the photocollage – claimed that the work violated her right to privacy as well as the photographer’s copyright. Both her claims failed in the United States but this example is demonstrative of issues that have not been fully explored on the international legal platform. Had the jurisdiction been different, had the woman been a celebrity, had more of her face been a part of the photocollage, the result may have been different. The United States also permitted free speech principles to trump publicity rights with regard to a painting of golfer Tiger Woods but other jurisdictions may not have done so.

For TCEs, this issue could require more vigilance. Certain tribes and cultures find great offense in the reproduction of their tribal elders’ likenesses, for example. While there is no separate legal regime in this vein for TCEs, museums should take care to foster their relationships with any tribes or cultural groups whose creations they exhibit and manage. Generally, it would behoove museums to understand the privacy and publicity rights law in their jurisdiction so that they neither exhibit nor reproduce images of individuals who have not given consent to the artist or photographer for either activity.
9. What is the relationship between copyright and trademark? Can a trademark also be copyrighted? And where do TCEs fall?

Trademark and copyright law generally operate independently of each other but do not prohibit the other legal mechanism from applying. For example, the Rijksmuseum in Amsterdam utilizes a graphic that operates as its logo. It ostensibly places this logo on its publications and on promotional materials linked to its exhibitions. As such, the logo operates as a trademark. The logo is also copyrightable, however, as an original expression. It can be found on the Museum’s website along with a wide array of other copyrighted material, ranging from artwork to exhibition information.360

A TCE in the form of a symbol or sign could also ostensibly fall under both copyright and trademark rubrics although, as is pointed out throughout this compendium, that is unsettled internationally and within most individual jurisdictions. Legally, there are reasons that a TCE may or may not be copyrightable and there may be reasons that the people from whose tribe or group object to copyright covering that TCE. If a TCE is being used as a trademark (to identify goods or services in commerce), the Indigenous group or tribe from which that TCE comes may or may not condone such usage so, while a TCE may legally or technically be used as a trademark, it is probably not advisable to do so unless the prior informed consent of the relevant cultural group is obtained.

10. What does my institution need to know about the copyrightability of our physical location? We recently spent a vast amount of money to have a celebrity architect renovate the building and a local tourist shop is selling photograph postcards of the building.

Depending on your jurisdiction, a photograph of a building that is visible from a public place (such as a street, a park, etc.), may be photographed and that photograph may be used for commercial gain without infringing the copyright of either the architect or the building owner. This is made explicit in the laws of the United States, the United Kingdom and Japan, for example. There are some exceptions, however. In Paris, a lighting display has been installed on the Eiffel Tower and it is forbidden to photograph it, and therefore to photograph the Tower at night.361 In New York, the Flatiron Building has also gained status as a trademark of Newmark & Co. Real Estate. As such, the real estate company has settled some cases out of court that involve reproductions of the building. The general international standard, however, is that buildings that are visible from a public place may be photographed and that photograph may be used for commercial gain, ranging from postcards to movies.

11. What is a “thumbnail” image? Is it permissible to use them without getting permission from a copyright owner?

With regard to a website layout, a “thumbnail” is generally understood to be a small, reduced-size graphic image. It is used for easy recognition, much as a text index is used for words. Visual search engines, such as Google Images®, utilize thumbnail images. Whether they can be used in a cultural website context may depend on several factors. In the United States, a 2003 Ninth Circuit case ruled that thumbnails comprised a fair use of copyrighted imagery. That situation involved a photographer whose photographs, in thumbnail format, were included in a search engine. While fair use may therefore be applicable in the United States in this kind of scenario, it does not address the moral rights of the photographer. An artist may not wish his or her painting or photograph to be shrunk and placed on a
museum’s website as representative of his or her work. Furthermore, in other jurisdictions, use of a thumbnail may not be considered fair use at all. In Australia, for example, “fair use”-type exemptions are currently much narrower. Because a cultural institution aims to present the art it houses in the most favorable light possible, use of thumbnails should be considered in light of many things, including moral rights and TCE sensitivities, an institution’s mission and relationship with its artists, and the purpose of the thumbnail (i.e., for simple indexing purposes or to show to the public).

12. What could we add to our website to promote prior informed consent for using TCEs, even if it’s not a legal requirement?

There are several proactive measures you can take in an effort to handle your collection appropriately. Firstly, address the issues in the “copyright” or “reproductions” section of your website. Explain some of the differences between your jurisdiction’s copyright law and the wishes/requirements of the culture whose artwork you are exhibiting (if you have taken the appropriate steps to ensure that the relevant culture is comfortable with its artwork being exhibited at all). Become knowledgeable about the cultures whose works you are exhibiting or representing. For example, the National Museum of Australia Canberra displays a “warning” along the top of its webpages: “Indigenous Australians are advised that this website includes images or names of people now deceased.”

Digital rights management may also be something to consider. It is possible to technologically “protect” web images against downloading or modification or to utilize “flash” technology so that the images are not static and therefore not downloadable.

13. My institution, rich in tribal art and archaeology, often enters into agreements with other cultural institutions around the world to allow for traveling exhibitions. Given the fact that there is no legal instrument applicable internationally for the protection or proper handling of these pieces, what can we do to ensure that our policies are complied with at a host museum?

Bilateral contracts offer a very good opportunity for your museum to spell out its expectations and even to mention specific requirements for the handling and prospective reproduction of certain sensitive pieces. The Institut de Cultura: Museu de Ciències Naturals in Barcelona, for example, uses a clause in its Conditions Governing Loans of Museum Material:

The publication – by photograph, movie, video, DVD, molds, or any other type of reproduction of the loaned specimens – must be authorized by the Museum prior to publication. Approval of reproductions intended for scientific publication will be determined by the appropriate Museum technician. The management of the Museum will be responsible for authorizing and determining under what conditions material loaned for public or commercial programs may be reproduced.

While different types of stipulations would be made for the handling and reproduction of cultural pieces that include TCEs, it is important to note that your museum can require compliance with whatever conditions you deem necessary to effectively and appropriately handle your collection.
14. Wouldn’t current IP systems provide a workable avenue for indigenous and traditional peoples to market and profit from their cultures? My institution’s gift shop has several tradition-inspired souvenirs and jewelry and these items are top sellers.

Some tribes and cultural groups are happy to commodify portions of their cultural heritage. In this vein, the New Zealand Maori and some Native groups in Alaska for example have created certification marks that demonstrate to would-be consumers that certain pieces of art or handicraft are authentically made by those groups of people. That being said, making a profit from cultural heritage is not always something that indigenous people are interested in at all; maintaining the integrity of and respect for certain TCEs is of paramount importance.

It is often the case that cheaply-made “fakelore” by people who do not belong to a certain people or community is marketed as if it were authentic. If your institution is selling goods that are “inspired by” but not “made by” a certain people or community, you should ensure that that is made clear to the public.

15. As a jewelry designer inspired by the works at the Musée du Quai Branly in Paris, what should I mention – or not mention – when marketing my jewelry?

The answer depends quite heavily on the particular details of your situation. To show respect for the people or culture from which you are drawing your ideas, it may be a good idea to mention that on the tag you attach to your jewelry. That being said, if you misconstrue – inadvertently or not – any important cultural symbols and somehow distort images that would cause offense to that culture, making the connection between your work and their cultural heritage may cause offense. If possible, contact the relevant curator at the museum, as they may have a working relationship with the people or community whose art you are working from, and ask specifically how or whether they would like to be attributed.

Otherwise, this Compendium addresses some of the characteristics of “derivative works,” copyright infringement and misappropriation. You should never advertise or market your jewelry as if it were made or endorsed by a people or community unless that is the case. To determine whether and how to credit the culture from which you are drawing your ideas, direct communication is often the best route, followed by transparent marketing tactics that indicate that your work is not made by indigenous artisans.


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