

Gordon Dodds Prize

Learning to Listen: Archival Sound Recordings and Indigenous Cultural and Intellectual Property



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RÉSUMÉ Les enregistrements sonores et les préoccupations liées à la propriété intellectuelle ont une relation complexe : le statut de publication des enregistrements est entrelacé avec des craintes au sujet de l'âge et de la vulnérabilité des supports physiques. Ces préoccupations affectent à la fois l'accès aux enregistrements sonores archivistiques et leur préservation. En dépit du fait que des enregistrements ethnographiques sur le terrain de chansons, contes et histoire orale autochtones peuvent sembler comme des cas simples en matière d'accès, ces enregistrements existent dans un contexte éthique unique. Ceci est caractérisé par le déséquilibre historique du pouvoir entre les nations autochtones, les chercheurs non-autochtones et le pouvoir étatique de l'État colonial, aussi bien que par la confrontation entre le droit occidental de la propriété intellectuelle et les ordres juridiques autochtones. Cet article explore la nature de la propriété culturelle et intellectuelle autochtones dans les archives sonores, visant à améliorer la compréhension et la reconnaissance des protocoles autochtones dans la profession archivistique. Il suggère que collaborer avec les partenaires autochtones dans la prise de décision au sujet de l'accès et adopter une vision nuancée de la propriété intellectuelle et de la possession sont nécessaires pour la sauvegarde convenable des archives non-autochtones.

ABSTRACT Intellectual property concerns and sound recordings have a complex relationship: the publication status of recordings is intertwined with worries about the age and vulnerability of their physical carriers. These concerns affect both the access to and the preservation of archival sound recordings. Although unpublished ethnographic field recordings of Indigenous songs, stories, and oral histories can seem like straightforward cases for access, these recordings exist in a unique ethical context. This is characterized by the historic power imbalance between Indigenous nations, non-Indigenous researchers, and settler-colonial state powers, as well as a clash between Western intellectual property law and Indigenous legal orders. This article explores the nature of Indigenous cultural and intellectual property in sound archives, aiming to increase understanding and acknowledgement of Indigenous protocols in the archival profession. It suggests that collaborating with Indigenous partners in decision making about access and taking a nuanced view of intellectual property and ownership are necessary for proper care of non-Indigenous archives.

Introduction

Intellectual property and sound recordings have a complex relationship at the best of times: concerns over the publication status of recordings are intertwined with worries about the age and vulnerability of their physical carriers.¹ When making decisions about preservation or digitization, archives need to consider whether or not material will be accessible to justify the cost of the project,² and sound recordings – especially published sound recordings – have lengthy copyright protection,³ making access a primary concern. In a survey of American archivists, Jean Dryden found that most are reluctant to digitize any material whose copyright status is uncertain, while researchers increasingly expect materials to be digitized.⁴ In this context, where archives often do not receive transfer of copyright when materials are donated,⁵ old, unpublished ethnographic field recordings of Indigenous songs and stories seem like a relatively clear case for digitization, especially in light of the fact that field recordings were generally made on media that are less stable than published recording formats and are vulnerable to deterioration.⁶ Also, traditional songs and stories are generally not protected by Western copyright law.⁷ The case for open access is complicated, however, by two factors: first, a 2000 survey of American folklore and ethnomusicology found that “much of what has been recorded is poorly controlled, badly labeled, and lacking critical documentation about rights to use”⁸; and second, recordings made by folklorists and ethnomusicologists of Indigenous stories and songs exist in a unique ethical context. This article will explore this context and expand on the nature of Indigenous cultural and intellectual property in archives to increase understanding and acknowledgement of Indigenous protocols in the archival profession.

- 1 Council on Library and Information Resources (CLIR), *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age*, CLIR pub. 148 (Washington, DC: National Recording Preservation Board, Library of Congress, 2010), 109–10, accessed 2 December 2015, <http://www.clir.org/pubs/reports/pub148/pub148.pdf>.
- 2 *Ibid.*, 14.
- 3 *Ibid.*, 116.
- 4 Jean Dryden, “The Role of Copyright in Selection for Digitization,” *American Archivist* 77, no. 1 (Spring/Summer 2014): 68.
- 5 CLIR, *The State of Recorded Sound Preservation in the United States*, 112.
- 6 *Ibid.*, 17.
- 7 Anthony Seeger, “Who Got Left Out of the Property Grab Again? Oral Traditions, Indigenous Rights, and Valuable Old Knowledge,” in *CODE: Collaborative Ownership and the Digital Economy*, ed. Rishab Aiyer Ghosh (Cambridge, MA: MIT Press, 2006), 79.
- 8 Ellen D. Swain, “Oral History in the Archives: Its Documentary Roles in the Twenty-First Century,” in *The Oral History Reader*, ed. Robert Perks and Alistair Thomson (New York: Routledge, 2006), 353.

The ethical context of these recordings must be considered before archivists digitize or grant wide access to records, even in cases where archives have documentation that shows they are legally within their rights to do so. Ethnographic field recordings from the late 19th and early 20th century are vulnerable to degradation, but the conditions in which they were made would not necessarily pass ethics board standards today. Oral histories, recorded by researchers on cassette tapes and eventually donated to the archives, may never have been intended by their teller to reach beyond a certain audience, or may require special care from listeners. There is a clash here between Western intellectual property law and Indigenous legal orders, and a legacy of colonialism that marks ethnographic research.⁹ This clash can leave both archives and Indigenous communities in a precarious position, but by building our understanding of why and how property systems conflict with each other, and by seeking to build reciprocal relationships with communities, archivists can begin to uncover possible solutions to these problems.

Indigenous Cultural and Intellectual Property

Traditional conceptions of intellectual property and copyright do not take into account non-Western concepts of property because they focus on monetary rights and unique, individual authorship.¹⁰ This focus leaves sound recordings – especially recordings of traditional music – vulnerable to appropriation and exploitation because of their inherent potential for commodification.¹¹ The 1992 house album *Deep Forest*, for example, sampled archival recordings made by ethnomusicologists of traditional music from Ghana, the Solomon Islands, and African “pygmy” communities. It was enormously successful – receiving a Grammy Award nomination and remaining on the Billboard charts for several weeks – and very profitable, with songs from the album used in commercials and movie soundtracks.¹² The traditional musicians featured on this album, however, received no compensation or attribution for their performances.¹³ Some of the profits from the album went to a charity aimed at preserving African pygmy culture, but that charity benefits the Efe people

- 9 Sally Treloyn and Andrea Emberly, “Sustaining Traditions: Ethnomusicological Collections, Access and Sustainability in Australia,” *Musicology Australia* 35, no. 2 (2013): 163.
- 10 Catherine Bell and Caeleigh Shier, “Control of Information Originating from Aboriginal Communities: Legal and Ethical Contexts,” *Inuit Studies* 35, no. 1–2 (2011): 41.
- 11 Catherine Grant, “Rethinking Safeguarding: Objections and Responses to Protecting and Promoting Endangered Musical Heritage,” *Ethnomusicology Forum* 21, no. 1 (2012): 33.
- 12 Sherylle Mills, “Indigenous Music and the Law: An Analysis of National and International Legislation,” *Yearbook for Traditional Music* 28 (1996): 59.
- 13 Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (Geneva: World Intellectual Property Organization, 2010), 19.

in Zaire, not the communities actually featured on the recording. Also, this donation was only attached to American sales of the album.¹⁴ Even if direct compensation had been offered, it likely would have gone to the ethnomusicologists whose recordings were used, not to the performers themselves, because copyright of *recorded* traditional songs and stories generally belongs to the recorder, not the performers.¹⁵

Although sharing profits would have made *Deep Forest* less exploitative, for many Indigenous communities control over their cultural property is not just about protecting it from commodification, but also about dignity and human rights.¹⁶ When we talk about Indigenous communities, especially in colonial countries like Canada, we have to consider their historical context. Indigenous peoples often occupy a social and political space that places them at a disadvantage in very real and basic ways. They live with “extreme levels of poverty, chronic ill health and poor educational opportunities”¹⁷ as a direct result of the actions of the states in which they reside.¹⁸ In this context, the “need for increased control [of cultural property] is connected to reparation of past injustice, survival of cultural identity, and respect for Indigenous legal and social orders.”¹⁹ How, then, do Indigenous concepts of cultural property and ownership differ from Western European concepts?

Indigenous Concepts of Cultural and Intellectual Property

There are many different systems governing access, ownership, and the restriction of Indigenous cultural property around the world – they are specific to location and context²⁰ – but they tend to share similar characteristics, which set them apart from Western European conceptions.²¹ Stories, histories, and songs are not just for entertainment. They have a deeper meaning to the communities to which they belong. Folklorist Barre Toelken, for example, recounts the role of the stories he taped in their home community: “their larger role is to dramatize many of the Navajo cultural abstract values that maintain an individual’s equilibrium, balance, harmony, and beauty.”²² In

14 Mills, “Indigenous Music and the Law,” 59–60.

15 *Ibid.*, 66.

16 Bell and Shier, “Control of Information Originating from Aboriginal Communities,” 38.

17 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2012), 34.

18 *Ibid.*, 34–35.

19 Bell and Shier, “Control of Information Originating from Aboriginal Communities,” 38.

20 *Ibid.*, 37.

21 Tulalip Tribes of Washington, “Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge and the Public Domain, July 9, 2003” (presented at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, 5–17 July 2003).

22 Barre Toelken, “The Yellowman Tapes, 1966–1997,” *Journal of American Folklore* 111, no.

Navajo culture, traditional stories are directly tied to the health of those who hear them, Navajo and outsider alike²³ – so much so that listening to the stories at the wrong time of year is considered dangerous and irresponsible.²⁴

The idea that misusing songs and stories can cause harm is not uncommon in Indigenous communities.²⁵ Ownership of traditional songs and stories comes with obligations, and violating those obligations has consequences for their caretakers and those with whom they share their stories²⁶ – just as violating Western property law has consequences. Ownership can be individual, collective, or communal, so for communities that see their stories or songs as sacred or secret, and dangerous when misused, the effect of that misuse can be far-reaching and the consequences much greater than a loss of profit.

In general, Indigenous property systems do not have the same strong ties to economic compensation that are the basis of Western copyright. Instead, they are rooted in relationships between people, land, and culture. Intangible aspects of culture, like stories and songs, are often passed down through families. The act of passing down a story, of transmitting oral histories across generations, is a way to ensure that culture stays alive, that the beliefs and values the story embodies continue to be valued and believed. It is crucial that archivists recognize that, for the community members, the stories contained within these recordings are not just stories or a record of historical facts. Dakota professor Waziyatawin (Angela Cavender Wilson) emphasized the importance of oral histories and traditions in 1996, writing about the passing down of oral histories within families in Dakota culture. Stories are “transmissions of culture upon which our survival as a people depends. When our stories die, so will we.”²⁷

In Canada and other settler states, these stories may *only* exist in archives, in the sound recordings made by ethnographers, because generations of children were taken from the families and forced into residential schools, resulting in an incredible loss of language, culture, and connection.²⁸ Systems that govern transmission and ownership of songs and stories represent world-views that may be fundamentally different from those represented in Western law.²⁹ The misuse or mistreatment of Indigenous property, then, undermines

442 (1998): 383.

23 Ibid.

24 Ibid., 381.

25 Mills, “Indigenous Music and the Law,” 68.

26 Bell and Shier, “Control of Information Originating from Aboriginal Communities,” 41.

27 Angela Cavender Wilson, “Grandmother to Granddaughter: Generations of Oral History in a Dakota Family,” *American Indian Quarterly* 20, no. 1 (1996): 12–13.

28 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), 200–203.

29 Deidre Brown and George Nicholas, “Protecting Indigenous Cultural Property in the Age of

the values and identity of Indigenous peoples. In very real ways, infringement of Indigenous cultural and intellectual property can lead to “loss of access to ancestral knowledge, loss of control over proper care of heritage, diminished respect for the sacred, commercialization of cultural distinctiveness [and] threats to authenticity and loss of livelihood.”³⁰ In this way, misappropriation not only constitutes a violation of copyright or moral rights, but also attacks Indigenous cultures directly – it is a threat to their cultural survival.

The concept of the public domain is particularly problematic in relation to Indigenous communities. Many Indigenous nations have no similar concept of their own and may not accept Western definitions of what is public knowledge.³¹ Although laws vary depending on local context, in Canada work enters into the public domain 50 years after the death of the creator,³² depending on authorship and format. Unpublished material and material not publicly performed – a category into which most archival sound recordings of the type we are considering here would fall – are somewhat more complicated. If they were created before 31 December 1998, they entered the public domain on 1 January 2004.³³ If they were created after 31 December 1998, they enter the public domain 50 years after the death of their last surviving author.³⁴

Here we run into the problem of authorship and the concept of “original.” Traditional songs and stories are not considered original work, similar to the way Western folktales like Cinderella are not considered original in their basic forms.³⁵ This means they are not eligible for copyright protection. However, the act of recording traditional songs and stories can mean that copyright ends up belonging to non-Indigenous people, usually the ethnomusicologists and folklorists who tape songs and stories as part of their research.³⁶ In response to these issues, the Hopi community in Arizona – the United States has similar copyright rules in relation to what is and is not original – introduced strict controls on how outsiders behave when visiting. Although Hopi ceremonies are believed to be beneficial to all people and are open to the public,³⁷ the

Digital Democracy: Institutional and Communal Responses to Canadian First Nations and Māori Heritage Concerns,” *Journal of Material Culture* 17, no. 3 (2012): 310.

30 Ibid.

31 Tulalip Tribes of Washington, “Statement by the Tulalip Tribes of Washington”; Bell and Shier, “Control of Information Originating from Aboriginal Communities,” 41.

32 Scholarly Communications and Copyright Office, “Public Domain,” last modified 19 August 2015, <http://copyright.ubc.ca/guidelines-and-resources/support-guides/public-domain>.

33 Ibid.

34 Ibid.

35 Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures*, 32–34.

36 Terri Janke and Livia Iacovino, “Keeping Cultures Alive: Archives and Indigenous Cultural and Intellectual Property Rights,” *Archival Science* 12, no. 2 (2012): 156.

37 Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures*, 77.

community restricts documentation, including audio recording, to those who gain consent from the Hopi Cultural Preservation Office. This regulation was put in place because of past experiences with recordings of ceremonial music being sold without their permission.³⁸

A willingness to share music, stories, and ceremonies is not the same as permitting those traditions to be widely distributed by outsiders.³⁹ Ethnomusicologist Anthony Seeger likens the claim that traditional cultural expressions are in the public domain – that they are unownable – to a new kind of colonialism where “raw materials are provided by colonies, taken to the mother country, and turned into products that are then sold back.”⁴⁰ This privileging of Western copyright laws over Indigenous peoples’ own legal systems undermines one culture’s power for another’s profit.⁴¹

A Question of Power

Power is at the centre of intellectual property issues. Copyright does not just determine who owns these recordings – it also determines who has *access* to them. Archives are much less likely to grant access to materials with uncertain copyright status,⁴² and although the rules determining what is in the public domain seem relatively clear-cut, when you talk about sound recordings there is yet another complication. Archives, especially archives of research material, “hold millions of hours of unique recordings for which legal clearances were not obtained [as] no one imagined they would be necessary.”⁴³ With no paperwork documenting their creation, archives are left with holdings full of sound recordings in legal limbo, recordings that cannot be distributed, even to the communities who are documented in them.⁴⁴ This is often the case for orphan works as well.⁴⁵ In both cases, an archivist’s reluctance to make material accessible could mean the knowledge contained in recordings is lost both to the world as a whole and to their home community. Old records can contribute to modern cultural revitalization efforts. For example, although Franz Boas did not speak Kathlamet Chinook, he wrote out the words of one of the last speakers of the language as part of his ethnographic studies of the Northwest Coast. In 1955, Dell Hymes was able to reconstruct the language from those

38 Ibid., 76.

39 Tulalip Tribes of Washington, “Statement by the Tulalip Tribes of Washington.”

40 Seeger, “Who Got Left Out of the Property Grab Again?,” 79.

41 Mills, “Indigenous Music and the Law,” 68.

42 Dryden, “The Role of Copyright in Selection for Digitization,” 68.

43 Seeger, “Who Got Left Out of the Property Grab Again?,” 76.

44 Ibid.

45 Dryden, “The Role of Copyright in Selection for Digitization,” 70–71.

notes and save several traditional stories that might otherwise have been lost.⁴⁶ The modern Kathlamet now have access to these stories. This kind of contribution, though, is only possible with access.

It is important to note, too, that these recordings can aid more than language and cultural revitalization efforts – although the importance of language and culture revitalization to Indigenous peoples who have had them stripped away cannot be overemphasized. Sound recordings also contain concrete information about cultural sites and geographies. They are records of land use that can be vital in modern assertions of sovereignty over traditional territory.⁴⁷ In Canada, under the *First Nations Land Management Act*, First Nations are able to assert limited control over land and its management,⁴⁸ but doing so requires that nations first prove the land they claim was under the exclusive occupation of their nation “at the time of the assumption of British sovereignty.”⁴⁹ Proving occupation requires concrete evidence, and this evidence may be contained in the recorded stories told by elders, or in recorded ceremonies and songs. In such cases, the ethnographic recordings held by archives – recordings that archivists may be reluctant to provide access to because of uncertain copyright status or a lack of documentation – become a potentially vital political tool. In fact, in Australia archival sound recordings from the 1898 Cambridge anthropological expedition to the Torres Strait were used to successfully challenge *terra nullis*, proving that the Meryam people’s claim to ownership of Murray Island was rooted in a long history of occupation.⁵⁰ This court case opened up new possibilities for land claims and introduced the concept of native title to the Australia court system.⁵¹

Institutions must consider the restrictions they place on their recordings and whom they affect most: what are the consequences of denied access and who bears them? Archivists should not further the historic colonialism of ethnographic fieldwork by maintaining long-held hierarchies that privilege the work of academics over the concerns of the people whose songs and stories are recorded in the archive.

46 Sharon R. Sherman, “Who Owns Culture and Who Decides?: Ethics, Film Methodology, and Intangible Cultural Heritage Protection,” *Western Folklore* 67, no. 2/3 (2008): 227.

47 Bruce Ziff and Melodie Hope, “Unsightly: The Eclectic Regimes That Protect Aboriginal Cultural Places in Canada,” in *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, ed. Catherine Bell and Robert K. Paterson (Vancouver, BC: University of British Columbia Press, 2009), 183.

48 *First Nations Land Management Act*, Statutes of Canada 1999, c. 24, <http://laws-lois.justice.gc.ca/PDF/F-11.8.pdf>.

49 Ziff and Hope, “Unsightly,” 183.

50 Grace Koch, “Songs, Land Rights, and Archives in Australia,” *Cultural Survival Quarterly* 20, no. 4 (1996), accessed 9 February 2017, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/songs-land-rights-and-archives-australia>.

51 Ibid.

Working toward Best Practices

Although most of the types of recordings discussed so far are not considered the property of Indigenous communities, archivists with Indigenous sound recordings in their holdings should consider guidelines offered by international and professional bodies when they are in a position to make decisions about access to these materials. In many cases, access may be stipulated by donor agreements, which the archive is bound to honour, but where the status of recordings is uncertain, documents like the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) – which Canada ratified in 2016,⁵² after years of debate⁵³ – or the First Archivist Circle’s *Protocols for Native American Archival Materials* can offer useful guidance.

The UNDRIP articles 11, 12, and 31 are the most relevant to the intellectual property issues under discussion here. These articles state that Indigenous peoples have the right to protect and maintain control over their traditional cultural and intellectual property, as well as the right to privacy for their traditions.⁵⁴ Although UNDRIP is not legally binding, it offers a framework for archivists to consider when approaching recordings of Indigenous materials in their collections, one that emphasizes that Indigenous peoples should have some control over material that may have deep meaning to them and which originates from their communities. UNDRIP is especially relevant to Canadian archivists in the wake of the Truth and Reconciliation Commission’s *Calls to Action*. The TRC specifically called upon archivists to review their policies and best practices to determine their level of compliance with

52 Indigenous and Northern Affairs Canada, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples,” news release, 10 May 2016, http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602.

53 Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples,” last modified 30 July 2012, <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>. The explicit recognition of Indigenous intellectual property concerns in UNDRIP was one of Canada’s primary objections to ratifying the declaration when it was originally presented before the United Nations in 2007. If truly honoured – and although the Liberal government has agreed to UNDRIP in principle, it is still debatable at the time of publication whether or not they will honour it in their actions and policies – UNDRIP would allow Indigenous nations to pursue repatriation of objects and knowledge taken from their communities. It would also indicate at least a partial acknowledgement of culpability on the part of Canada’s government in its actions toward the Indigenous nations on whose land Canada is built.

54 United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295 adopted by the General Assembly 13 September 2007 (Geneva: United Nations, 2008), 9, 14, accessed 9 February 2017, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

UNDRIP.⁵⁵ Doing so opens up new possibilities for archivists who wish to provide access to materials for Indigenous communities, or to restrict access to material about them, as UNDRIP explicitly states that Indigenous peoples have the right to access and protect their cultural and intellectual property.⁵⁶

The *Protocols for Native American Archival Material* mirror UNDRIP. They advise archivists to be aware of the fact that “discussing property in Native American communities can be antagonizing from the perspective of community members” because archival concepts of property are so tied to Western worldviews.⁵⁷ They also offer up an expansion of the idea of moral rights as a possible way to protect Indigenous cultural and intellectual property.⁵⁸ Moral rights specify that creators have a right to attribution and to have the integrity of their work maintained and not distorted or used in a defamatory way.⁵⁹ Using this concept to govern access to Indigenous materials offers a way to restrict access to culturally sensitive materials if an Indigenous community requests it. Although the Society of American Archivists has not endorsed the *Protocols*,⁶⁰ in cases where the archive is unaware of the authorship of recordings, these guidelines are particularly useful because many of the authors of the *Protocols* are Indigenous as well as being librarians or archivists.⁶¹ It should also be acknowledged, though, that the plurality of Indigenous cultures makes the existence of a one-size-fits-all solution impossible. Even documents frequently relied on by Indigenous scholars as frameworks – such as UNDRIP – are not universally accepted. Some Indigenous legal scholars object to using UNDRIP as a background for proposed protocols and decolonizing efforts because it is rooted in Western European legal traditions and systems, framing Indigenous concerns as something to be accommodated by the settler states they live in rather than truly inherent rights.⁶²

First Nations communities are deeply aware of the problems inherent in intellectual property law. Like the Hopi community, which established its

55 Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015), 8.

56 United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 11.

57 First Archivist Circle, *Protocols for Native American Archival Materials* (2007), accessed 9 February 2017, <http://www2.nau.edu/libnap-p/PrintProtocols.pdf>, 15.

58 Ibid.

59 Ibid.

60 Society of American Archivists, Native American Archives Roundtable, “‘Protocols for Native American Archival Materials’: Information and Resources Page,” accessed 4 December 2015, <http://www2.archivists.org/groups/native-american-archives-roundtable/protocols-for-native-american-archival-materials-information-and-resources-page>.

61 First Archivist Circle, *Protocols for Native American Archival Materials*, 3–4.

62 This concept is discussed in more detail in Isabel Altamirano-Jiménez, “The Political Economy of Indigeneity Articulation,” in *Indigenous Encounters with Neoliberalism: Place, Women, and the Environment in Canada and Mexico* (Vancouver, BC: University of British Columbia Press, 2014), 15–66.

Cultural Preservation Office, many Indigenous nations now have researcher protocols and agreements in place that stipulate the kinds of work researchers can produce when working with their community and how that resulting documentation should be handled. These protocols offer a way to navigate the issue of plurality as they are generally created by each nation or organization to address their specific needs. The Union of British Columbia Indian Chiefs (UBCIC) Resource Centre and its *Ethical Research Policy* provides an example of a First Nations archive and library with one such protocol in place. This policy acknowledges that “researchers are collectors of information and producers of meaning which can be used for or against Indigenous interests” and is in place to ensure that “appropriate respect is given to the cultures, languages, knowledge and values of Aboriginal peoples” during research.⁶³ Researchers at the UBCIC Resource Centre agree that “the rights, interests and sensitivities of the people being researched will be acknowledged and protected,” and that they will be “open, direct and transparent” in their research at all times.⁶⁴ Signing the agreement also means that, if a researcher has concerns over the sensitivity of materials, he or she agrees “to bring this to the attention of Resource Centre staff.”⁶⁵ It is a document crafted to hold researchers accountable and to make sure they are aware that their research has the potential to do both harm and good. Through the policy, the Resource Centre unequivocally advocates a do-no-harm approach to Indigenous research.

Research protocols, agreements, and codes of ethics are one way First Nations and other Indigenous groups ensure research does not continue the exploitation of culture and resources that often occurred in the past.⁶⁶ Archivists can use these agreements as guidelines for handling materials donated by researchers by ensuring that archival practices and handling are not at odds with the wishes of communities. Although archivists need to balance the needs of Indigenous communities with the needs of researchers – which can be in competition with each other⁶⁷ – archivists aware of the complex intellectual property issues surrounding sound recordings will be in a better position to do so. Another possible solution, when moral rights and guidance from community-based research protocols are not enough, is to

63 Union of British Columbia Indian Chiefs, *Ethical Research Policy*, accessed 9 February 2017, http://d3n8a8pro7vhmx.cloudfront.net/ubcic/legacy_url/177/Ethical_research_policy.pdf?1426350017 (UBCIC Resource Centre, n.d.)

64 Ibid.

65 Ibid.

66 For more information on research ethics from a First Nations perspective, see Assembly of First Nations, Environmental Stewardship Unit, *Ethics in First Nations Research* (2009), accessed 9 February 2017, http://www.afn.ca/uploads/files/rp-research_ethics_final.pdf.

67 Krisztina Laszlo, “Ethnographic Archival Records and Cultural Property,” *Archivaria* 61 (Spring 2006): 305.

rely on privacy as a way to protect culturally sensitive recordings in archives. Concern for personal privacy is normal practice for archives and has been a particular focus for sound recordings, especially in the realm of oral histories.⁶⁸ This could be extended to group privacy as well. Group privacy would allow for the restriction of access to materials that Indigenous groups consider sacred or secret.⁶⁹

There are projects in development that aim to address the specific cultural and intellectual property needs of Indigenous communities at a more complex level, specifically from the perspective of those who, like archivists, manage cultural heritage materials. Kimberly Christen and Jane Anderson co-direct the Local Contexts project (www.localcontexts.org). This project established Tradition Knowledge (TK) Licenses and Labels, inspired by the Creative Commons licensing model, to combine legal (the licences) and non-legal (labels) strategies to address Indigenous needs. TK Licenses and Labels “work to extend sets of *internal* ‘best practices,’ cultural norms, and responsible behaviour to those *outside* of the local group.”⁷⁰ The labels developed by Local Contexts allow for more complex representations of information held by heritage institutions. They make the responsibilities attached to knowledge clear. For example, a TK Seasonal label informs users that material is “heard and/or utilized at a particular time of year” and highlights the “sophisticated relationships between land and knowledge creation.”⁷¹ This label, when applied, for example, to the Navajo stories recorded by Barre Toelken, would allow archivists to easily identify possible issues with the use of material by outsiders while simultaneously providing both archivist and researcher with a well-articulated reason behind restrictions placed on materials, although there is still no legal consequence to disregarding a TK label the way there would be if Western intellectual property law were flouted.⁷²

Even if archives do not wish to include use of the actual labels in their daily work, they are an important resource in developing an understanding

68 Swain, “Oral History in the Archives,” 350.

69 Kay Mathiesen, “A Defence of Native Americans’ Rights over Their Traditional Cultural Expressions,” *American Archivist* 75, no. 2 (Fall/Winter 2012): 476.

70 Jane Anderson and Kim Christen, “‘Chuck a Copyright on It’: Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels,” *Museums Anthropology Review* 7, no. 1/2 (Spring–Fall 2013): 111 (emphasis in original).

71 Local Contexts, “TK Seasonal (TK S),” accessed 1 June 2016, <http://www.localcontexts.org/tk/s/1.0>.

72 Although TK labels are a useful tool, it is important to acknowledge that they are not without shortcomings. The use of these labels does not solve ownership issues in archives and museums, and may obscure the fact that issues still exist. Applying TK labels to records may place an unfair burden on Indigenous community members, who are often contributing unpaid labour to the archive in order to restore some level of control over records to their community. Archivists must be aware of these pitfalls when considering TK labels as a tool.

of community concerns. While some archivists object to access restrictions,⁷³ it is important to remember the unique historical context and relationship that exists between Indigenous peoples and colonial institutions, including researchers. Indigenous peoples have had their cultural practices, stories, and songs captured in archival records by outsiders, and have lost control over – and sometimes access to – them because of this. They have a right to moral, if not legal, ownership over the records.⁷⁴ Archivists find themselves in the unique position to acknowledge that right.

Collaboration

In order to acknowledge these rights, archives should work in collaboration with Indigenous communities and build relationships with them. Working with communities and opening up lines of communication is perhaps the most crucial aspect of addressing cultural and intellectual property issues in a real way. Archivists must be aware that, for many Indigenous communities, there is a tension between the need to work with non-Indigenous institutions that hold these sound recordings and “deeply held values of autonomy, independence, and self-sufficiency.”⁷⁵ There is not, to paraphrase poet Janice Gould, an archive in this country that is not built on what was once native land. Gould, speaking about universities, called for reflection on this as a “fundamental point about the relationship of Indians [*sic*] to academia.”⁷⁶ Reflection of this kind is key to understanding the tension that exists between Indigenous communities and archives as well. As a whole, archives are colonial institutions that exist to support other, more overtly colonial projects. Government archives support settler governments in their various forms – federal, provincial, municipal – and are part of the settler state that continues to occupy Indigenous lands. Church archives are representatives of institutions that, alongside the government, ran the residential school system in Canada. Museum and university archives support institutions that studied and “othered”⁷⁷ Indigenous people and nations, taking stories and songs from communities with no reparations. Although archivists may want to build real

73 Janke and Iacovino, “Keeping Cultures Alive,” 157.

74 Laszlo, “Ethnographic Archival Records and Cultural Property,” 301.

75 Elizabeth Joffrion and Natalia Fernandez, “Collaborations between Tribal and Nontribal Organizations: Suggested Best Practices for Sharing Expertise, Cultural Resources, and Knowledge,” *American Archivist* 78, no. 1 (Spring/Summer 2015): 196.

76 Janice Gould, “The Problem of Being ‘Indian’: One Mixed-Blood’s Dilemma,” in *Del colonizing the Subject: The Politics of Gender in Women’s Autobiography*, ed. Sidonie Smith and Julia Watson (Minneapolis, MN: University of Minnesota Press, 1992), 81–82.

77 For more on “othering” in the settler state, see Alison Mountz, “The Other,” in *Key Concepts in Political Geography*, ed. Carolyn Gallaher, Carl T. Dahlman, Mary Gilmartin, Alison Mountz, and Peter Shirlow (London: Sage Publications, 2009), 328–38.

relationships with Indigenous nations and acknowledge the damage their institutions have dealt communities, they should not be surprised by mistrust.

A real relationship, in this context, is one that benefits Indigenous communities and not just the archive. The long history of exploitation of Indigenous peoples means that archives working for a new type of relationship must not go to communities expecting information from them and offer nothing in return. A relationship between archives and communities can be mutually beneficial. Indigenous communities likely have important contextual information about recordings that archives are unaware of, and certainly will know better than the archivist what is and is not appropriate for public consumption.⁷⁸ Archives, in turn, might house sources of modern traditions and recordings that Indigenous communities are unaware of because they are beyond the reach of most non-academics.⁷⁹ Jesse Walter Fewkes's 1890 ethnographic field recordings, for example, are used today by the descendants of the Passamaquoddy, Zuni, and Hopi peoples he studied to aid cultural revitalization efforts.⁸⁰

To reach the point where archives can make these contributions, they must first reach out to communities. According to a 2015 study by Elizabeth Joffrion and Natalia Fernandez, the best practice for collaboration between tribal and non-tribal organizations is to be willing to learn from and respect different cultural perspectives, recognizing that "historical difference in power and privilege" is going to colour interactions through the process of relationship building – which is ongoing for both parties.⁸¹ The act of reaching out to Indigenous communities first to let them know about the recordings in collections, rather than waiting for communities to come forward, is one way of beginning to recognize and break down this historical power imbalance.⁸²

Part of addressing intellectual property issues may also be establishing clear guidelines around sound recordings to minimize future questions about rights and appropriateness. Archives can "adopt practices of managing rights clearances that seek consent of Indigenous communities"⁸³ and establish clearance from both the donor and the Indigenous community documented in their recordings before acquiring materials. Although cultural and intellectual property concerns are complex, especially in relation to sound recordings, this emphasis on co-operation and collaboration can help archivists determine culturally appropriate access protocols.

78 Joffrion and Fernandez, "Collaborations between Tribal and Nontribal Organizations," 219.

79 CLIR, *The State of Recorded Sound Preservation in the United States*, 118.

80 *Ibid.*, 117.

81 Joffrion and Fernandez, "Collaborations between Tribal and Nontribal Organizations," 219.

82 Laszlo, "Ethnographic Archival Records and Cultural Property," 307.

83 Janke and Iacovino, "Keeping Cultures Alive," 164.

Archives willing to work with Indigenous communities may, in fact, find themselves in a better position than those that are not, gaining contextual information and a greater appreciation for records that might otherwise be left untouched because of their uncertain status. Partnerships between archives and Indigenous communities build trust, leading to a kind of outreach and advocacy on the part of the archive, with the potential of gaining important allies. In Canada, where Indigenous issues and the building of trust between archives and Indigenous communities is especially relevant in light of the opening of the National Centre for Truth and Reconciliation in 2015,⁸⁴ these relationships are an important part of the future of the archival profession. By actively courting Indigenous participation in decision making about access and by taking a nuanced view of intellectual property and ownership, archivists can help address the problems of the past.

Conclusion

Creating a non-Indigenous archive that respects Indigenous cultural and intellectual property is a daunting proposition. Sometimes there is no clear answer as to how a record should be treated. If a field recording is in danger of degrading to the point of destruction, perhaps it should be digitized before it is too late. Perhaps an archive was never the right home for it to begin with, and it should be allowed to degrade. Perhaps, after digitizing the recording, the archivist should get in touch with the community from which it originated – when this is possible – and ask what should be done with it. When assessing an oral history cassette, archivists may find themselves in the unique position to reconnect people to family members whose stories and voices they have not heard in a long time, perhaps grandparents and parents who participated in research that their descendants were not aware of. No matter what decision is ultimately made, the archive and the Indigenous nation or individuals in question could benefit from the archivist's acknowledgement that ownership and copyright are not clear-cut. Addressing these issues can be messy and hard, but just because this is a complex undertaking does not mean it is not worth doing, and the first step is learning to listen.

84 David T. Barnard, "U of M Is Honoured to Celebrate Official Opening of NCTR," *UM Today*, 21 October 2015, accessed 4 December 2015, <http://news.umanitoba.ca/u-of-m-is-honoured-to-celebrate-official-opening-of-nctr>.

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