

Towards Intellectual Property Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage

A Survey of Codes, Conduct and Challenges in North America

Prepared for the
World Intellectual Property Organisation (WIPO)
by Martin Skrydstrup



The views expressed in this Survey are those of the author, and not necessarily those of the WIPO Secretariat or its Member States. The Survey is current at the time of preparation of the initial draft (October 2006).

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ACRONYMS

AAA: American Anthropological Association

AAM: American Association of Museums

Standing Committees under AAM mentioned in the report include:

CurCom: The Curators' Committee

EdCom: The Committee on Education

MSM: The Museum Store Association

NAME: The National Association for Museum Exhibition

RegCom: The Registrars Committee

AAMD: Association of Art Museum Directors

AANA: Assembly of Alaska Native Educators

AASLH: The American Association for State and Local History

AAT: Art & Architecture Thesaurus (The Getty)

ACA: Association of Canadian Archivists

Standing Committees under ACA mentioned in the report include:

SISAA: The Special Interest Section on Aboriginal Archives

AERA: American Educational Research Association

AFC: The American Folklife Center

AFN: Alaska Federation of Natives

AFS: American Folklore Society

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AHA: American Historical Association

AIC: American Institute for Conservation of Historic and Artistic Works

ALA: American Library Association

AMNH: American Museum of Natural History

DAA: Division of Anthropology Archives

DoA: The Division of Anthropology

SCD: Special Collections Department

ANKN: Alaska Native Knowledge Network

AT: Anthropology Thesaurus (American Museum of Natural History)

BAE: Bureau of American Ethnology

CARCC: Canadian Artists Representation Copyright Collective

CBoC: Copyright Board of Canada

CCAAA: The Co-ordinating Council of Audiovisual Archives Associations

CFCH: The Center for Folklife and Cultural Heritage

CHIN: The Cultural Heritage Information Network

CLA: The Canadian Library Association

CLIR: Council on Library and Information Resources

CMA: Canadian Museum Association

COHA: Canadian Oral History Association

CoPAR: Council for the Preservation of Anthropological Records

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CRC: Cultural Resources Center (NMAI's facility in Suitland, Maryland)

DCI: Dene Cultural Institute (*Yamózhá Káé Society*)

ECOSOC: United Nations Economic and Social Council

EoF: Expressions of Folklore

ET: Ethnographic Thesaurus (American Folklife Centre)

GGHC: George Gustav Heye Center

HCPO: Hopi Cultural Preservation Office

HSFA: Human Studies Film Archives

IASAA: The International Association of Sound and Audiovisual Archives

ICA: The International Council on Archives

ICH: Intangible Cultural Heritage

ICEM: ICOM Code of Ethics for Museums

ICME: The International Committee of Museums of Ethnography

ICOM: The International Council of Museums

ICOMOS: The International Council on Monuments and Sites

IFLA: The International Federation of Library Associations and Institutions

IP: Intellectual Property

ITK: Inuit Tapiriit Kanatami

LoC: Library of Congress

NAA: National Anthropological Archives

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NAGPRA: Native American Graves Protection and Repatriation Act (1990)

NAPA: National Association for the Practice of Anthropology

NARA: National Archives and Records Administration

NCLIS: National Commission on Libraries and Information Science

NCPH: National Council on Public History

NDIIPP: Plan for the National Digital Information Infrastructure and Preservation Program

NINCH: National Initiative for a Networked Cultural Heritage

NMAI: National Museum of the American Indian

NMAIA: National Museum of the American Indian Act (1989)

NMNH: National Museum of Natural History

OHA: Oral History Association

PIMA: Pacific Islands Museums Association

RARIN: The Rights and Reproduction Information Network

SAA: Society of American Archivists

SEM: The Society for Ethnomusicology

SfAA: Society for Applied Anthropology

SGS: Smithsonian Global Sound

SHI: Sealaska Heritage Institute

SIRIS: Smithsonian Institution Research Information System

SSHRC: Social Sciences and Humanities Research Council

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SSRC: Social Science Research Council

SSTF: Social Science Task Force

TCEs: Traditional Cultural Expressions

TK: Traditional Knowledge

UNESCO: United Nations Educational, Scientific and Cultural Organization

WIPO: World Intellectual Property Organization

EXECUTIVE SUMMARY

Indigenous communities and developing States have had extensive first-hand experiences with the ways in which ethnographic materials recorded in different formats within their territories have subsequently been misappropriated. For this reason, Indigenous communities today claim a say over whether, how and on what terms elements of their intangible cultural heritage are studied, recorded, re-used and represented by researchers, museums, commercial interests and others. These claims lie at the confluence of technological innovations and the many benefits they offer, on the one hand, and renewed claims by indigenous and local communities and developing States for greater protection of their cultural expressions and knowledge systems, often considered “public domain” by conventional intellectual property (IP) law, on the other. A matter of particular concern is the institutional handling of “culturally sensitive materials” depicting secret or sacred ceremonial practices. Within a complex web of issues, calls for new IP-type standards for enhanced protection of traditional knowledge and traditional cultural expressions (TCEs), and recent institutional digitization efforts enabling instantaneous distribution of ethnographic materials in various media to anywhere in the world, the system of intellectual property is faced with unprecedented challenges, both conceptually and policy-wise. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO) has been set up to discuss some of these issues and possibly develop a *sui generis* legal instrument which, amongst others, reconciles creators’ rights with wide scale accessibility and dissemination of TCEs in today’s global knowledge economy.

Responding to a widely-expressed need for more information on the role of IP in questions of access to, ownership of and control over collections of intangible cultural heritage, WIPO has also initiated the Creative Heritage Project aimed at developing IP guidelines and “best practices” for managing IP when recording and digitizing intangible cultural heritage. These guidelines and “best practices” could be of interest and benefit to communities who wish to prevent the unauthorized exploitation and misuse of their traditional cultures and derive economic benefit from them through community-based cultural enterprises; museums, galleries and other cultural institutions who wish to devise IP-related strategies in support of their safeguarding, educational and, in some cases, income-generation objectives; and, creators, researchers and scholars wishing to access, study, share and re-use intangible cultural heritage.

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This Survey of existing codes, conduct and challenges was commissioned by WIPO as part of this Project. The brief was to gather and consult on existing codes and practices in North America as an empirical basis for the eventual distillation and development of guidelines and best practices which address the IP aspects of managing collections of intangible cultural heritage. This survey is one of several commissions by WIPO; others focus on other regions.

This WIPO Project is a timely and remarkable contemporary project. It faces steep challenges and holds great promises. It is both remedial and prospective. Remedial in the sense that during the first half of the 20th century, Western anthropologists ventured to the rest of the world collecting and documenting what we today refer to as “traditional knowledge” and “traditional cultural expressions”. Local knowledge about the pharmaceutical properties of plants was recorded; secret-sacred rituals were described and recorded; distinctive local music was captured; and, graphic designs on pottery, woodwork and the human body were photographed or copied by drawing techniques. This transfer and fixation of traditional cultural expressions and knowledge took place in a variety of contexts, circumstances and situations, mainly for preservation purposes and scholarly research by Western institutions and researchers. These valuable safeguarding efforts have also led inadvertently to unauthorized commercial exploitation. The WIPO project is remedial in the sense that it needs to grapple with and try to resolve these past legacies.

However, the WIPO initiative also looks forward towards contemporary and future cultural productions by indigenous communities and local cultural centers around the world. Initiatives are underway for local communities to build local capacity so they could eventually undertake their own recordings and distribute, protect and promote them as they see fit, for their own, direct cultural and economic benefit. Through creating and trading in distinctive cultural goods and services, supported by strategic use and management of IP rights, communities can derive cultural and economic benefit from their rich cultural heritage. Clarity on IP options, especially in the digital world, could spur new mutually-beneficial collaborations between institutions and communities, so promoting wider respect for cultural diversity, facilitating educational and scholarly opportunities, enriching and enhancing museum and archival services and stimulating creativity and community-development. In this sense, the WIPO Creative Heritage initiative is prospective.

The report is structured in two main parts: Part (1) comprises a presentation of the results of the survey, i.e. it is meant to answer the question of the available existing resources in North America

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which could be considered in the drafting process for a new set of IP guidelines. Part (2) is an analysis of the challenges facing such a venture followed by a set of recommendations of how to overcome them. There are a number of challenges, such as refining the scope of the project, integrating customary laws and notions to a greater extent, clarifying what is meant by the “misappropriation” of TCEs (for example when is a use of a TCE an illegal misappropriation and when is it legitimate borrowing), balancing claims of access against claims of exclusivity and protection, and, finally, finding a common indexical language. The Survey concludes with a number of key recommendations and concluding observations. Furthermore, the Annexes to the Survey contain a range of additional useful resources including information on related research projects, manuals, handbooks and guides, and standard forms, and on the many people consulted during the preparation of the Survey.

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In the course of writing this report, I have been very fortunate to have had so much support and guidance from Wend Wendland of WIPO. Since he enabled me to observe the fascinating story of the IGC process unfold in Geneva and made everything about IP seem not only easy but also remarkably interesting in Nafplion, Wend has taught me more about the intricacies of IP and the art of diplomacy than any apprentice could have hoped for. Many thanks Wend for being such an excellent supervisor and I hope we will continue to work together in the years to come! I would also like to thank WIPO for having funded my participation in an important Symposium entitled *Ethnographic Archives, Communities of Origin, and Intangible Cultural Heritage* in Washington, D.C. Through global teleconferences - skillfully juggled by Lulu Henriod of WIPO - the other WIPO consultants Molly Ann Torsen based in

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ABOUT THE AUTHOR

The author is currently a Ph.D. Candidate in the Department of Anthropology, Columbia University, New York. His dissertation research revolves around a comparison of the making of cultural property doctrines in civil and common law systems. The author also holds a MA (Cand.Scient.Anth.) in cultural anthropology from the University of Copenhagen based on his dissertation *The Global Horizon of Local Tradition: The mvèt harp zither of the Fang in Gabon* (2000). For this MA, he conducted thirteen months of extensive ethnographic field research in Gabon, Equatorial Guinea and Cameroon supported by the Nordic Africa Institute recording Fang troubadours performing *mvèt* epics and chants.

The author holds extensive working experiences from museum and archival settings both as an educator at the Ethnographic Collection, Danish National Museum and as a researcher in the Berlin Phonogram Archive, as well as other archival repositories in Europe and the United States. He also possesses extensive experiences in documentary film making and has produced a feature about Haitian immigrants in New York at Columbia's School of Journalism¹.

He has held consultancies for the Nordic Africa Institute in Uppsala and for the UNESCO study collections housed at Moesgaard Museum in Denmark. He is a Board Member of ICME (International Committee of Museums of Ethnography) and a Special Reference Colleague to ICOM's Ethics Committee. Finally, the author participated as an observer for la Societe Internationale d'Ethnologie et Folklore (SIEF) in the 7th session of the WIPO IGC meeting on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (November 2004).

¹ 2003 *From Slavery to the Promised Land*, 24 min. Columbia Journalism School, Digital Video

INTRODUCTION

Everyone in the world knows my voice, but no one knows it's mine.

Kuo Ying-Nan (2002:195)²

How does one determine the ultimate origin of ideas, images, musical expressions, and environmental knowledge? And even if we can identify the communities that gave birth to these intangibles, what would be the social and political costs of controlling their movement?

(Brown and Bruchac 2006:212)

CONCERNS

Indigenous communities and developing States around the world have had extensive first-hand experiences with the ways in which ethnographic materials recorded in different formats and media within their territories have impacted their religion, cultural practices, and ultimately their sense of identity; sometimes with disastrous consequences, sometimes to their benefit. Briefly, the current concerns and claims often advanced by indigenous communities and developing countries could be subsumed under two general rubrics:

1) Indigenous communities claim a say in the access, circulation and control over ethnographic materials currently considered as public domain resources under most codified IP regimes. A matter of particular concern is the institutional handling of “culturally sensitive materials” depicting secret or sacred ceremonial practices many of which continue today. Under most current IP regimes, this sensitive type of material is often owned by the researchers who recorded the materials, controlled by the institution, which preserves the material, or in the public domain. The lack of protection of this type of material is currently a source of concern at local, national and trans-national levels; 2) Demands put forward by developing States - whose interests at times converge with Indigenous groups, but at other times are in tension with these - for new IP-type standards for enhanced protection of traditional knowledge, hereunder traditional cultural expressions (TCEs). Bolivia’s official letter of appeal to UNESCO’s Director General in 1973 for an international IP instrument preventing misappropriations

² Here quoted from GUY, NANCY. 2002. "Trafficking in Taiwan Aboriginal Voices," in *Handle with Care: Ownership and Control of Ethnographic Materials*. Edited by S. R. Jaarsma, pp. 195-209. Pittsburgh, PA: University of Pittsburgh Press.

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of expressions of folklore³ could be seen as setting the stage for this type of concerns. This raises policy as well as legal questions: 1) Does the “processes of globalization and social transformation” to which the Bolivian minister referred in his 1973 letter threaten the integrity and vitality of local cultural productions? 2) If affirmative, how should the international community work towards maintaining and promoting the cultural diversity of the world? 3) Would a legal instrument protecting TCEs against misappropriation constitute a viable policy option? 4) If such an instrument is out of reach (for a number of policy as well as substantive conceptual reasons) could soft law, envisioned as a set of recommendations, an international code of ethics, IP guidelines for the cultural heritage sector, etc. do the job?

Regarding the first question, the UNESCO 2003 Convention, is very clear. It states that commercially oriented globalization is deemed destructive of traditional cultures and gives rise to “grave threats of deterioration, disappearance and destruction”⁴. Others argue that globalization is a double edged sword, which not only puts traditional cultural practices on the verge of extinction, but also empowers local communities through the possibility of universal access and distribution of their cultural creations. Of late, the coming of the digital age has perhaps accentuated and strengthened both arguments. Today, the possibility exists of instantaneous distribution of ethnographic materials in various media to anywhere in the world. This makes the challenge even greater of how to reconcile creators’ rights with wide scale accessibility and dissemination of TCEs in today’s global knowledge economy. Regarding question two and three, this survey is not intended to provide any definite answers. Its purpose is to deliver the necessary empirical ground, which may facilitate future and thoroughly informed answers to question four.

³ This letter was crafted in the aftermath of Simon & Garfunkel’s appropriation of the Andean Indigenous folksong *El Condor Pasa* featured on their hit album *Bridge over Troubled Waters* (1970).

⁴ Please see the UNESCO 2003 Convention entitled *Safeguarding of the Intangible Cultural Heritage* available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=16429&URL_DO=DO_TOPIC&URL_SECTION=201.html

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BACKGROUND

From the conference for revision of the Berne Convention⁵ in Stockholm (1967) to the contemporary WIPO Intergovernmental Committee process on IP and Genetic Resources, TK and Folklore the debate about how best to protect TCEs has roughly oscillated between amending existing IP rights to accommodate the protection of TCEs and a new *sui generis* form of international instrument supposed to enable more adequate protection of TCEs. Some argue that the possibilities of existing IP legal systems to accommodate Indigenous claims about misappropriations have yet to be fully explored and often cite Australian case law as a successful example thereof within the common law family⁶. Others argue that IP law is an inherently Western artifact embodying deeply Eurocentric notions of ownership, authorship and originality, and when put to work on indigenous cultural productions is at best inadequate⁷. These critics would prefer to see the ascendance of a *sui generis* system, which fundamentally re-conceives existing doctrines of IP legislation such as concepts of public domain; fixation criteria, individual versus collective authorship and the notion of “appropriation” in non-economical terms.

What underwrites this policy debate is the often-quoted dictum that the type of cultural products embodied in TCEs is a poor fit for western IP laws. The argument goes that the criteria of copyrightable subject matter - which generally includes original literary, scientific and artistic works, provided such works are fixed in a tangible expression that can be seen, heard or touched - fits poorly

⁵ The Diplomatic Conference in Stockholm for the revision of the Berne Convention for the Protection of Literary and Artistic Works convened in 1967. The Delegates found themselves unable to draft elaborate legal principles for folklore protection, referring to the conceptual and definitional difficulties of this topic. The only legislative trace of their attempt is article 15(4)(a) of the Berne Convention (added in the Stockholm and Paris Acts of 1967 and 1971), which provides a possibility for the international protection 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.” In such cases, national legislation may designate the competent authority to represent the unidentified author.

⁶ In the case *Milpurrurru v. Indofurn Pty Ltd.* (1994) Aboriginal artists sued to prevent the import from Vietnam to Australia of carpets with prominent aboriginal designs reproduced without the permission from the artists. In its decision, the federal court awarded the Aboriginal artists substantial damages for infringement of the copyright. Although strong in its wording, this decision ultimately rested on traditional copyright law and compensated only the individual artists, not the larger community. In a similar case, *Bulun Bulun & Anor v. R&T Textiles Pty Ltd.* (1998), the Aboriginal artist John Bulun Bulun argued that his painting *Magpie Geese and Waterlilies at the Waterhole* (1980/Natural pigments on bark) represented the principal totem for his clan and that unauthorized reproduction threatened the coherence and survival of his society by interfering with the relationship between the Ganalbingu people, their ancestors and the land given to them. The Court decided that a fiduciary relationship did exist between the plaintiff and the Ganalbingu people preventing the claimant from exploiting his artistic work contrary to customary laws. However, the Court dismissed the action, ruling that the Ganalbingu people had no “collective rights” under Australian law, but that the claimant had a personal right to enforce his copyright against third party infringers, in which he had already prevailed. This case confirmed the precedent established in *Yumbulul v. Reserve Bank of Australia* (1991), where the claim of communal harm caused by the unauthorized use of sacred images also was rejected.

⁷ See e.g. Rosemary Coombe’s highly influential work *The Cultural Life of Intellectual Properties* (Duke 1998).

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with the nature of TCEs. More specifically: (1) The criterion of “originality” is in IP law understood as an independent creation attributable to an individual author. This is clearly at odds with TCEs which by nature are expressions of, by and for collective entities; (2) The criterion of “fixation” found in many national copyright laws is related to the often quoted dictum that copyright law does not protect ideas, but the tangible expressions of ideas. TCEs such as dance, ritual performance, oral narrative and other forms of choreographic and verbal art are not intended to be fixed in any tangible medium, making it a poor fit for those IP laws which require fixation⁸; (3) Finite duration of protection is a common feature of copyright law. However, with reference to certain sacred and highly sensitive TCEs, protection is sought for in perpetuity; and (4) Conventional copyright law vests the rights with an individual creator, whereas many TCEs are considered to be held by a community, clan or tribe, without any designated individual ownership. However, in assessing these conundrums between copyright laws and TCEs, one should not forget that IP law is often faced with similar problems vis-à-vis the subject matter of contemporary conceptual art. In many contemporary art forms produced in the metropolises of the West, originality, tangibility and authorship is often elusive not to say evasive.

Beyond the often rather technical debate on whether TCEs are susceptible to current IP laws and/or requires a new *sui generis* regime, looms the larger predicament of how to achieve a balance in the global information architecture between a new type of creators rights asserted by Indigenous communities and the dissemination of knowledge in the service of creativity and progress. One of the challenges is to ensure that right holders are rewarded and recognized, and at the same time acknowledging that certain sectors of society such as education and research should benefit from reasonable exceptions. All stakeholders in the process recognize that this balance is essential for the long term preservation of cultural diversity and the advancement of civil society. Maintaining and calibrating this precarious balance is the subject matter of policy development, norm-building and capacity-building programs at WIPO. In the aftermath of UNESCO’s 2003 Convention on the Safeguarding of Intangible Cultural Heritage⁹ special attention has been directed by WIPO and others towards clarifying options and developing IP standards, guidelines and best practices regarding the relationship between IP and intangible cultural heritage¹⁰. This has given rise to a host of questions about existing resources, current

⁸ The Tunis Model Law on Copyright for Developing Countries (1976) provides a waiver to the fixation requirement for folklore.

⁹ For further information, please consult:

http://portal.unesco.org/culture/en/ev.php-URL_ID=16429&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹⁰ Within the broad category of ICH is here understood the promotion, preservation and protection of traditional cultural expressions/expressions of folklore (TCEs) and the related area of traditional knowledge (TK).

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needs and challenges facing a set of potential IP Guidelines on intangible cultural heritage. The purpose of this survey is then to prepare and facilitate a possible drafting process. That is, I seek to identify the current IP resources and institutional experiences in North America, upon which we might be able to build and craft a new set of IP guidelines for intangible cultural heritage.

THE SURVEY QUESTIONS

The formal objective of the survey is to ascertain the practical IP-related experiences and needs of museums, archives and other such institutions, with particular reference to issues of *access* to, *ownership* of and *control* over collections of traditional cultural expressions (TCEs). The survey aims to answer some of the following questions: What kind of IP issues arise for museums, archives, libraries and other repositories of ethnographic materials? To what extent do codes of ethics, protocols of conduct and other normative standards already address these issues? If ethnographic repositories were to take into account the concerns voiced by source communities listed above what policy issues would be at stake from a collecting-holding perspective? What would/could practical measures look like? And finally, would institutions find a compilation of IP-related guidelines, options and best practices useful in addressing the concerns of source communities?

RESEARCH METHODOLOGY

Research methodology is what makes the results of a survey like this credible. Opening the methodology up enable your readers to evaluate the validity of your results and more importantly, the ways in which you reached them. Since this project does not seek access to any confidential information, such as internal procedures or particular experiences that are not intended for public dissemination, the bulk of the information presented here was sought and found via e-research and in the relevant literatures. However, parts of the Questionnaire prepared by WIPO for this project, entailed questions such as what kind of IP issues arise for ethnographic repositories. Answering this type of questions required a combination of on-line research and in-person-consultations with specialized staff at the relevant institutional sites about their handling of IP issues¹¹.

¹¹ Please consult the Annex “Resource Persons Consulted” for an overview of the sample of this survey.

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For the purpose of organizing the information on institutional conduct, I deployed an adapted version of the Questionnaire provided by WIPO¹². Instead of mailing this Questionnaire out to a sample of cultural institutions in North America¹³, I choose to search on-line for the relevant information and single out the premier ethnographic repositories (seemingly setting the standards in North America) for personal consultation: the Museum of Civilisation in Ottawa, the Smithsonian Institution and the Library of Congress both in Washington, D.C.¹⁴. In depth consultations were conducted with the two latter institutions in March and August 2006. These meetings yielded rich information not readily available elsewhere. The Director of the National Anthropological Archives in Washington, DC stressed that for various reasons the Institution did not make their different sets of archival restrictions governing access in specific instances of “culturally sensitive materials” publicly available. And at the National Museum of the American Indian, Washington D.C., the staff told me that they quite deliberately did not put their archival policies on the web, because they preferred to deal with users on a face-to-face basis. Such statements of course illustrate the shortcomings of any on-line survey.

However, combining institutional “IP profiling” based on e-research with follow-up consultations proved a winning match, which produced high quality data. During consultation, the staff would always contextualize different codes and protocols available on-line in light of the nature of their collections, their mission and their primary constituencies. Moreover, in the longer run of this project, building an institutional network of contacts through in-house consultations will ensure that the development of possible IP-guidelines by WIPO will respond to factual institutional needs and concerns. Generally, I met much encouragement and support in conducting this first-of-its-kind survey aiming essentially at sharing institutional experiences and compiling publicly available IP resources. The work was initiated in mid-December 2005 and conducted part time until October 2006. In the course of this time frame, I undertook two consultations with key repositories in Washington, D.C. (March and August), participated in a WIPO side-event for the 5th Session of the Permanent Forum on Indigenous Issues (May) and represented WIPO at a Symposium on Ethnographic Repositories, Intellectual Property and Intangible Cultural Heritage in Washington, D.C. (August). Finally, I co-authored an article with Wend Wendland published in ICOM News no. 2, 2006 (August) garnering interest and awareness about the survey within the global museum community.

¹² Please find this questionnaire in the Annex.

¹³ Which with all likelihood at the very best would have given less than a 10% response rate (normally much lower).

¹⁴ These institutional choices were made in full consultation with the project director Wend Wendland of WIPO.

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THIS SURVEY AND THE WIPO IGC PROCESS

This regional survey presents the results from North America within the framework of a global survey of similar resources from the other UN regions conducted by other WIPO consultants. This global survey is being conducted in tandem with a legal assignment looking at prevailing IP laws, resources and case law of relevance to collection management in museums, archives and other cultural institutions worldwide.

This set of preliminary surveys aspires to lay an empirical foundation for a longer-term possible development of IP-related options, practical guidelines, and best practices for cultural institutions engaged in collecting, inventorying, digitizing, preserving and making accessible intangible cultural heritage materials. Thus, the longer-term objective of the WIPO project is to support cultural institutions in their endeavors to preserve, make accessible and serve educational and scholarly purposes, by developing guidelines for the identification and navigation of IP issues to the extent that they apply in collection management of TK and TCEs.

As such, the work here being undertaken is meant to support and complement the ongoing policy discussions within the WIPO Intergovernmental Committee on Intellectual Property on Genetic Resources, Traditional Knowledge and Folklore (the IGC). In the debate on the objectives and principles for the protection of TK and TCEs within the IGC process a draft is being discussed which would recognize *inter alia* the collective interests in expressions of traditional cultures which are “characteristic” of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be affiliated with the cultural expressions. The draft principles and objectives suggest certain exceptions from protection for the making of recordings and other reproductions of TCEs “for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes”¹⁵. However, this exception might - the draft suggests - be limited by certain public policy considerations. This compilation of institutional codes and conduct may support, effectively frame and advance this kind of policy discussions. Moreover, the IGC has expressed its support for this kind of complementary capacity building work.

¹⁵ WIPO Document: WIPO/GRTKF/IC/8/4/ (TCEs) Comments received on earlier drafts are available at http://www.wipo.int/tk/en/consultations/draft_provisions/comments.html

STRUCTURE OF THE WORK

This report is structured in three main parts: Part (1) comprises a presentation of the results of the survey, i.e. it is meant to answer the question of the available existing resources in North America which could be considered in the drafting process for a new set of IP guidelines. Part (2) is an analysis of the challenges facing such a venture followed by a set of recommendations of how to overcome them. Part (1) on the existing resources is divided into two sections: Chapter I is a presentation of written codes of ethics organized according to the issuing agency; and Chapter II presents a number of institutional profiles regarding IP conduct in alphabetic order. Part (2) is split into Chapter III on the current challenges facing a new set of IP Guidelines followed by Chapter IV which entails a number of recommendations of how to overcome these as well as suggestions to next steps within the WIPO initiative. Finally, the report concludes with a Part (3), which comprises a set of Annexes covering relevant supplementary materials. For instance, Annex I is a Questionnaire used to obtain much of the raw materials for this report. Annex II comprises Consultative IP Resources, which include existing guide books, manuals, standards and other consultative resources¹⁶ on the relationship between IP and ICH. Annex III summarizes all the key persons consulted, while Annex IV covers a consultation with NMAI staff. Annexes V and VI outline some bibliographic resources and list the author's bibliography.

¹⁶ A compilation of a select number of these resources have been made available at the WIPO website associated with this project: <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>
The longer-term intention is to make these resources searchable, structured according to a template and a taxonomy to facilitate a user-friendly interface.

PART 1: EXISTING RESOURCES

CHAPTER I: CODES

INTRODUCTION

The following collection of normative codes includes *codes of ethics, professional standards, institutional guidelines, protocols* and *principles* which have been developed to serve as “best practice” for museums, archives and libraries in Canada and the United States. Throughout this chapter I refer to this cluster of documents as “codes”. They fall in the category of “soft law”, i.e. they take for granted institutional compliance with regulations¹⁷ and existing laws¹⁸ and go beyond these. Thus, from an institutional perspective the objective of these codes is not just to avoid liability, but to foster and maintain public trust. As such, these documents are generally accepted professional standards and principles applicable to the ethical issues faced in common by cultural heritage professionals. They entail no enforcement

¹⁷ The National Park Service's *Museum Handbook* (NPS; 2002), Chapter 2 addresses legal IP issues as they arise in collection management. A comprehensive range of questions are answered such as: “How do I handle unpublished materials?”; “What criteria determine fair use?”; “Are there additional copyright exemptions besides fair use?”; “Why and when must I place copyright notices on copies and copiers?”; “Is fair use different in a networked electronic environment?”; “What do I do if I receive a FOIA [*Freedom of Information Act*] request?”; etc..

¹⁸ The primary legislation in the United States that affects access and use of museum collections or is related to these questions includes:

- I) Freedom of Information Act (FOIA 5 USC 552)
- II) Copyright (17 USC 101-810 et seq. (1988 & Supp. V 1993)
- III) Sonny Bono Term Extension Act of 1998 (PL 105-298, 112 Stat. 2827)
- IV) Visual Artists Rights Act (10 USC 106a)
- V) Digital Millennium Copyright Act (PL 105-304, 112 Stat. 2860)
- VI) Patents (U.S. Constitution Article I, Section 8 and 35 USC)
- VII) Trademarks (15 USC 1051 [a]-[b])
- VIII) Trademark Law Treaty of Geneva, October 27, 1994
- IX) Privacy (5 USC 552a and state laws including Restatement [Second])
- X) Of Torts 652A-652I and the Lanham Act Section [15 USC 1125])
- XI) Publicity (state common or statutory law in almost half the states)
- XII) Obscenity and Pornography (state law as well as federal, including the Child Protection Act of 1984)
- XIII) Defamation, including slander and libel (state law)
- XIV) Archaeological Resources Protection Act (16 USC 470 aa-mm)
- XV) National Historic Preservation Act of 1966, as amended (16 USC 470-470t, 110)
- XVI) Executive Order 13007—Indian Sacred Sites (May 24, 1996)
- XVII) Federal Cave Protection Act of 1988 (16 USC 4301-4309)
- XVIII) National Parks Omnibus Management Act of 1998 (PL 105-391)
- XIX) Changing Case Law
- XX) Indian Arts and Craft Act (1990)
- XXI) Native American Graves Protection and Repatriation Act (1990); NAGPRA addresses four different categories of *tangible* objects: “associated and unassociated funerary objects”, “sacred objects” and “objects of cultural patrimony”. There is currently a debate (Nason 1997) whether NAGPRA could be extended to intangibles: Does a tape with a sacred song fall within the category of “sacred objects”? Could photographs depicting restricted ceremonial activities be claimed with recourse to NAGPRA? However, at this time there is no clear precedence set at the level of case law.

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provisions¹⁹, nor provision for censure in case of violation. Relying exclusively on voluntary compliance may to some constitute a less viable approach. However, public media has often been effective to publicize potential breaches with relevant codes deploying a “name and shame” approach. Such media comments have often demonstrated that the “court of public opinion” carries considerable weight for the cultural heritage sector *ipso facto* ensuring compliance.

ICOM Code of Ethics for Museums (ICEM)²⁰ issued by ICOM²¹

In assessing the range of codes presented in this section, it is important to understand that these codes are situated within a “layer mechanism”; above them we have the international level and beneath them the institutional level. In other words, the codes surveyed mediate between what we could call an “international layer”²² and “institutional policies”. Allow me to exemplify for the sake of clarity: The International Council of Museums (ICOM) was established in 1946, as a non-governmental, non-profit organization, maintaining formal relations with UNESCO²³ and having consultative status with ECOSOC²⁴. The cornerstone of ICOM is its development of ethical guidelines for the museum profession. The *ICOM Code of Professional Ethics* was first adopted in Buenos Aires in 1986, then amended in Barcelona in 2001 and renamed *ICOM Code of Ethics for Museums (ICEM)*, and revised at the General Assembly in Seoul in 2004. The *ICEM* reflects general principles and sets minimum standards of professional practice for museums and their staff. Briefly, the *ICEM* document does two things: (a) it sets the golden universal standard of professional self-regulation; (b) it serves as a baseline for

¹⁹ Two ethical codes do actually open up for the possibility of some kind of sanction or enforcement: The *CMA Ethical Guidelines* and the *Statement on Ethics: Principles of Professional Responsibility*. No enforcement possibilities exist, except for the “name and shame” approach.

²⁰ A new 2006 edition of the *ICEM* was released in the beginning of this year and is available in English, French and Spanish on ICOM’s website, which can be downloaded in PDF or printed in Word format at <http://icom.museum/ethics.html> (Paris: ICOM, 2006). In April, I had a meeting with the chief editor of ICOM News, Ms. Lysa Hochroth in New York, who most kindly entrusted me with this new version. I will be quoting from this edition for this survey.

²¹ The organization is a global umbrella for the world’s museum professionals. Its mission is the “conservation, continuation and communication to society of the world’s natural and cultural heritage, present and future, tangible and intangible.” The organization has more than 21,000 members in more than 145 countries.

²² This international level is comprised of a bundle of Codes issued by International Organizations. The most important in the field of intangible heritage are the following: The International Association of Sound and Audiovisual Archives (IASAA); The Co-Ordinating Council of Audiovisual Archives Associations (CCAAA); The International Council of Museums (ICOM); The International Council on Archives (ICA); The International Council on Monuments and Sites (ICOMOS); The International Federation of Library Associations and Institutions (IFLA).

²³ The ICOM Secretariat is placed in Paris in the same edifice as UNESCO headquarters

²⁴ United Nations' Economic and Social Council

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elevating specific standards, as regional²⁵ or national museum organizations may see fit. As we shall soon see, the Canadian Museum Association's (CMA) *Ethical Guidelines* (1999) departs from the ICEM and tailor this Code to contemporary and particular issues within the Canadian museum community. However, this "Canadian specificity" of the ICEM articulated in the *CMA Ethical Guidelines* cannot be stretched to replace specific institutional museum policies within Canada. The *CMA Ethical Guidelines* do simply not provide the level of procedural detail, which would be appropriate at the institutional level. Generally speaking the codes surveyed here are intended as *frameworks* for institutional policies - not as their substitute - mediating between the international layer and the institutional level. Thus, the codes, which follow, have to be read and understood within this layer structure.

I have divided the codes in three different categories, depending upon the type of organization, which has issued the document²⁶. For each code, I highlight the extent to which it accommodates IP issues broadly conceived, and assess the ways in which the code offers guidance on these. A caveat; I do not claim this section to be an exhaustive survey of the totality of ethical codes in operation in this field in North America. However, I do claim to have identified the most important ones in terms of norm setting. In the next section, I will attempt to couple these normative codes with actual practice through a selective survey of current institutional conduct. In this sense, the present section provides the reader with the normative backdrop to assess the range of illustrative examples and appropriate case studies presented in the next section. The survey does not touch upon the immense literature *about* this wide array of normative documents, e.g. about registration mechanisms²⁷, whether databases warrant copyright protection²⁸, whether legal regimes on tangible cultural property could be extended to intangibles²⁹, whether all forms of intangible cultural heritage needs and warrants protection³⁰, or whether the terms of existing copyrights should be extended³¹.

²⁵ As an illustration of this, the Pacific Islands Museums Association (PIMA) produced and adopted in February 2006 a specialized version of *ICEM* particularly adapted to the values of Pacific Islands museums and cultural centers. Please see Malia Talakai's survey for WIPO (forthcoming) for further details.

²⁶ Please refer to the chart at the opening of this section for an overview.

²⁷ A technical debate outside the immediate scope of this survey

²⁸ A debate turning on the questions whether there is "independent effort and creative originality" involved in the compilations of information resources.

²⁹ The Native American Graves Protection and Repatriation Act (NAGPRA; 1990), stipulates that certain categories of material objects, such as "sacred objects" must be repatriated to the original owner. There is much debate whether e.g. audio-visual material with "sacred songs or performances" falls in the category of "sacred" under this Act. Does the NAGPRA definition of "cultural patrimony" apply to culturally sensitive archival materials? The national NAGPRA committee and state and federal courts have yet to review a case involving documentary materials as opposed to objects. NAGPRA does not reference archival records or traditional knowledge. Some institutions have voluntarily, in the spirit of

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CODES ISSUED BY MUSEUM ORGANIZATIONS

I have been able to identify ten different codes of ethics issued by museum organizations in North America. It is the exception rather than the rule that these documents address IP issues³². To the extent that they do, the IP issue overwhelmingly dealt with is the reproduction of two-or three dimensional items. As we shall see, the Canadian code *CMA Ethical Guidelines* is the only Code specific to the museum sector addressing IP issues other than the specifics of reproduction.

The AAM Accreditation Program (2005)³³ issued by AAM³⁴

The AAM Accreditation Program is a widely recognized seal of peer approval that brings national recognition to a museum for its high professional standards. Since 1971, this program has served as the museum field's primary vehicle for quality assurance, self-regulation, and public accountability. The Program reflects, reinforces, and promotes best practices, institutional ethics, and the highest standards of museum operations. The AAM has a set of Accreditation Standards, which any museum applying for accreditation must meet. The document entitled "The Accreditation Commission's Expectations Regarding Collections Stewardship"³⁵ was adopted in 2004 and effective from 2005.

NAGPRA, offered to repatriate culturally sensitive archival materials as sacred and/or patrimonial objects, including images and recordings.

³⁰ See e.g. Michael F. Brown "The trouble with heritage..." (2006)

³¹ The recent ruling by the U.S. Supreme Court in *Eldred v. Ashcroft* regarding the duration of existing copyright protection has for the time being put this prolific debate to rest. See the ruling at: <http://www.copyright.gov/pr/eldred.html>

³² The following codes of ethics specific to the museum sector in the United States do not mention IP issues at all:

I) The *Code of Ethics for Museums* adopted in 1991 by the American Association of Museums (AAM) Board of Directors and amended most recently in 2000.

II) The *Code of Ethics* adopted by the membership of the Association of Art Museum Directors (AAMD), June 1966, and amended 1971, 1973, 1974, 1991, and 2001.

III) The *Code of Ethics for Registrars* developed by the Registrars Committee of the American Association of Museums (AAM) and adopted in 1984.

IV) The *Code of Ethics and Guidelines for Practice* originally developed in 1961, by the IIC-American Group, now the American Institute for Conservation of Historic and Artistic Works (AIC), amended in 1985 and revised in 1994;

V) The *Ethics Policies for Archaeological & Ethnological Resources* developed by the Museum Store Association (MSM) adopted in 1984 and revised in 1996.

VI) The *Museum Education Principles and Standards* developed by the Committee on Education (EdCom), a Standing Professional Committee under AAM, adopted in 2002 and revised in 2005.

VII) The *Standards for Museum Exhibitions and Indicators of Excellence* developed by the National Association for Museum Exhibition, a Standing Professional Committee under AAM.

³³ <http://www.aam-us.org/museumresources/accred/index.cfm>

³⁴ <http://www.aam-us.org/>

³⁵ [http://www.aamus.org/museumresources/accred/upload/Collections%20Stewardship%20ACE%20\(2005\).pdf](http://www.aamus.org/museumresources/accred/upload/Collections%20Stewardship%20ACE%20(2005).pdf)

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Setting the eligibility criteria of an “Accreditable Museum” for over a hundred institutional evaluations per year, this document reflects quite adequately the nature of standards and practices in American museums. The document’s opening statement reads: “Possession of collections incurs legal, social, and ethical obligations to provide proper physical storage, management, and care for the collections and associated documentation, as well as proper intellectual control.” Moreover, in its review, the Commission expects that: “...the scope of a museum’s collections stewardship extends to both the physical and intellectual control of its property.” This indicates that a major component of the review of any American museum in the future will be its handling of IP issues related to its collection management³⁶.

Ethical Guidelines (1999)³⁷ issued by CMA³⁸

The Canadian Museums Association (CMA) supports the guiding principles of the *ICOM Code of Professional Ethics* (1986), but has in accordance with ICOM’s recommendations also developed a Canadian version of this code³⁹. This code was approved by CMA members at the 1999 Annual General Meeting. The CMA Board of Directors has announced its intention to consider dealing with alleged violations of the *Ethical Guidelines*, however at present it is estimated to take several years to put into effect. Compared with many of its American sister codes, the CMA *Ethical Guidelines* is a more comprehensive and therefore lengthier document. It opens with a Preface and is divided into twelve different sections⁴⁰, of which one section addresses IP issues directly⁴¹, and four more indirectly⁴².

³⁶ This rising awareness of IP issues in American museum governance is also apparent in the document entitled “The Accreditation Commission’s Expectations Regarding An Institutional Code of Ethics”³⁶, which was adopted in 2004 and effective from 2005. In its evaluation, the Commission expects *inter alia* a museum to address the following ethical issues: “Museum management practices (for example: legal compliance, ownership, intellectual property/scholarly research, personnel management).”

³⁷ <http://www.museums.ca/Cma1/About/CMA/ethics/introduction.htm>

³⁸ <http://www.museums.ca/>

³⁹ Please see the note made in the Introduction about the three different layers of codes: international – national and institutional.

⁴⁰ Preface; (A) Introduction; (B) Definitions; (C) Public Trust Role; (D) Museum Governance; (E) Collection Policies; (F) Accessibility and Presentations; (G) Culturally Sensitive Objects and Human Remains; (H) Research, Publications and Field Work; (I) Commercial and Revenue-Generating Activities; (J) Employer/Employee Relations; (K) Volunteers; (L) Conflict of Interest.

⁴¹ Principle (I) Commercial and Revenue-Generating Activities.

⁴² The following principles: (B) Definitions; (C) Public Trust Role; (F) Accessibility and Presentations; (G) Culturally Sensitive Objects and Human Remains.

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The key to any code's accommodation of IP issues could be said to lie in its very definition of a museum collection. The CMA Ethical Guidelines defines museum collections as consisting of "...natural or cultural (i.e. manmade) objects and intellectual property directly owned by the museum, as a public trust, and registered as part of its permanent collection, to be used for the exclusive purposes of preservation, research and presentation to the public." (§B.4; *my underline*) This direct acknowledgement of IP in collections is the exception, rather than the rule in this type of documents. Moreover, the recognition of intangibility is extended further: "Museums may also hold or steward collections on behalf of other parties, and have a stewardship interest in other such properties not directly owned by the museum. These might include heritage sites and cultural landscapes, material that has been acquired with public funds or is communally or publicly owned, and the living traditions, such as ceremonies, of communities served by the museum." (§B.4; *my underlines*) Putting this definition into practice, the Code does state that: "Museums should respect the world view of other cultures or communities, including oral history and traditional knowledge concerning culturally significant objects and human osteological material." (§C.3 Public Trust Role) The document continues to address what in fact is an IP issue: "Information about these culturally sensitive objects may not be readily available, and it is the responsibility of museums to actively seek it out, and to consult with knowledgeable members of the appropriate communities before using the material in any way." (§C.3 Public Trust Role) Under the heading of Accessibility and Presentations, the code urges museums to be: "...especially conscious of copyright requirements, and exercise due diligence in this matter," but leaves the specificity of this provision to the particular intuition. The principle stated in (§C.3) about access to culturally sensitive objects is replicated in a slightly different form in a later section: "Information about certain culturally sensitive objects may not be readily available, and it is the responsibility of museums to actively seek it out from knowledgeable members of the appropriate cultural groups before using the object in any way." (§G; Culturally Sensitive Objects and Human Remains).

IP issues are most directly addressed under the heading entitled "Commercial and Revenue-Generating Activities" in which the sub-section "Reproductions and copyright" outline three principles: (A) Museums must ensure that they have secured the appropriate copyright or license to reproduce before reproducing items for sale, particularly images that are modified or decontextualized." (§I.1); (B) "When material is acquired directly from an artist (or an individual who holds copyright) for the purpose of reproduction, museums must ensure that royalty and reproduction rights are negotiated and documented." (§I.1); and (C) "Replicas, reproductions or items derived from the collections should be

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clearly marked as such and made in a size, material or other manner so as to ensure that the reproduction is not identical with the original. Every effort should be made by museums to avoid any confusion on the part of the buyer.” (§I.1)

Curators Code of Ethics (1996)⁴³ issued by CurCom⁴⁴

The *Curators Code of Ethics* was developed in 1996 by the Curators’ Committee (CurCom), a standing Professional Committee of the American Association of Museums (AAM). Regarding the replication of an object the Code states: “In collaboration with the conservator, curators should evaluate and support only those proposals for commercial replication that guarantee the safety of an object, ensure that the copy will be accurate, and the use appropriate. The extent possible, any object should be marked as a copy in as permanent a manner as possible.”(Section IIIc) It appears that the proprietary rights of the creator(s) of the object to control certain uses of his/her/their work in which copyright subsist are not recognized. However, with reference to the interpretation of an object, the creators’ rights are recognized: “Curators also have responsibility to an object's creators and should make an effort to incorporate accurately and sensitively the creator's perspective and the object's cultural context.” (Section IIIg).

Code of Ethics (2000)⁴⁵ issued by MSA⁴⁶

The Museum Store Association (MSA) adopted a *Code of Ethics* in 1984 and revised it in 2000. Under the heading “Reproductions, Replicas and Derived Products,” the following principle is outlined: “The policy regarding the propriety of manufacturing reproductions, replicas and derived products varies from museum to museum. Their sale in museum stores must be carefully regulated because of the ease with which they can be misconstrued by the public. All reproductions and replicas must be clearly and indelibly identified as such. Museum store managers are obligated to learn and observe applicable copyright laws.” The code further specifies that: “Advertising implying that reproductions are original

⁴³ <http://www.curcom.org/ethics.php>

⁴⁴ <http://www.curcom.org/>

⁴⁵ <http://www.museumdistrict.com/membership/EthicsCode.cfm>

⁴⁶ <http://www.museumdistrict.com/index.cfm>

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works is unethical, misleading and in some instances, illegal. Any representation suggesting that the value of a reproduction appreciates is also unacceptable.”

In conclusion, we may say that the museum sector is beginning to recognize that IP questions do arise in collection management beyond the reproduction of two-and three-dimensional items. Perhaps the most significant indication of this is the professional standards set very recently by the AAM Accreditation Program.

CODES ISSUED BY PROFESSIONAL ASSOCIATIONS

I have found sixteen different codes issued by professional organizations in North America, which address IP issues in different ways⁴⁷. Generally, they gravitate towards the IP issues involved in the production and dissemination of scientific knowledge.

Statement of Ethics (1998)⁴⁸ issued by AAA⁴⁹

This code was developed by the Commission to Review the American Anthropological Association (AAA) *Statements on Ethics* during the period January 1995-March 1997. It applies to the four fields that encompass the academic discipline of anthropology in the United States: cultural anthropology, archaeology, physical anthropology, and linguistics. What unites these sub-disciplines is that they are all considered “field sciences”, meaning that the collection of primary evidence is conducted away from the research institution. The code does not explicitly mention IP issues. However, it does in principle address IP issues with regard to access and ownership of material collected in the field. Here, the whole ethos of the code is that the primary ethical obligations of anthropologists are owed to: “...the people, species, and materials they study and to the people with whom they work” (§III;A;1)⁵⁰. Additionally, anthropological researchers are cautioned to: “...do everything in their power to ensure that their

⁴⁷ The following Codes specific to Professional Associations in North America does not mention IP issues at all:

I) The *Standards for Museum Exhibits Dealing with Historical Subjects* adopted in 2001, by the American Historical Association (AHA). Please see: <http://www.historians.org/press/Museums.cfm>

II) The *Ethical Guidelines for the Historian* originally released in 1986 by the National Council on Public History (NCPH). Please refer to: <http://ncph.org/ethics.html>

⁴⁸ <http://www.aaanet.org/committees/ethics/ethcode.htm>

⁴⁹ <http://www.aaanet.org/>

⁵⁰ <http://www.aaanet.org/committees/ethics/ethcode.htm>

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research does not harm the safety, dignity, or privacy of the people with whom they work, conduct research, or perform other professional activities” (§III;A;2). Two important principles of the code anticipate IP issues: “Anthropological researchers should obtain in advance the informed consent of persons being studied, providing information, owning or controlling access to material being studied, or otherwise identified as having interests which might be impacted by the research” (§III;A;4). In other words, it is necessary that field workers be able to demonstrate to the best of their ability that the information provided and recorded within “field notes”⁵¹ will not be used to endanger or compromise the lives of the people studied. The second principle further specifies the first: “Anthropological researchers must determine in advance whether their hosts/providers of information wish to remain anonymous or receive recognition, and make every effort to comply with those wishes” (§III;A;3).

Statement of Professional Standards and Ethics (2002)⁵² issued by AASLH⁵³

The American Association for State and Local History (AASLH) has developed a *Statement of Professional Standards and Ethics*, which was adopted in 2002. The code recommends that: “Access and limitations of access are governed by institutional policies and by applicable rights of privacy, ownership and intellectual freedom.” Under the heading of “Intellectual Freedom” the following two principles are set out: “Historical scholarship and interpretation depend upon free and open exploration and interpretation of the human experience: (A) At the same time, historical institutions must respect other legal, ethical, and cultural standards regarding individual privacy, human-based research and access to and use of sensitive cultural materials;(B) Historical institutions and their representatives shall respect the rights and authority of individuals and cultures that had no voice in the disposition of those collections related to them.”

⁵¹ Here it might be helpful to provide a definition of “anthropological field notes”. The AAA Executive Board adopted in 2003 a Statement on the Confidentiality of Field Notes. Here “field notes” are defined as:” a hybrid of research ideas, research observations, general thoughts, and even a diary. They are works in progress and are often incomplete notations meant not only to clarify thoughts on situations but also to provide mental stimulation to help recall peripheral aspects of situations.” The Statement goes on to say: “It is extremely important for researchers to be able to maintain the security of their thoughts and ideas, as well as the material gained through the confidence of the people studied or with whom they work”.

⁵² <http://www.aaslh.org/ethics.htm>

⁵³ <http://www.aaslh.org/>

Code of Ethics (1999)⁵⁴ issued by ACA

The Association of Canadian Archivists' (ACA)⁵⁵ code consists of two parts: "Principles," which does not mention IP directly and "Application of Principles", which has two paragraphs on IP: "Archivists should endeavour to inform users of copyright restrictions on records, and inform users that it is their own responsibility to obtain copyright clearance from the copyright owners." (§C4). Nothing new here. More interesting perhaps is the paragraph: "Archivists make every attempt possible to respect the privacy of the individuals who created or are the subjects of records, especially those who had no voice in the disposition of the records" (§C2). This paragraph touches directly on TCEs and other related issues. It should also be mentioned that ACA embodies a Special Interest Section, which lists a forum for Aboriginal Archives (SISAA), which has issued a set of guidelines as well as other relevant documents⁵⁶.

Ethical Standards (2000)⁵⁷ issued by AERA⁵⁸

This Code was adopted in 1992 by the American Educational Research Association (AERA) and revised in 1996 and in 2000. This Code entails six specific "Guiding Standards," of which the Third is entitled "Intellectual Ownership"⁵⁹. However, the set of guidelines advanced here is intended for "educational researchers" specifically to clarify the appropriate credit due for various contributions to scholarly research. As such, the code is of limited interest to this survey.

⁵⁴ <http://archivists.ca/about/ethics.aspx>

⁵⁵ <http://archivists.ca/home/>

⁵⁶ http://archivists.ca/special_interest/aboriginal.aspx

⁵⁷ <http://www.acera.net/aboutaera/?id=222>

⁵⁸ <http://www.acera.net/>

⁵⁹ <http://www.acera.net/aboutaera/?id=175>

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Position Statements (1988)⁶⁰ issued by AFS⁶¹

Founded in 1888, the American Folklore Society (AFS) today is a member organization for scholars, teachers, librarians at colleges and universities, professionals in arts and cultural organizations, and community members all involved in folklore work in different capacities. AFS has developed four documents entitled “Position Statements” of which two of them address IP issues conceived broadly as the predicaments arising from the transmission of traditional knowledge in oral form in a fieldwork situation and the subsequent scholarly processing of this information.

The document entitled *Statement of the American Folklore Society on Research with Human Subjects*⁶² is developed in response to the Code of Federal Regulations, Title 45, “Public Welfare”; Part 46, “Protection of Human Subjects”. This federal regulation is implemented by so-called IRBs (Institutional Review Boards) at universities, museums, archives and libraries. All research projects proposed and conducted at such institutions are subject to IRB approval. The document sets out the nature of folklore research with regard to “informed consent” and “confidentially”. Regarding the first the document reads: “Folklorists inform their consultants about the aims and methods of research. The nature of the relationships that folklorists build with their consultants, however, is such that a written, signed, legally effective document would be inimical to the relationship upon which folklore research is based. Folklorists cannot go as guests into people's home communities, build trust and friendships, and then present a legal document for signature. Nor can they ask for signatures to be witnessed. Informed consent is given orally, and possibly can be recorded on audio- or videotape, but introducing a written legal document into the folklorist-consultant relationship would generally prove an insult to the consultant and bring folklore research to a halt. Institutional review boards should alter or waive the requirements for written informed consent in the case of folklore and other forms of ethnographically based research.”

Concerning “confidentially” the document states that: “Folklorists document folk traditions. They do not destroy such documentation but preserve it in their own files, in archives, and make it known through publications and exhibitions. Folklorists inform consultants of identifiable materials prior to

⁶⁰ <http://www.afsnet.org/aboutAFS/positionstatement.cfm>

⁶¹ <http://www.afsnet.org/>

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publication and exhibition and obtain written consent for the placement of materials in public archives. Folklorists guard the confidentiality of their consultants when such confidentiality is requested. In most, instances, however, consultants want their contributions to research to be made known. They want to be acknowledged for their contributions and be recognized as community artists and experts in local traditions. In such cases, the folklorist acknowledges their contributions in books, articles, exhibition catalogs, and displays. However, the folklorist would keep confidential such information as might place the consultant “at risk of criminal or civil liability or be damaging to the subject’s financial standing, employability, or reputation” and would forewarn the consultant that such information might not be kept confidential were records subpoenaed as part of some legal action.”⁶³

The second relevant Position Paper is entitled *Statement on Ethics: Principles of Professional Responsibility*⁶⁴. This document was developed through many discussions and circulation of drafts, and was approved in its “final draft” form in 1987 by the Executive Board of AFS⁶⁵. The document is divided into five clusters of professional responsibilities towards: (I) Those Studied; (II) The Public; (III) The Discipline of Folklore; (IV) Students; and (V) Sponsors, including own and host Governments. The code addresses the transfer of knowledge in the field context in the following way: “Where research involves the acquisition of materials and information transferred on the assumption of trust between persons, the rights, interests, and sensitivities of those studied must be safeguarded.” (§1; a) The code tackles informed consent in the following way: “The aims of the investigation should be communicated as is possible to the informant.” (§1; b). The issue of confidentiality and disclosure is also accommodated: “Informants have the right to remain anonymous. The right should be respected both where it has been promised explicitly and, as much as possible, where no clear understanding to the contrary has been reached. These strictures apply to the collection of data by means of cameras, tape recorders, and other data-collecting devices, as well as to data collected in interviews.” (§1; c) With regard to misrepresentation and misappropriation the following two principles are acknowledged: “There is an obligation to reflect on the foreseeable repercussions of research and publication on the general population being studied.” (§1; e) and “The anticipated consequences of the research should be

⁶² <http://www.afsnet.org/aboutAFS/humansubjects.cfm>

⁶³ This is most likely informed by a recent legal action against Dr. Sheldon Zink, an anthropologist at the University of Pennsylvania's Center for Bioethics. She was conducting ethnography in the operating room of a hospital when a patient was having surgery done. Lawyers have subpoenaed the anthropologist wanting her to disclose the field notes she recorded during the operation. However, the anthropologist insists on preserving the subject under study’s right to privacy and confidentiality. Please see the following link for full details: <http://www.ahrp.org/infomail/0303/09.php>

⁶⁴ <http://www.afsnet.org/aboutAFS/ethics.cfm>

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communicated as fully as possible to the individuals and groups likely to be affected.” (§1;f). The Code is quite unusual in so far it opens for some measure of sanction in the case of breach: “When folklorists by their actions jeopardize peoples studied, professional colleagues, students or others, or if they otherwise betray their professional commitments, the American Folklore Society, through its State of the Profession Committee, may legitimately inquire into the propriety of those actions and take such measures as lie within its legitimate powers.” (Epilogue).

Statement on Standards of Professional Conduct (2003)⁶⁶ issued by AHA⁶⁷

The *Statement on Standards of Professional Conduct* was developed by the American Historical Association (AHA), adopted 1987 and amended most recently in 2003. Section (4) of the document is entitled “Plagiarism” and reads: “In addition to the harm that plagiarism does to the pursuit of truth, it can also be an offense against the literary rights of the original author and the property rights of the copyright owner....The real penalty for plagiarism is the abhorrence of the community of scholars.” To the extent that IP issues surface in the code, these are seen solely from a disciplinary scholarly perspective.

Code of Ethics (1995)⁶⁸ issued by ALA⁶⁹

This code was adopted in 1995 by the American Library Association (ALA) Council and directly addresses several IP issues. The preamble of the code embodies the entire ethos of the document: “In a political system grounded in an informed citizenry, we are members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations.” (Preamble) This special obligation is codified in three principles of the statement: “We uphold the principles of intellectual freedom and resist all efforts to censor library resources” (Principle II); “We protect each library user's right to privacy and confidentiality with respect to information

⁶⁵ First published in *AFSNews*, February 1988, volume 17, no. 1

⁶⁶ <http://www.historians.org/PUBS/free/professionalstandards.cfm>

⁶⁷ <http://www.historians.org/index.cfm>

⁶⁸ <http://www.ala.org/ala/oif/statementspols/codeofethics/codeethics.htm>

⁶⁹ <http://www.ala.org/>

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sought or received and resources consulted, borrowed, acquired or transmitted” (Principle III); and “We recognize and respect intellectual property rights” (Principle IV). In brief, this code endorses the free flow of knowledge and information to the furthest extent possible under the observance of existing IP laws. It would seem that the balance between protecting user interests and content provider interests is here clearly struck in favor of the former.

Position Statements⁷⁰ issued by CLA⁷¹

The Canadian Library Association *Code of Ethics* (1976)⁷² does not mention IP and is akin in its scope and ethos to its American sister organization. The document entitled *Intellectual Freedom* (June 1974; Amended November 1983 and November 1985)⁷³ similarly underwrites the Enlightenment ideal of public access: “It is the responsibility of libraries to guarantee the right of free expression by making available all the library's public facilities and services to all individuals and groups who need them.” The position statement entitled *Copyright* (1995)⁷⁴ outlines what “a library must be able to do under the Copyright Act” as well as briefs on this Act, such as: “The Copyright Act should be amended to include a definition of 'browsing' as the temporary display of a work on a video screen or other similar device, but not the making of a copy by downloading the work to a user's hard drive or other memory device, for the purposes of creating or retaining a permanent copy in any format.” One looks in vain for any positions on TCEs. The position statement on *Internet Access* (1997)⁷⁵ is quite clear: “To offer Internet access with the fewest possible restrictions”. CLA features no particular mentioning of Indigenous issues, except for a reference to Volume 49, Number 5 (2003) issue of *Feliciter* guest edited by Jim Bruce and Janice Linton “presenting a strong collection of articles and resources related to the provision of services in aboriginal communities.” However, access to this resource is restricted to CLA members⁷⁶.

⁷⁰ <http://www.cla.ca/about/poslist.htm>

⁷¹ <http://www.cla.ca/>

⁷² <http://www.cla.ca/about/ethics.htm>

⁷³ <http://www.cla.ca/about/intfreed.htm>

⁷⁴ <http://www.cla.ca/about/copyrigh.htm>

⁷⁵ <http://www.cla.ca/about/internet.htm>

⁷⁶ <http://www.cla.ca/about/igroups/native.htm>

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***How To Do Oral History* (forthcoming)⁷⁷ issued by COHA⁷⁸**

The Canadian Oral History Association is an educational non-profit association established to encourage and support the creation and preservation of sound recordings which document the history and culture of Canada, as well as developing standards and increase competence in the field of oral history through study, education and research. A forthcoming guide on Legal and Ethical Issues is a work in progress project.

Guide to Preserving Anthropological Records (2006-)⁷⁹ issued by CoPAR⁸⁰

This guide is developed by the *Council for the Preservation of Anthropological Records* (CoPAR). Its website is hosted by the Smithsonian Institution, Washington, D.C. The guide is divided into fifteen sub-sections of which the last one is forthcoming (“Managing Electronic Records”). Each section is authored by individuals and has the format of a bulletin, which makes this guide appear more like a newsletter, than a standardized code. When I discussed the document with the Director of the National Anthropological Archives Robert Leopold, the current co-chair of CoPAR (August 2006), he stressed that the CoPAR document is not a code, nor protocols, but simply notices or bulletins. Three of the bulletins directly address legal and ethical IP issues (“Why Preserve Anthropological Records?”; “Some Ethical Issues to Consider When Depositing Your Records”; “Ethical Use of Anthropological Records”), whereas other sections deal more peripherally with IP issues (“Organizing and Transferring Records”; “Appointing a Literary Executor”). The overall purpose of the document is to assist “anthropologists, librarians, archivists, information specialists and others preserve and provide access to the records of human diversity and the history of the discipline [*of anthropology*].”

The first CoPAR Bulletin entitled *Why Preserve Anthropological Records?*⁸¹ is penned by Sydel Silverman; a major figure in American Anthropology. Her section serves as a sort of preamble to the entire document, sketching the broader issues at stake in the archiving of ethnographic materials and the questions it raises. One of these is “Whose Records Are They,” and Silverman answers: “It is too easily assumed that unpublished materials are the property of the anthropologist who produced or collected

⁷⁷ <http://oral-history.ncf.ca/Howto.html>

⁷⁸ <http://oral-history.ncf.ca/index.html>

⁷⁹ <http://www.nmnh.si.edu/naa/copar/bulletins.htm>

⁸⁰ <http://www.nmnh.si.edu/naa/>

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them, and his/hers to dispose of at will. While this might be true of certain personal papers, it is not the case for records generated in the course of research or other professional activity.” Suggesting that ethnographic field notes are co-authored documents, she argues that this type of records have been written by the field worker, the community who hosted the anthropologist, the funding agencies having enabled the research and the institutions with which the field worker is affiliated. In sum, ethnographic records in the form of field notes are the product of intricate relationships between the anthropologist, the people he/she interacts with, and different institutional contexts. Silverman distils *inter alia* the following normative implication from this notion of ethnographic records: “Taking into account the multiple interests of diverse parties—and above all the interests of the people about whom information is contained in records—means that there are legitimate sensitivities about how these records should be handled.... It is vital, and also possible, to address the problem of materials containing confidential or sensitive information so as to ensure protection of those involved while also recognizing the need for access by researchers, by the social or cultural groups the materials pertain to, and by others with legitimate interests in them.”

Practical implications of this notion of ethnographic field notes are developed further in CoPAR Bulletin 9, entitled *Some Ethical Issues to Consider When Depositing Your Records*⁸². The rationale of this section is that the key to make determinations of ownership and access is the descriptive observations embedded in the ethnographic material itself. Thus, of singular importance is the division of the material into various types. If the data at hand describes ceremonial activities or secret-sacred performances that are of fundamental use to the people studied, such materials may involve collective property rights, namely those of a native community. On the other hand, personal and professional papers: “more clearly pertain to an individual field worker’s intellectual property. They, more than anything else, are the product of your mental activity: the synthesis and interpretation of ethnography or prehistory, the grammar of a language, conclusions about the morphology, demography or other biological aspects of a population”(CoPar Bulletin 9). However, field notes directly pertaining to tangible collections – human remains, archaeological artifacts, ethnographic objects – are “useless” if the “researcher kept the field notes as personal property” (op.cit.). Regarding archival information records, the section notes the important distinction between the right of an institution to possess such records as tangible property and the rights to the intellectual content thereof, which may be vested

⁸¹ <http://www.nmnh.si.edu/naa/copar/bulletin1.htm>

⁸² <http://www.nmnh.si.edu/naa/copar/bulletin9.htm>

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outside the institution. This is of course common knowledge for IP specialists, but nevertheless a point which some heritage professionals without formal legal training might fail to acknowledge. With regard to some categories of ethnographic field data, such as audio and/or video recordings of cultural performances the Guide anticipates that: "...the fieldworker was indeed only the custodian of these materials, or else a distinction may be made between the tape and the transcription, with the researcher becoming the "author" of the transcription."(op.cit.)

With regard to the issues of "who controls access" and "what might be the outcome of such access" the Guide refers to the "fair use" doctrine set forth in U.S. copyright law. This mandate recognizes the right of individuals to use a copyrighted work: "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"(op.cit.). Under Section 108 of the U.S. Copyright Act, archives are allowed to make copies of unpublished ethnographic materials with recourse to the "fair use" clause. However, the CoPAR Bulletin 10 entitled *Ethical Use of Anthropological Records*⁸³ adds the important caveat that it is "not presently clear under the law who actually retains rights to all classes of data. In the future, some of these rights may be determined to reside with the communities of origin or with individuals within those communities" (CoPAR Bulletin 10). This section of the Guide distills the following ethical principles or "cardinal rules" with reference to the intellectual content of ethnographic materials in the form of archival records and any use or interpretation of them by scholars:

- i. Recognize the full intellectual property rights of the originator of the records. This includes full credit in the form of citation for his/her ideas as well as data. In some cases, this may extend to the persons within a community in which a field worker gathered the data--if issues of privacy or confidentiality are not violated. (CoPAR Bulletin 10)
- ii. Respect the context and circumstances under which records were gathered, as well as under which specific comments contained in the records were made. This means being aware of the use of language in former times that may now have different connotations. (CoPAR Bulletin 10)
- iii. Be aware of sensitive materials within records and how to handle them appropriately....All potentially sensitive materials should be discussed with the community and/or individuals or their descendants before deciding on their appropriate use or interpretation. (CoPAR Bulletin 10)

⁸³ <http://www.nmnh.si.edu/naa/copar/bulletin10.htm>

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- iv. Respect and maintain confidentiality, especially if that was part of the original contract between field worker and community/individual. Avoid identifying persons or revealing anything that could potentially injure the originator of the field records and/or his/her subjects or their descendants....communities and/or descendants may be the best judges of these matters. (CoPAR Bulletin 10)
- v. Stay within the guidelines of "fair use" and other restrictions established by copyright law or by the repository. (CoPAR Bulletin 10)

To summarize, we might conclude that the *CoPAR Guide to Preserving Anthropological Records* entails informed knowledge of what ethnographic materials in repositories actually contain: very different categories of material representing a wide array of different sensitivities. The first crucial point of the guide is that questions regarding access, ownership and control should be based on an informed assessment regarding the sensitivity of the information embedded in the archival records. The second point is that in making such an assessment multiple stakeholders should be involved and consulted: (1) the people from whom the records were generated, (2) the discipline of anthropology, (3) other potential users of the records, and (4) the public at large.

Ethical Guidelines for Practitioners (1988)⁸⁴ issued by NAPA⁸⁵

The *Ethical Guidelines for Practitioners* was developed by the National Association for the Practice of Anthropology (NAPA) as a guide for the “practicing anthropologist”⁸⁶. The guidelines address general contexts, priorities and relationships, which should be considered in anthropological practice, but these do not directly touch on IP issues. To the extent that the document in principle addresses IP issues, it is with reference to informed consent by, sensitivities of and recognition for the contributions by “resource persons” to research. Principle (2) of the code states: “To our resource persons or research subjects we owe full and timely disclosure of the objectives, methods and sponsorship of our activities.

⁸⁴ http://www.practicinganthropology.org/inside/?section=resources_ethical_guidelines

⁸⁵ <http://www.practicinganthropology.org/>

⁸⁶ “A practicing anthropologist is a professionally trained anthropologist who is employed or retained to apply his or her specialized knowledge problem solving related to human welfare and human activities. The designation "practicing anthropologist" includes full-time practitioners who work for clients such as social service organizations, government agencies and business and industrial firms. This term also includes part-time practitioners, usually academically based anthropologists, who accept occasional assignments with such clients.” Please see: http://www.practicinganthropology.org/inside/?section=resources_ethical_guidelines

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We should recognize the rights of resource persons, whether individuals or groups, to receive recognition for their contributions or to remain anonymous if they so desire or to decline participation altogether. These persons should be informed of our commitment to the principle of confidentiality throughout the design of research or other activities involving resource persons and should thoroughly investigate and understand all of the limitations on our claims of confidentiality and disclosure.”

Principles and Standards (2000)⁸⁷ issued by OHA⁸⁸

This set of standards was adopted in 1989 and revised in 2000 by the Oral History Association (OHA). The code does explicitly mention IP issues and is concerned with questions of access and related issues arising in the recording of oral history and its subsequent deposit in archives. The document divides the responsibilities of the researcher into three different types of obligations vis-à-vis the following constituencies: (A) The interviewees; (B) The public and the profession; and (C) The sponsoring and archival institutions. Under (A) ten different guidelines are stated of which the following specifies the nature of prior informed consent: “Interviewees should be informed of the mutual rights in the oral history process, such as editing, access restrictions, copyrights, prior use, royalties, and the expected disposition and dissemination of all forms of the record, including the potential for electronic distribution.” (§A;II) This responsibility is further elaborated: “Interviewers should guard against possible exploitation of interviewees and be sensitive to the ways in which their interviews might be used. Interviewers must respect the rights of interviewees to refuse to discuss certain subjects, to restrict access to the interview, or, under extreme circumstances, even to choose anonymity.” (§A;VII) A question here could be whether an interviewer having deposited his or her recording material in a repository actually retains the kind of control necessary to exert the responsibility prescribed here. Under cluster (B) the code reads: “Interviewers should be sensitive to the communities from which they have collected oral histories, taking care not to reinforce thoughtless stereotypes nor to bring undue notoriety to them. Interviewers should take every effort to make the interviews accessible to the communities.” (§B;XI) This recognition of the content providers is stressed further: “Interviewers and oral history programs should conscientiously consider how they might share with interviewees and their communities the rewards and recognition that might result from their work.” (§B;XIV) Under cluster

⁸⁷ http://www.dickinson.edu/oha/pub_eg.html

⁸⁸ <http://www.dickinson.edu/oha/>

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(C) one principle touches on IP rights: “Interviewers and interviewees should receive appropriate acknowledgment for their work in all forms of citation or usage.” (§C;VI)

Code of Ethics for Archivists (2005)⁸⁹ issued by SAA⁹⁰

This Code was approved by the Society of American Archivists (SAA) Council in February 2005. It is divided into principles of which two directly address IP questions. The first is the principle entitled “Access” which reads: “Archivists strive to promote open and equitable access to their services and the records in their care without discrimination or preferential treatment, and in accordance with legal requirements, cultural sensitivities, and institutional policies. Archivists recognize their responsibility to promote the use of records as a fundamental purpose of the keeping of archives. Archivists may place restrictions on access for the protection of privacy or confidentiality of information in the records.” (Section VI) The second IP relevant principle is set forth under the heading “Privacy”: “Archivists protect the privacy rights of donors and individuals or groups who are the subject of records. They respect all users’ right to privacy by maintaining the confidentiality of their research and protecting any personal information collected about them in accordance with the institution’s security procedures.” (Section VII) Overall, the balance struck between users and content providers seems at first glance more equitable than the ALA Code, in so far the SAA Code speaks of “cultural sensitivities” and not only recognizes the privacy of users, but also the privacy of “groups who are the subject of records”.

Statement on Ethical Considerations (1998)⁹¹ issued by SEM⁹²

This Code was developed by The Society for Ethnomusicology (SEM) and approved by their Board in 1998. The general purpose of the document is “to stimulate ongoing dialogue and debate in order to gain increased understanding of ethical perspectives, and thus to respond as necessary to ethical issues in the changing discipline of ethnomusicology.” The document is divided into four sections: “General”; “Field Research”; “Publication”; and “Education”. Most relevant to IP issues is the section on Field

⁸⁹ http://www.archivists.org/governance/handbook/app_ethics.asp

⁹⁰ <http://www.archivists.org/>

⁹¹ http://webdb.iu.edu/sem/scripts/aboutus/aboutethnomusicology/ethical_considerations.cfm

⁹² <http://webdb.iu.edu/sem/scripts/home.cfm>

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Research, which acknowledges: “a particular responsibility to deal ethically with the people and communities that work with ethnomusicologists.” The obligations towards the people under study should include: “informed consent, rights of privacy and confidentiality” (§II;A;2); “Sensitivity to proprietary concerns regarding recorded materials, photographs, and other documentation” (§II;A;4); and “Awareness of the connection between proprietary concerns and economic interests” (§II;A;5). Regarding misappropriation, the code states: “Ethnomusicologists acknowledge that field research may create or contribute to the basic conditions for future unanticipated, possibly exploitative, uses of recordings and other documentation. They recognize responsibility for their part in these processes and seek ways to prevent and/or address misuse of such materials when appropriate.” (§II;B) IP issues are directly addressed in the following paragraph: “Ethnomusicologists recognize the need to be informed regarding copyright and other laws pertaining to the ownership of intellectual and cultural property and to be aware of the potential protections and liabilities of contractual arrangements dealing with depositing, licensing, and distributing musical sound and audiovisual recordings.” (§II;D).

Ethical & Professional Responsibilities (1983)⁹³ issued by SfAA⁹⁴

The *Ethical & Professional Responsibilities* Code was developed by the Society for Applied Anthropology (SfAA) to guide their members about “professional behavior”. We find no acknowledgement in the document that IP issues may arise in the collecting and documentation of indigenous knowledge practices *in situ*. Principle (1) does speak to the obligations of the fieldworker to disclose research objectives to the people being studied and confidentiality should be guarded: “To the peoples we study we owe disclosure of our research goals, methods, and sponsorship. The participation of people in our research activities shall only be on a voluntary basis. We shall provide a means through our research activities and in subsequent publications to maintain the confidentiality of those we study. The people we study must be made aware of the likely limits of confidentiality and must not be promised a greater degree of confidentiality than can be realistically expected under current legal circumstances in our respective nations. We shall, within the limits of our knowledge, disclose any significant risks to those we study that may result from our activities.”

⁹³ <http://www.sfaa.net/sfaaethic.html>

⁹⁴ <http://www.sfaa.net/>

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Principles for the Conduct of Research in the Arctic (1990)⁹⁵ issued by SSTF

This document was developed by the Social Science Task Force (SSTF) in response to a recommendation by the Polar Research Board of the National Academy of Sciences and at the direction of the U.S. Interagency Arctic Research Policy Committee. It addresses the need to promote mutual respect and communication between researchers and “northern residents” and does touch upon IP issues, but not in any elaborate manner.

CODES ISSUED BY INDIGENOUS ORGANIZATIONS

We're not looking at an issue paper by paper or record group by record group. It's a whole system of a way of life. Our knowledge systems don't make sense without spirituality. We are asking for respect for a system of knowledge.

Kim Lawson (Heiltsuk Nation)⁹⁶

Protocols for Native American Archival Materials (2006)⁹⁷; issuing agency to be determined⁹⁸

In April 2006, a group of nineteen archivists, librarians, museum curators, historians, and anthropologists representing fifteen Native American, First Nation, and Aboriginal communities convened at Northern Arizona University. The objective was to identify “best professional practices” for the “culturally responsive⁹⁹ care and use of American Indian¹⁰⁰ archival material held by non-tribal organizations”¹⁰¹. This meeting produced a document entitled *Protocols for Native American Archival*

⁹⁵ <http://www.ankn.uaf.edu/IKS/conduct.html>

⁹⁶ The Heiltsuk Nation is comprised of the descendants of the Heiltsuk Tribal Groups; *'Isdaitxv, Uyalitxv, Unwitbitxv, 'Qvuqayaitxv, Xixis, and 'Kvial'itxv* who reside in Waglisla (Bella Bella) on the Central Coast of British Columbia, Canada. (for more information see <http://www.heiltsuk.com/>)

⁹⁷ <http://www.firstarchivistscircle.org/protocols.html>

⁹⁸ Credit possibilities are the following: First Archives Circle, Native American Archives Roundtable of the Society of American Archivists, American Indian Library Association.

⁹⁹ *Culturally responsive*, here refers to “tailored actions which demonstrate awareness and appreciation of the needs of a particular group, community, or nation.”

¹⁰⁰ *Native American* here refers to “Indian (First Nations), Eskimo (Inuit), and Aleut individuals and communities in the United States and Canada as well as to Native Hawaiians.”

¹⁰¹ <http://www.firstarchivistscircle.org/protocols.html>

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Materials which was released in June 2006¹⁰². In its present draft state the document is intended to be a work in progress “subject to revision and enhancement”.¹⁰³

The code asserts that “Most archivists and librarians in the United States and Canada are well-intentioned and want to “do the right thing” when it comes to culturally respectful care and use of Native American archival materials.”¹⁰⁴ The code is issued to answer the kind of questions, which arise in the management, preservation, and transmission of Native American archival resources: “Who do you ask? How do you know? What if “I can’t do that!” The document directly addresses “Native American Intellectual Property Issues” among a host of related concerns such as “Accessibility and Use”; “Culturally Sensitive Materials”; “Providing Context”; and “Copying and Repatriation of Records to Native American Communities”.

The whole ethos of the document is one of asserting Native American rights and customary laws vested in Native American “sovereign governments” *en pair* with western judicial thought vested in States. Moreover, the document strives to emphasize multiple curatorial perspectives on archival materials, although ultimately stressing “a common commitment to the preservation and dissemination of knowledge”¹⁰⁵. The overall architecture of the document is unusual in so far each one of the ten key issues are addressed with two separate sets of “guidelines for action”; one set for “Archives and Libraries” and another set for “Native American communities”. However, three of these key issues (“Accessibility and Use”; “Culturally Sensitive Materials” and “Native American Intellectual Property Issues”) entail only guidelines for “Archives and Libraries”, not for “Native American communities”. In the Tenth concluding issue (“Awareness of Native American Communities and Issues”) the guidelines are collated. This unorthodox structure of the document speaks directly to its intention of encouraging collecting institutions and source communities to build relationships, open new lines of communication and establish mutually beneficial practices through dialogue and cooperation. By way of such an approach: “institutions and communities can identify win-win solutions to common problems and develop new models for shared stewardship and reciprocity or for the appropriate transfer of

¹⁰² First draft released June 19th 2006

¹⁰³ The document mentions three archival institutions which have served as model for the drafting of the Protocols: (1) The Seneca National Archives; (2) The Caretakers of the Old Words; and (3) The Mashantucket Pequot Archives and Special Collections. Regarding the first two mentioned, I found no URL. For the last mentioned, please see site: [http://www.pequotmuseum.org/Home/LibrariesArchives/ARCHIVESSPECIALCOLLECTIONS/GeneralInformation.h](http://www.pequotmuseum.org/Home/LibrariesArchives/ARCHIVESSPECIALCOLLECTIONS/GeneralInformation.htm)
[tm](http://www.pequotmuseum.org/Home/LibrariesArchives/ARCHIVESSPECIALCOLLECTIONS/GeneralInformation.htm)

¹⁰⁴ <http://www.firstarchivistscircle.org/protocols.html>

¹⁰⁵ <http://www.firstarchivistscircle.org/protocols.html>

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responsibility and ownership for some materials.”¹⁰⁶ The code is a comprehensive twenty-six-page document. Here I will highlight what is novel in the IP approach compared with existing codes in the field.

Collecting holding institutions are *inter alia* encouraged to take a pro-active approach and “Inform Native communities about collections of relevant materials”. Source communities are encouraged to “Publicize who may speak for them, by informing archives and libraries of the individuals who will act as community representatives for these matters”. This responds to the common critique that in many cases it is not clear who has the authority to speak for the community¹⁰⁷.

Regarding multiple perspectives on curatorial approaches, the code recommends institutions to: “avoid artificially prolonging the life cycle of sensitive documentary material...such as a photograph of a sacred ceremony, or object, or culturally sensitive documentation of a burial”. This is likely to meet contention, as it conflicts with the primacy of preservation, which is an overriding concern for most cultural heritage institutions. However, the recommendation that institutions should “respect traditional and customary practice” and that “Some documentary collections may need to be kept together based on content, rather than segregated by format” is perhaps easier to accommodate for museums and archives. In fact, it is already practiced by e.g. the *National Museum of the American Indian*, part of the Smithsonian Institution situated in Washington, DC (please see Chapter 2; p. 81-85). On the other hand, the code prescribes that source communities: “must continually find ways to come to terms with relatively new Western archives concepts and practices.”

Regarding access and use, institutions are recommended: “to be wary of providing access or use until tribes can be consulted”. However, if “a community fails to respond to a good-faith effort to request consultation” then “a collecting institution may proceed with providing access to and use of material as it deems appropriate”. The thesaurus of an institution is key to access and use, since it mediates the user interface. Here the *Protocol* recommends institutions to: “work with community representatives to revisit indexing terminology...and classification schemes”. Source communities are encouraged to: “Assist, based on consultation reviews, in providing preferred language, in identifying people, places, and events, and in sharing additional context for archival materials.”

¹⁰⁶ <http://www.firstarchivistscircle.org/protocols.html>

¹⁰⁷ Interview with staff at the American Folklife Center: Michael Taft said that the issue was often “Who is a tribal leader? The Cherokee of Oklahoma cannot agree with the Cherokee in North Carolina about who is in charge” (AFC 280306)

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On the issue of “Native American Intellectual Property”, the code makes a case for a *sui generis* regime declaring that: “Existing copyright legislation does not address issues of significance to Native American communities such as: community ownership of works and management of rights; community interests in public disclosure of religious or sensitive information; protection of older or ancient works (e.g., rock art); the antiquity and accumulative nature of traditional knowledge; and the protection of oral traditions, songs, and other culturally sensitive intangible property. In some cases, Native American knowledge has been copyrighted by outsiders without appropriate permissions or approval.” As mentioned above, this section only contains guidelines for institutions, which in line with the *sui generis* approach are encouraged to: “Recognize that the “right of possession”¹⁰⁸ to some Native American materials may be held by communities of origin...Only consultations with culturally affiliated communities can determine whether or not materials in archives are there illegally or unethically.” Such determinations may result in what is later referred to as “knowledge repatriation” in the code. Moreover, institutions are recommended to: “Consider the application of moral rights¹⁰⁹ to protect Native American cultural and intellectual property.” In other words, what is in fact suggested here is a breach from the conventional approach of common law systems to protect intellectual property.

Closely related to IP issues is the section entitled “Native American Research Protocols”, which addresses the development of formal community research protocols “to defend against misappropriation and abuse of traditional knowledge.” Such protocols should cover the following range of topics: “intellectual property rights, ownership of data and subsidiary products, research controls, risks, informed consent, community rights, access, right of review, confidentiality, deposit with a tribally-designated repository, preference in employment and training, and safeguarding individual and communal privacy.” Institutions are encouraged to familiarize themselves with such protocols in order to understand “tribal concerns”, since “A community will often endorse a project which complies with tribal guidelines.” On the other hand, communities are encouraged to: “Provide archives and libraries with copies of their research protocols.”

¹⁰⁸ According to SEC. 2.13 in *Native American Graves Protection and Repatriation Act* (Public Law 101-601), the “Right of Possession” term means “possession obtained with the voluntary consent of an individual or group that had authority of alienation.”

¹⁰⁹ The Code explicitly mentions the “European notion of the *Droit Moral*...which is perpetual.” The Code goes on to state that: “American creators of visual art are entitled to the right of attribution and integrity under 17 USC Section 106A, known as the Visual Artists Rights Act of 1990. Other moral rights of authorship recognized by some nations include: the right of disclosure, the right to withdraw and retract, and the right to reply to criticism.”

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In the concluding section “Awareness of Native American Communities and Issues”, the guidelines are collated and both institutions and source communities are recommended to: “Become aware of issues surrounding the collection, ownership, preservation, handling, access, and use of physical and digital American Indian archival resources held in tribal and non-tribal repositories.” In conclusion, we may say about this remarkable document, that the key question which reverberates throughout the text is this: Who is the archival information about source communities intended to serve? In its present draft state, the code places the source communities as the primary stewards of this material, reclaiming it from the public domain.

Guidelines for Research (1993)¹¹⁰ issued by ANKN¹¹¹

This document was adopted by the Board of Directors of the Alaska Federation of Natives (AFN). The policy document entails a set of research principles to be conveyed to researchers who plan to conduct scholarly work among Alaska Natives. Several of the principles touch upon IP issues, but add nothing new to what has already been elaborated on.

Guidelines for Respecting Cultural Knowledge (2000)¹¹² issued by ANKN¹¹³

This set of guidelines was adopted by the Assembly of Alaska Native Educators (AANA) and published by the Alaska Native Knowledge Network (ANKN)¹¹⁴. The document addresses issues of concern in the documentation, representation and utilization of traditional cultural knowledge as these activities relate to a wide array of stakeholders. The document is divided into ten clusters of guidelines opening with a “Preface” and concluding with “General Recommendations”. Each of the ten sections addresses a distinct group of practitioners: (1) Native Elders; (2) Authors and Illustrators; (3) Curriculum Developers and Administrators; (4) Educators; (5) Editors and Publishers; (6) Document Reviewers; (7) Researchers; (8) Native Language Specialists; (9) Native Community Organizations; and the (10) General Public.

¹¹⁰ <http://www.ankn.uaf.edu/IKS/afnguide.html>

¹¹¹ <http://www.ankn.uaf.edu/index.html>

¹¹² Please see the content at: <http://www.ankn.uaf.edu/publications/knowledge.html>

¹¹³ <http://www.ankn.uaf.edu/index.html>

¹¹⁴ <http://www.ankn.uaf.edu/index.html>

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Dene Cultural Institute Guidelines (1991)¹¹⁵ issued by DCI¹¹⁶

The Dene Cultural Institute (*Yamózhá Kíé Society*) (DCI) was established in 1987. The Institute has focused on: "...coordinating research and educational activities that protect and promote Dene culture, languages, spirituality, heritage, tradition and customs." The DCI has issued a set of detailed protocols for a community-managed and controlled research projects on Dene traditional knowledge¹¹⁷ which directly address intellectual property rights.

Protocol for Research, Publications and Recordings (2006-)¹¹⁸ issued by HCPO¹¹⁹

The Hopi Cultural Preservation Office (HCPO) has developed a policy and research protocol addressing IP issues, as well as two background papers on some of the particulars of Hopi IP. The first background document entitled "Respect for Hopi Knowledge"¹²⁰ juxtaposes Western and Hopi knowledge cultures; the Enlightenment notion of the courage and "right to know" versus the Hopi notion of the "integrity of specific cultural knowledge" reserved for certain privileged tribal members. Put simply, it comes down to "freedom of inquiry" versus "Hopi privacy". The second background document is entitled "Intellectual Property Rights,"¹²¹ which lists a range of previous violations and expropriations of the "intellectual property rights of Hopi". Some of these are: "...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

¹¹⁵ The full title of this Code is: *Guidelines for the conduct of participatory community research to document traditional ecological knowledge for the purpose of environmental assessment and environmental management*. The version which appears at the site is lightly edited and reformatted:http://www.idrc.ca/en/ev-28709-201-1-DO_TOPIC.html

¹¹⁶ <http://www.deneculture.org/>

¹¹⁷ For more details please consult the article "Dene Traditional Knowledge" by Martha Johnson at:

<http://www.carc.org/pubs/v20no1/dene.htm>

¹¹⁸ <http://www.nau.edu/~hcpo-p/hcpo/index.html>

¹¹⁹ <http://www.nau.edu/~hcpo-p/index.html#table>

¹²⁰ http://www.nau.edu/~hcpo-p/current/hopi_nis.htm

¹²¹ http://www.nau.edu/~hcpo-p/current/hopi_ipr.htm

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potters have been duplicated by non-Hopis. Katsinas dolls¹²² have also been duplicated from Hopi dancers seen at Hopi.”¹²³ The document explains that: “Through these thefts, sacred rituals have been exposed to others out of context and without Hopi permission.” Over time, this type of misappropriations of restricted knowledge never intended for the public domain and large-scale consumption then feed back into the Hopi community itself reaching younger Hopi age classes and members of other Hopi clans¹²⁴ for whom this category of information is off-limits. Needless to say, over time this traffic in restricted knowledge threatens the integrity and sustainability of the entire Hopi knowledge system.

To prevent this type of misappropriations, the Hopi Cultural Preservation Office (HCPO), has issued a policy and research protocol. The document is divided into three sections entitled “Policy”; “Definitions” and “Procedure” striking a balance between abstract principles and concrete actions. The overall objective stated in the Policy section is that: “the Hopi Tribe shall be consulted by all projects or activity involving Hopi intellectual resources and that such project or activity be reviewed and approved by the Office of Historic and Cultural Preservation through a permitting process or other contractual agreement.”¹²⁵ To implement the announced objective, the Procedures stipulate that: “All projects or activity must be submitted in a proposal format and shall address, at a minimum, the following: (1) Intent and Benefit to the Hopi Tribe; (2) Risks; (3) Tribal Consent; (4) Right to Privacy; (5) Confidentiality; (6) Use of Recording Devices; (7) Fair and Appropriate Return; (8) Hopi Preference in Employment and Training; (9) Review of Product or Research Results/Study; (10) Ownership”¹²⁶.

¹²² Katsina dolls are called *tithu* by the Hopi and refer to small brightly painted wooden dolls embodying supernatural beings believed to visit Hopi villagers during half of the annual cycle. *Tithu* possess the power to exercise control over the weather, help in daily village life and sanction breaches of Hopi customary laws. Generally speaking, *tithu* function as mediators between the ancestors and the living. Please see the following site for a full explanation: <http://www.nau.edu/~hcpo-p/arts/kachina.htm>

¹²³ http://www.nau.edu/~hcpo-p/current/hopi_ipr.htm

¹²⁴ Hopi clans are constituted by matrilineal genealogies. Each of the present 34 contemporary Hopi clans has a common ancestor, who is part of that clan's creation story. Today, clans include more than one family and have developed into many lines of ancestry. Several clans reside within each village, but they are each distinct from one another. For more information please consult: <http://www.nau.edu/~hcpo-p/culture/clans.htm>

¹²⁵ <http://www.nau.edu/~hcpo-p/hcpo/index.html>

¹²⁶ For more details set forth under each of the Hopi requirements, please consult: <http://www.nau.edu/~hcpo-p/hcpo/index.html>

Research principles for community-controlled research (n.d.)¹²⁷ issued by ITK¹²⁸

The Inuit Tapiriit Kanatami (ITK) was founded in 1971 and incorporated in 1972. It operates primarily as an advocacy organization representing four Inuit regions: Nunatsiavut (Labrador), Nunavik (northern Quebec), Nunavut, and the Inuvialuit Settlement Region in the Northwest Territories. A query regarding the twelve guiding principles below did not yield any response.

- i. Informed consent should be obtained from the community and from any individuals involved in research.
- ii. In seeking informed consent the researcher should at least explain the purpose of the research; sponsors of research; the person in charge; potential benefits and possible problems associated with the research for people and the environment; research methodology; participation of or contact with residents of the community.
- iii. Anonymity and confidentiality must be offered and, if accepted, guaranteed except where this is legally precluded.
- iv. Ongoing communication of research objectives, methods, findings and interpretation from inception to completion of project should occur.
- v. If, during the research, the community decides the research is unacceptable, the research should be suspended.
- vi. Serious efforts must be made to include local and traditional knowledge in all stages of the research including problem identification.
- vii. Research design should endeavour to anticipate and provide meaningful training of aboriginal researchers.
- viii. Research must avoid social disruption.

¹²⁷ http://www.idrc.ca/en/ev-28709-201-1-DO_TOPIC.html

¹²⁸ <http://www.itk.ca/>

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- ix. Research must respect the privacy, dignity, cultures, traditions and rights of aboriginal people.
- x. Written information should be available in the appropriate language(s).
- xi. The peer review process must be communicated to the communities, and their advice and/or participation sought in the process.
- xii. Aboriginal people should have access to research data, not just receive summaries and research reports. The extent of data accessibility that participants/communities can expect should be clearly stated and agreed on as part of any approval process.

Four Policy Papers (2004)¹²⁹ issued by SHI¹³⁰

Established in 1981, the Sealaska Heritage Institute (SHI) is a regional Native non-profit organization founded by and for the Tlingit, Haida and Tsimshian people of Southeast Alaska. The SHI acts on cultural and educational issues on behalf of Sealaska Corporation, a federally recognized tribe. The Institute's mission is to "perpetuate and enhance Tlingit, Haida and Tsimshian cultures"¹³¹ by way of preserving, promoting and maintaining the cultures and heritage of the Tlingit, Haida, and Tsimshian peoples of Southeast Alaska. Part of this mandate encompasses making knowledge about Southeast Alaska Native Peoples available to a broader audience through publications, programs, and other means. SHI has developed four policy documents of which three are of direct relevance to IP issues.

The *Cultural and Intellectual Property Rights Policy*¹³² addresses the subject matter of Tlingit, Haida and Tsimshian, crests, songs, stories and names. This type of TCEs are considered to be "real property"¹³³ and subject to "defined protocols" informed by "traditional laws" which "may in some instances conflict with western copyright and public law". The Code clearly states exempt status for "cultural, educational or scientific use", but any use must be "accompanied with a statement that acknowledges

¹²⁹ The relevant policy documents have not been publicized, but are at the courtesy of SHI accessible at:

<http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

¹³⁰ <http://www.sealaskaheritage.org/index.htm>

¹³¹ <http://www.sealaskaheritage.org/about/mission.html>

¹³² <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

¹³³ By "real property" is not exclusively meant immovable cultural property in a conventional judicial sense such as cave pictographs, cliff petroglyphs, buildings and other non-moveable architectural edifices, sacred lands or special grounds for wildlife, but instead what *de facto* constitutes *óow* ("clan property") from an indigenous customary perspective.

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that the information is the cultural and intellectual property of the Southeast Alaska Indians or the appropriate clan.”

The policy document entitled *Photography (Including Video and Film) Policy*¹³⁴ is much more specific in subject scope than the above. The backdrop of the document is the biennial Celebrations and other cultural events taking place in and around Juneau. These events include *inter alia* Native Artist Gathering, a Juried Art Show, three days dance festival, handling shamanic objects, report on DNA studies and DNA testing, seaweed contest, baby parade and canoe racing. Even though these types of performances are non-ceremonial and non-religious, many dancers wear Native regalia with clan crests and perform dances which constitute specific clan ownership. In fact, the Director of the SHI Rosita Worl told me that the protection of intellectual property was a major underlying issue of all these events¹³⁵. Here, it is important to contextualize “protection”, which is not solely intended to prevent misappropriations and/or commercialization by outside media and photographers, but also to prevent misappropriation and/or commercialization by other clans¹³⁶. Basically, the purpose of this policy paper is to limit the commercialization of the biennial Celebrations, while permitting appropriate personal photography. The method to obtain this objective is through registration: “Any individual, organization or company wishing to engage in still photography, video-taping or filming for broadcast or public news dissemination by any means on or in property used for SHI Celebrations must obtain permission by registering in advance with an appropriate SHI official. By registering, news agencies agree not to reproduce their work in any forum other than print or broadcast news, and further agree not to sell their work for any non-news use.”¹³⁷

The document entitled *Protection of Sacred and Historical Sites, Human Remains and Cultural Property Policy*¹³⁸ is divided into ten different paragraphs, of which number nine explicitly mentions IP: “Southeast Alaska communities and tribes should enact and implement Cultural and Historical Ordinances and Plans that incorporate the protection of sacred and historical sites, cultural property and intellectual

¹³⁴ <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

¹³⁵ E-mail correspondence with Dr. Rosita Worl dated May 15th 2006.

¹³⁶ Rosita Worl states: “My clan is purchasing an ad in our program guide because we are concerned that many dance groups are signing our songs without acknowledging that they are owned by our clan. The public may not actually witness all the behind the scenes activities associated with attempting to protect our at.óow or clan ownership.” (Electronic correspondence with Rosita Worl dated May 15th 2006). Rosita Worl’s point speaks to the need to develop a more precise notion of “misappropriation”. This need was also identified in the intervention advanced by the US Delegation at the 9th IGC WIPO session (Peggy Bulger’s statement (AFC)).

¹³⁷ See the document entitled “Photography Policy” under Sealaska Heritage Institute, Alaska, USA, at: <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

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knowledge of the aboriginal population.”¹³⁹ This paragraph and indeed the ethos of the entire document echoes the epigraph drawn from the Heiltsuk Nation that IP cannot be cut out from an overarching knowledge-belief system. It follows that IP is difficult to single out for purposes of specific protection. This is of course a general challenge in the encounter between Western jurisprudence and Native world views, which WIPO could overcome by listening carefully - as they already do - to indigenous voices.

One possible way forward here is to be as specific and precise as possible. The SHI document entitled *Rights and Permissions Policy*¹⁴⁰ represents a step in this direction. It sets forth very concise guidelines for the subject matter under protection, the deployment of the “fair use” doctrine, review process of requests, stipulations for permissions granted, rules for citation and appropriate acknowledgement, and the calculation of fees and compensations. The document is pragmatic and concrete. Basically, it allows for cultural and educational use of clan property (including, but not limited to songs, names, stories, and crests) with the permission of a clan member and with full acknowledgment by the users of appropriate clan ownership.

PRELIMINARY CONCLUSIONS

Normative codes governing intellectual property all strike some sort of precarious balance between protecting the rights entailed to creators – in an effort to promote and incite further creativity from them – and the rights of the public to benefit from and consume those endeavors – in an effort to advance, educate and develop society as a whole. The institution of intellectual property calibrates this balance differently, depending on particular jurisdictions. The conventional claim is that civil law systems lean more towards protecting the moral rights of authors (*droit d’auteur*), whereas common law systems protect the rights of the producers (*copyright*). This survey of Canada and the United States seem to indicate that this distinction carries some weight, insofar Canada’s legal system is a *mélange* of civil and common law, whereas the United States is thoroughly based on common law.

¹³⁸ <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

¹³⁹ See the relevant document under Sealaska Heritage Institute, Alaska, USA, at: <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

¹⁴⁰ See the relevant document under Sealaska Heritage Institute, Alaska, USA, at: <http://www.wipo.int/tk/en/folklore/culturalheritage/predatabase.html>

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With regard to the survey of the museum codes, this distinction between civil and common law systems transpires in the material in so far the artist has an “exhibition right”¹⁴¹ in Canada akin to the *droit d’auteur* notion protecting the integrity of the exhibited piece from the artist’s perspective, which is not found in the US codes. Beyond this apparent difference, the codes issued by the museum sector generally focus on the reproduction of two-and three-dimensional items in their collections. Most major museum institutions have a “Rights and Reproductions Office” in-house, which needless to say complies with existing IP laws and makes some revenue. However, the IP questions which may arise related to the access, ownership and control of the *knowledge* about an object’s provenance¹⁴² and its provenience¹⁴³, its meaning, use and significance, as well as the intellectual creative efforts which went into its conception, do not surface in these codes. This type of knowledge about a museum object is embodied in primary and secondary documentation records held by the repository, as well as in the form of orally transmitted knowledge in the source communities. Thus, we may conclude that the surveyed codes issued by museum organizations fail to acknowledge what we perhaps could refer to as the “fourth dimension” of museum objects. This resonates with Daniel Papuga’s conclusion, President of ICME, who after having surveyed a range of Ethical Codes in response to Wend Wendland’s presentation at the annual ICME conference (2005), concluded: “After looking through these various ethical codes, I still have gotten little help in learning how we might address the intellectual property rights of groups contra individuals, or of how the existing material in our collections might ethically be exhibited or used. How can we 'do the right thing' in respecting intellectual property rights here?”¹⁴⁴ The museum codes surveyed here offer little substantial guidance on these vexing dilemmas. This of course reflects a long history in the museum profession of preoccupation with the *tangibility* of material collections. However, ICOM’s recent endorsement of the UNESCO 2003 Convention, as well as recent released codes indicates an awakening recognition in the museum community of the *intangible* aspects of collections.

Regarding the cluster of codes issued by the Professional Organizations, we find in contrast to the museum sector that the intangible aspects of ownership are recognized. The CoPAR code phrases it

¹⁴¹ Personal communication, John Mactivity, Director of the Canadian Museum Association: “In Canada it is more complicated than in most other countries as we have what is called the "exhibition right" which gives to artists or their copyright holders the right to "exhibition" of the works owned by artists or copyright holders [remember copyright is generally a property right which can be transferred to others].

¹⁴² Ownership history

¹⁴³ Original context, or *in situ* context

¹⁴⁴ Please see Papuga’s entire paper at: <http://biblioteknett.no/alias/HJEMMESIDE/icme/icme2005/papuga.pdf>

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quite clearly and explicitly: “Valid titled to an object, a photograph and a catalogue record does not imply that copyright subsists in the physical possessor”. According to many of the codes issued by Professional Organizations, copyright will subsist in the institution that holds the recording rather than be held by the people who were recorded. However, the tendency here is toward recognizing that the rights or interests of a “performer” or his/her community versus those of the “recorder” should be taken into account. Again, the *CoPAR Guide to Preserving Anthropological Records* deserves to be singled out, because it achieves a more detailed understanding of the subject matter in question here: That ethnographic materials in repositories are composed of very different categories of material representing a wide array of different sensitivities.

With regard to the codes issued by the Indigenous Heritage Organizations, one far-reaching effect of NAGPRA has been its power to provide a new vocabulary for the intangible elements of Native cultures – stories, religious beliefs, music, art styles, and biological knowledge. These, of course, are not directly affected by NAGPRA, but the law’s success in reframing relations between Native Americans and museums in the U.S. has made it an obvious model for emulation by many Indigenous constituencies. This can be seen in many of the codes issued by Indigenous Heritage Organizations.

If we move beyond sector specific perspectives and look at the production of soft law in North America in a global perspective, it could be said that especially the United States provides a plethora of ethical codes and professional standards, partly because most of its museums, archives and libraries are non-governmental and part of the “non-profit sector”. As such they set their own operating procedures and develop their own professional codes. The AAM launched its first Code of Ethics in 1925¹⁴⁵, so looking at the history of ethical codes in the U.S. we may conclude that the cultural heritage sector has a long history of entertaining the possibility of setting their own operating standards.

Generally, there is no single set of standards which immediately emerges as “best practice”, but of course a lot of convergences and links between the different codes surveyed here. Museum curators, archivists and librarians have been trained to champion intellectual freedom and unrestricted access to their collections within the public domain. The founding rationale of this type of institutions was the Enlightenment ideal of a public domain defined as the free and unlimited inquiry for every individual into whatever subject. These institutions serve that purpose by providing access to everyone and

¹⁴⁵ AAM's first code of ethics was published in 1925 as *Code of Ethics for Museum Workers*.

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holding their collections in trust for the public. Such institutions may be troubled by the notions of knowledge and information which surface in the codes issued by the Indigenous Heritage Organizations. Collective ownership of knowledge and restricted circulation of knowledge for privileged elders seem to run against the founding rationale of museums, archives and libraries. However, the Library of Congress – probably the institution most explicitly perpetuating Jefferson’s vision of the European Enlightenment in the U.S. – is a repository holding several collections which carry restricted access. To mention just one: The Kissinger Papers are classified material and cannot be accessed until 2025. Thus, Native perspectives about collections being too sensitive to be accessed by the general public are perhaps not inconceivable for seminal institutions in Western metropolises. On the other hand, Native communities may also need to achieve an appropriate balance of what type of ethnographic materials and traditional knowledge which warrants restrictions, and what does not.

CHAPTER II: CONDUCT

INTRODUCTION

To what extent do IP issues arise, in practice, as institutions strive to achieve their objectives? Do cultural heritage institutions already have IP-related practices, policies and protocols to address such issues? To what degree do IP options and considerations form part of the preservation efforts, educational programs and revenue-raising strategies of institutions? To what extent have institutions already taken into account concerns of source communities related to the protection against misappropriation of certain ethnographic materials as well as the “cultural sensitivity” of sacred or esoteric TCEs considered to be in the public domain? In this section, I attempt to look at the institutional responses to some of these questions at North America’s premier ethnographic repositories. This is not to be construed as an exhaustive survey. On the contrary, I have quite deliberately targeted single institutions, which have distinguished themselves as potential “models for best practice” in terms of providing access to their collections in a digital age paired with responsiveness to concerns raised by source communities.

Each institution has been dealt with according to an adapted version of the Questionnaire¹⁴⁶ provided by WIPO. However, I have not sought to impose any categorical scheme on a wide array of different institutions. Making an elementary categorical distinction between museums, archives and libraries does not make much sense, since most museums also house and run an archive and a library and some archives and libraries also hold three-dimensional object collections and run exhibitions. Given this fact – and until a more advanced taxonomy arises in the longer course of this project – I have chosen to structure this section alphabetically according to the name of each institution. Within this scheme, I have made the names of individual repositories subject to the overarching institutional framework of which they are part. This makes visible common as well as distinctive IP features within an overarching institutional framework. A case in point is the Smithsonian Institution in Washington, DC which operates a number of important ethnographic repositories¹⁴⁷ that all share a mainframe online access

¹⁴⁶ This Questionnaire was drafted by Wend Wendland (April; 2006). I have used it as a platform and tailored it on a trial and experiment basis specifically to the institutional life of intellectual property in North America. Please consult the Annex for a copy.

¹⁴⁷ The Smithsonian Institution holds the following range of important ethnographic repositories: National Museum of Natural History, Department of Anthropology, houses the *National Anthropological Archives* and the *Human Studies Film*

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system, but differ significantly with respect to IP policy. This structure also advances an understanding of the fact that an institution's IP policy is not an island, but is consciously crafted in some kind of dialogue with an institutional network of repositories. Finally, I would also like to foreground an appreciation of what might seem superfluous at first glance in a survey on contemporary IP issues; namely a historical sketch of each institution and the nature of its collections. The reason for including this information is the analytical insight (perhaps premature) acquired in the course of conducting this survey that present IP policy at the institutional level often seem a product of past acquisition policy. Moreover, without a working knowledge of an institution's collections, both tangible and intangible¹⁴⁸, the subject matter of what exactly its IP policies and procedures are crafted to protect, is lost upon the reader.

The presentation of each institution depends upon whether I am familiar with the particular institution in question and have visited in person and consulted with staff. If this is the case, the institutional profile is elaborate. If I have not ventured to the particular institution during the course of this survey, I have made the relevant information for the Questionnaire available via URL links. I have found this indexing system the most economical way to convey the relevant and pertinent information. This method also facilitates a later incorporation into a possible template. If deemed necessary in the longer course of this WIPO initiative, site visits could supplement these indexical URL references. The year set out in parenthesis next to the name of the repository refers to the year of establishment.

AMERICAN MUSEUM OF NATURAL HISTORY, NEW YORK, NY (1869)

Division of Anthropology Archives (1873)

Representational Scope of the Holdings: The Division of Anthropology (DoA) was established at the American Museum of Natural History (AMNH) in 1873, four years after the founding of the museum. During its first 17 years, the DoA collected artifacts more or less at random. This stage of its history lasted until 1890 when the first professional anthropologist, Frederic W. Putnam (1839-1915), was

Archives; The National Museum of the American Indian is home to the *Audio-Visual Archive*, the *Paper Archive* and the *Photo Archive* located at the Cultural Resources Center (CRC) in Suitland, Maryland; and the Center for Folklife and Cultural Heritage holds the *Ralph Rinzler Archive* and *Folkways Records*. Thus, we have seven different ethnographic repositories sharing some common features of the Smithsonian Institution, but with each their individual IP profile, policy and practice.

¹⁴⁸ In fact, the tangible and intangible collections of an institution are inseparable, since the bulk of an institution's archival material is either indirectly associated with or directly pertains to its tangible collections.

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appointed Curator of Anthropology. Putnam engaged the leading anthropologists of the day, such as Franz Boas (1858-1942) and Clark Wissler (1870-1947); two of the “founding figures” of American anthropology. Both Boas and Wissler were primarily interested in the North American Indians and from 1890 to the end of WWII the collecting activities of the DoA were mainly directed towards North American ethnology and archaeology. Today, the North American collections are especially strong in: (I) The ethnography of the Northwest Coast and Siberia¹⁴⁹; (II) The ethnography of the Plains Indians¹⁵⁰; (III) The archaeology and ethnography of the Indian cultures of the Southwest.

The African ethnographic collection is among the largest in the United States, spanning more than a century of field collecting, with a sustained focus on utilitarian objects of daily life. Four comprehensive, systematic and meticulously documented collections from Central Africa make up the bulk of the ethnographic material: (I) The ethnographic collection from Lozi (Barotse) culture acquired by Richard Douglas at the turn of the Century and accessioned in 1905-6; (II) The ethnographic collection from the Congo Free State donated by the Belgian King Leopold II and accessioned in 1907; (III) The comprehensive collections¹⁵¹ from northeastern Congo and southern Sudan acquired by Herbert Lang and James Chapin and accessioned in 1914¹⁵²; (IV) The Congo collection from southeastern Kasai (Kuba, Luba, Pende and other groups) acquired by Frederick Starr and accessioned in 1910¹⁵³.

The DoA’s holdings in Asian ethnography are also comprehensive and includes virtually all object types made of every conceivable material encompassing more than 60.000 catalog entries and spanning an immense range of diversity of cultures. In particular, two collections are characterized by extraordinarily detailed documentation: (I) The collections made under the auspices of the Jesup North Pacific Expedition¹⁵⁴ comprising many different types of objects¹⁵⁵ paired with written ethnographies, field

¹⁴⁹ On the Northwest Coast, the AMNH expeditions collected from the southern tribes, especially the Kwakwaka'wakw (Kwakiutl). The collections of the northern tribes, especially the Tlingit, were obtained by George Emmons during the 1880s. The Museum's overall collections for the Northwest Coast are the best in the world by general agreement of experts. The Siberian collection is even by Russian standards “impressive”.

¹⁵⁰ The DoA holds one of the most complete collections of Plains artifacts in the world.

¹⁵¹ The collection entails thousands of specimens and artifacts as well as 9000 photographs, and copious notes and drawings.

¹⁵² The objects collected on Herbert Lang’s and James Chapin’s Congo Expedition (1909-15) are accessible online at: <http://anthro.amnh.org/anthro.html>

¹⁵³ Frederick Starr’s expedition field notes and field diary have been put online alongside some of the nearly 5.000 artifacts he collected from 1904-5. Please consult: <http://anthro.amnh.org/anthro.html>

¹⁵⁴ The Jesup collection is considered the most significant collection of the peoples of the Russian Far East (Siberia) outside of Russia. The objects collected during the Jesup expedition are accessible online at: <http://anthro.amnh.org/anthro.html>
However, access to the entire expedition archive requires a password:

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notes, wax disc recordings, photographs, and following the science of the day, skull measurements and plaster head casts; (II) The comprehensive collections made by Berthold Laufer (1874-1934) during the Jacob H. Schiff expedition to China between 1901 and 1904, also meticulously documented¹⁵⁶.

In the past decades, the DoA's collecting policy has shifted from the "salvage" and documentary project of capturing "pristine indigenous material cultures" practiced in the first half of the 20th century to a contemporary focus on how indigenous people live in an interconnected and globalized world, e.g. by collecting objects made out of recycled materials. All in all, the tangible object collection includes more than 530.000 pieces from the cultures of the Americas, Africa, Asia, Oceania and the Greater North Pacific region¹⁵⁷. Approximately 10% of this collection is on view in the public exhibition galleries of the AMNH, whereas the remainder is housed in storage and different preservation facilities.

The intangible cultural heritage collection associated with the material collections is held by the *Division of Anthropology Archives* (DAA), which collects and preserves historical and contemporary materials that document its object collections, the history of the DoA and that of the discipline of anthropology. The DAA houses approximately 670 linear feet of archival material representing three of the four sub-disciplines of anthropology in the United States (ethnology, archaeology, and physical anthropology) and includes accession documentation, original catalogs, field notes, photographs, artwork pertaining to AMNH publications in anthropology, and DoA correspondence from 1894 to the present. The majority of DAA's photographic collection has been incorporated into the *Special Collections Department* (SCD) of the AMNH's Library Services Department. The DoA's collection of 2500 sound recordings

http://anthro.amnh.org/anthropology/databases/common/dsp_login.cfm?database=jesup&CFID=30689&CFTOKEN=15965509

¹⁵⁵ E.g. tools, weapons, boats, sleds, items of daily use, clothing, toys, musical instruments, charms, amulets, ritual equipment, and shaman paraphernalia.

¹⁵⁶ The objects collected by Berthold Laufer during the expedition to China (1901-1904) have been put online alongside his journal and field notes. Please consult: <http://anthro.amnh.org/anthro.html> However, like the field archives for the Jesup expedition full access to the field notes is password protected: http://anthro.amnh.org/anthropology/databases/common/dsp_login.cfm?database=jesup&CFID=30689&CFTOKEN=15965509

¹⁵⁷ Of those 530.000 catalog entries, 330.000 represent archaeological objects; 177.000 refer to ethnological objects; and 23.000 represent biological anthropology specimens. In fact, there are many more than 530.000 pieces in the collections of the DoA, because many catalog numbers refer to assemblages. In the archaeology collection, for example, one catalog number may refer to hundreds of projectile points. One costume in the ethnology collection may include a hat, a shirt, pants, shoes, and numerous pieces of jewelry. In the biological anthropology collection, the museum's plaster cast of *Australopithecus afarensis* ("Lucy") is made up of 74 distinct parts.

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obtained from 1900 to 1935, primarily from North American Indians and indigenous peoples of Siberia are deposited at the Archives of Traditional Music, Indiana University¹⁵⁸.

The earliest papers housed in the DAA are those of Joseph N. Nicollet (1786-1843). This collection includes papers and notebooks written by Nicollet during his 1838 expedition in the Upper Mississippi River Region. The expedition results produced accurate maps and a grammar and dictionary of the Chippewa and Dakota languages. Generally, the curatorial papers make up a large portion of the DAA and include the papers from the “founding figures” of North American anthropology among others Franz Boas, the DoA’s first Curator of North American Ethnology. Non-curatorial papers cover a broad spectrum and include *inter alia* William Beynon's (1888-1958) ethnographic field notes on the Tsimshian recorded between 1954-56¹⁵⁹; Claude Schaeffer’s (1901-1969) ethnographic field notes on the Kutenai Indians in Montana and British Columbia recorded in 1934-37¹⁶⁰, and Otto Finsch's (1838-1917) unpublished manuscript on his expeditions to the Pacific Islands between 1879 and 1885. Other noteworthy collections include the Journals recorded on arctic voyages from 1875 to 1916 by George Comer (1858-1937), field catalogs from Berthold Laufer's (1874-1934) China Expeditions¹⁶¹, and archaeological field notes from Erich Schmidt's early excavations in Arizona¹⁶² and his later work in the Middle East.

Search & Access: Through its Collections Database¹⁶³ the DoA provides online access to over 160,000 objects divided into five different categories: (I) The Pacific Ethnographic Collection¹⁶⁴; (II) The North American Ethnographic Collection¹⁶⁵; (III) The African Ethnographic Collection¹⁶⁶; (IV) The Asian Ethnographic Collection¹⁶⁷; and (V) The Ethnographic Textile Collection¹⁶⁸. The database can be

¹⁵⁸ Please see this institution under “Other institutions of potential interest”

¹⁵⁹ This collection corresponds to the representational strength of the Museum’s material collections from the Pacific Northwest Coast. The contemporary Tsimshian live along the Skeena and Nass rivers and along the many inlets and islands of the coast in present day British Columbia, Canada. In terms of IP, the different types of crests pertaining to different villages and clans are of key importance to indigenous cultures on the Pacific Northwest Coast. Reproductions of crest art, i.e. stylistic depictions of different animals such as a frog, beaver and eagle would according to local customary laws require permission from the clan with the specific animal as their crest. For more details, please consult the policy documents issued by the Sealaska Heritage Institute in Section I.

¹⁶⁰ Please see note above.

¹⁶¹ Berthold Laufer's original field notebooks were recorded on the Jacob H. Schiff China Expedition mentioned above.

¹⁶² Erich Schmidt’s field notes are associated with the comprehensive collections from the Indian cultures of the Southwest mentioned above.

¹⁶³ <http://anthro.amnh.org/anthro.html>

¹⁶⁴ About 27,000 objects is available online at: <http://anthro.amnh.org/anthro.html>

¹⁶⁵ About 49,000 objects is available online at: <http://anthro.amnh.org/anthro.html>

¹⁶⁶ About 37,000 objects is available online at: <http://anthro.amnh.org/anthro.html>

¹⁶⁷ About 45,000 objects is available online at: <http://anthro.amnh.org/anthro.html>

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searched by the following indexical terms: country/region, culture, object name, material, geographic locale, catalog number, and donor name. Each object is linked to images and detailed descriptions, which again are linked to the original catalogue pages, field notebooks, and photographs most of it available online. The basic principle of the cataloguing system is that for every catalog number the following information is included: accession number, nature of accession (e.g.: expedition, gift, purchase), collector, provenience, object name, materials, dimensions, condition, and storage location.

Currently, two online projects are being pursued to enhance the access to the collections. The DoA's original hand-written catalogs are scanned and the resulting digital images are linked to database records and digital images in the object collection. The accession records associated with the Jesup Expedition (1897-1902) have now all been scanned and are available for researchers to access through the AMNH's website with a password, which has to be applied for. The second project is the "Anthropology Thesaurus" (AT)¹⁶⁹, which has been developed to further improve online access. It provides a controlled vocabulary for use in searching across the collections of the DoA. The goal of the AT is to allow users to browse through a hierarchical indexical architecture to locate individual objects and to see broader, narrower, and related terms rather than having to perform a new search on individual terms. The DoA's AT is based upon the Art & Architecture Thesaurus (AAT)¹⁷⁰ developed by the Getty Research Institute in Los Angeles and follows as closely as possible its theoretical model for the organization of concepts. Each year, according to internal statistics, approximately 250 researchers including anthropologists, art historians, and graduate students visit the DAA in-house facilities.

IP Protocols & Procedures: The DoA has a collections management paper on-line entitled *Guidelines for Study in the Collections and Archives in the Division of Anthropology, AMNH*¹⁷¹, which delineates the policy of access. The document stresses that very limited photocopy orders can be handled by mail, but that any

¹⁶⁸ About 12,000 objects from all continents is available online at: <http://anthro.amnh.org/anthro.html>

¹⁶⁹ Please consult the DoA's Anthropological Thesaurus at <http://anthro.amnh.org/anthro.html>

The version of the AT presented at the URL should be considered as a "beta" version designed to demonstrate the capabilities of a thesaurus in searching across the AMNH anthropological collections and to generate feedback from researchers and the public. It is still under development and additional features will be added over time. For a detailed description of the AT please consult the article "The Development of a Local Thesaurus to Improve Access to the Anthropological Collections of the American Museum of Natural History" published in D-Lib Magazine; April 2006: <http://www.dlib.org/dlib/april06/devorse/04devorse.html>

Please see an assessment of some different approaches to the development of a standardized indexical language for TCEs in Chapter III, p.108 of this report.

¹⁷⁰ Please see the: http://www.getty.edu/research/conducting_research/vocabularies/aat/

¹⁷¹ <http://anthro.amnh.org/anthro.html>

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sustained engagement with the archival resources requires an on-site visit. In order to enable such a visit, a written form¹⁷² has to be filed and permission is granted upon review by the curatorial staff. With regard to photocopying of the materials from the DAA the policy is the following: “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.”¹⁷³ With reference to photography, visitors may take photographs of the collections “for record purposes”, which are “for personal use 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. The catalogue number of all AMNH objects must appear on any published image.”¹⁷⁴

Relations to Source Communities: Current relations are governed by NAGPRA.

Research Library, Special Collections Department (1869)

Representational Scope of the Holdings: The Special Collections Department (SCD)¹⁷⁵ holds archival collections relating to the history of the Museum, including scientific expeditions and research, exhibitions, education, and the general administrative history of the institution. It also includes personal papers and manuscripts of individuals closely associated with the Museum. The repository holds three main collections: (I) The Photographic Collection¹⁷⁶ consisting of more than 500.000 B&W prints and negatives, color transparencies, slides, approximately 20.000 lantern slides and over 900 vintage photographic prints. The images relate to the fields of anthropology, archaeology, astronomy, geology, paleontology, and zoology; (II) The Moving Image Collection¹⁷⁷ comprised of a film collection which includes thousands of feet of film footage spanning almost a century and 291 titles, as well as the video collection which includes copies of many of the films shown in conjunction with the Margaret Mead Film and Video Festival¹⁷⁸ held annually at the Museum since 1977. This material was shot by Museum

¹⁷² This is downloadable in pdf or MS Word format at the site: <http://anthro.amnh.org/anthro.html>

¹⁷³ Please see under “Archives” section 2 & 3: <http://anthro.amnh.org/anthro.html>

¹⁷⁴ Please see under “Photography”, section 1: <http://anthro.amnh.org/anthro.html>

¹⁷⁵ <http://library.amnh.org/special/index.html#collections>

¹⁷⁶ <http://library.amnh.org/special/photocoll.html>

¹⁷⁷ <http://library.amnh.org/special/filmcoll.html>

¹⁷⁸ <http://www.amnh.org/programs/mead/>

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staff to chronicle expeditions on every continent, to document Museum exhibition and preparation, to illustrate contemporary scientific discoveries, and to produce programs for public education and entertainment; and (III) The Archival Collection¹⁷⁹ includes the central administrative operational records and over 300 collections of personal papers and manuscript of notable naturalists and scientists.

Search & Access: To search the holdings of the Photographic & Archival Collections (collection # I&III, mentioned above), the SCD provides an online search tool entitled “List of Personal Papers, Manuscripts, and Photographic Print Collections online”¹⁸⁰. However, this catalog only provides information about the size of the holdings (linear footage & print counts). Currently, links on this list lead to related references in the library catalog, but more descriptive information is planned. Access to the materials from the Photographic & Archival Collections (collection # I&III) is provided for research purposes only. To obtain access one would have to contact the staff and complete the form “Application to Research the Archival Collections”¹⁸¹ and submit it for approval. One must provide information about the purpose of the research and a brief description of the project, as well as a copy of the CV of the applicant. Upon approval, the applicant may set up an appointment to visit.

To search the Moving Image Collection (collection #II) three tools are provided: 1) A Film List provides a way to browse the collection online¹⁸²; 2) Individual film titles can also be searched through the online catalog of the Research Library¹⁸³; 3) Finally, the publication entitled *The Catalog of the American Museum of Natural History Film Archives* (Garland; 1987) is currently out of print, but should be available in larger library collections in the U.S. To view films from the Moving Image Collection, the user must schedule an appointment with the staff at the SCD by phone, fax or e-mail. Copies of videotapes from the collection may also be borrowed via interlibrary loan. Generally, permission to access the holdings of the SCD (all three collections) is granted subject to whatever restriction may have been placed on the material by donors or on institutional records by the AMNH. Information about these restrictions is available upon request from the SCD staff.

¹⁷⁹ <http://library.amnh.org/special/archcoll.html>

¹⁸⁰ http://library.amnh.org/special/list_a-d.html Color slide collections, film, art and memorabilia collections will be added to this URL in the future.

¹⁸¹ <http://library.amnh.org/special/archform.pdf>

¹⁸² http://library.amnh.org/special/film_list1.html

¹⁸³ <http://libcat.amnh.org/> If you want to search by topic instead of film title, select the keyword search option and type in your topic. After you get the results click on the button to modify your search, and then select "Films, Videos, and Slides" for the material type -- and then click on the search button again.

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IP Protocols & Procedures: With reference to materials from the Photographic Collection (collection #I), the Museum can provide images of objects on request either through the DoA or the Division of Photographic Services. The DoA can provide digital images, while the SCD can provide prints and slides for some objects and for archival images. The reproduction rights and fees depend on the type of intended use of material. For reference, research, and educational use most of the images from the Photographic Collection can be purchased in digital, print, slide, or photocopy formats¹⁸⁴. For so-called “transmittal use”, i.e. print publication, display, web site, film, broadcast, CD-ROM, or other forms of reproduction the user would need to license the image(s) in question for an additional fee¹⁸⁵. In addition to the fees incurred, any user will also need to complete and submit the form “Application for Permission to Reproduce Images”¹⁸⁶. Images may not be published, displayed, or transmitted in any way without permission from the SCD.

With reference to using footage and items from the Moving Image Collection (collection #II) the search tool “Film List”¹⁸⁷ does provide an asterisk (*) next to each title that the AMNH holds full rights to. This implies that the SCD can license footage from that film. Information about fees and license forms pertaining to materials from this collection are not provided online and users are encouraged to inquire about price quotes on usage fees directly to the staff of the SCD.

With reference to materials from the Archival Collection (collection #III) the use of portable copiers, cameras, or scanners is prohibited. Notes may be made with paper and pencil provided by the Department or on a laptop computer. On written application by the user, permission to obtain photocopies of materials from the archives and manuscripts collection will be granted, subject to any restrictions that may govern the use of the collection and the need to preserve fragile materials that may be damaged by copying. The researcher is responsible for conforming to copyright and other applicable statutes. The AMNH is not necessarily the owner of copyrights of unpublished manuscripts in its collections. Permission to publish must be obtained from the owner of the copyright. Neither permission to examine nor photocopying of materials constitutes permission to quote or publish. Separate application for such permission must be made to the Library or the owner of the copyright¹⁸⁸.

¹⁸⁴ For an overview of fees please consult: <http://library.amnh.org/special/price.html>

¹⁸⁵ For an overview of fees please consult: <http://library.amnh.org/special/price.html>

¹⁸⁶ <http://library.amnh.org/special/permission.pdf>

¹⁸⁷ http://library.amnh.org/special/film_list1.html

¹⁸⁸ These rules are stipulated at: <http://library.amnh.org/special/archcoll.html>

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Relations to Source Communities: None independent from DoA.

Digitization Projects:

<http://library.amnh.org/diglib/index.html>

CANADIAN MUSEUM OF CIVILISATION, OTTAWA, QUEBEC (1989)

Representational Scope of the Holdings:

Canadian Museum of Civilisation currently houses 3.750.000 artifacts. The following collections are relevant for this survey:

Ethnology: 60.000 catalog entries representing Canadian Indian, Inuit, Metis cultures and Contemporary Native Art: <http://www.civilization.ca/cmc/ethneng.html>

Folk Culture: 23.000 catalog entries representing the multicultural makeup of Canadian society, with the exception of Canada's First Peoples: <http://www.civilization.ca/cmc/folkeng.html>

Library and Archives: published and unpublished materials including books, journals, photographs and documents relating to: Anthropology; History and material culture; Archaeology; Ethnology; Studies of the First Nations of Canada; Folklore and Folk Culture

Studies and Museology. Of greatest interest to this survey is the compilation of field notes, unpublished research reports, ethnographic films, and black and white photos produced by archaeologists and ethnologists on-site research regarding Canadian Native and Inuit life from the early 19th century: <http://www.civilization.ca/cmc/biblio/nofram-e.html#col>

Institutional History: <http://www.civilization.ca/cmc/ihisteng.html>

Mission: <http://www.civilization.ca/societe/principe.html>

Search & Access: <http://www.civilization.ca/cmc/biblio/index-e.html>

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IP Protocols & Procedures:

Rights and permissions policy: <http://www.civilization.ca/cmc/biblio/index-e.html>

Relations to Source Communities:

See the Memoranda of Understanding: <http://www.civilization.ca/societe/mou01eng.html>

See the Repatriation Policy: <http://www.civilization.ca/cmc/repatriation/repatriation00e.html>

Digitization Projects: <http://www.civilization.ca/cmc/digiteng.html>

Other Projects or Initiatives of Potential Relevance for IP Questions:

<http://www.civilization.ca/cmc/at/attoceng.html>

LIBRARY OF CONGRESS, WASHINGTON, DC (1800)

The American Folklife Center (1976)

Representational Scope of the Holdings: The American Folklife Center (AFC) was created by Congress by signing into law *The American Folklife Preservation Act* in 1976. The Act defines the term “American Folklife” as “the traditional expressive culture shared within the various groups in the United States: familial, ethnic, occupational, religious, regional.” It states that “the diversity inherent in American folklife has contributed greatly to the cultural richness of the Nation and has fostered a sense of individuality and identity among the American people.” The Act charged the AFC with the mandate to “preserve and present American folklife” through programs of research, scholarship, documentation, training, live performance, exhibition, publications, preservation, archival presentation, reference service and public programs¹⁸⁹. The AFC was placed within the Library of Congress incorporating the Archive of Folk Culture, which was established in the LoC in 1928. As a federal institution, the AFC is funded directly by the American Government.

¹⁸⁹ For a review of contemporary archival practice at the AFC, please see:

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The collections of the American Folklife Center's Archive of Folk Culture amount to more than three million photographs, manuscripts, audio recordings, and moving images itemized in over 4000 individual field collections, documenting the expressive register¹⁹⁰ of folklife¹⁹¹ within and without the United States¹⁹². A prevailing feature of the collections is that the bulk of the holdings are the products of face-to-face encounters between field researchers¹⁹³ and living communities¹⁹⁴. The rationale of this collecting enterprise was to compile a systematic record of human creativity *in situ*, preserved in so-called multi-format collections containing field notes in the form of diaries or log-books, manuscript materials, correspondence, photographs, drawings and audio recordings¹⁹⁵. The documentary strengths and weaknesses of these different types of representational media were arranged to balance and supplement each other by the field worker aiming for a holistic documentation of living intangible folk culture in different contexts around the world¹⁹⁶. The earliest field recordings in the archive date from

Catherine H. Kerst: "Access to Multi-Format Ethnographic Field Documentation: Archival Practice in the American Folklife Center." *Folklore Forum* 35, 1-2: 29-34. (2004)

¹⁹⁰ The expressive register of folklife is defined by AFC as: "...traditional songs, fairy tales, stories, ghost tales, personal histories, riddles, proverbs, figures of speech, jokes and special ways of speaking, childhood games and rhymes, the way we celebrate life from birthing our babies to honoring our dead, the entire range of our personal and collective beliefs (religious, medical, magical, and social), handed-down recipes and everyday mealtime traditions, ways in which we decorate (e.g. patchwork patterns on quilts, plastic flamingoes in yards, tattoos on bodies, crafts made by hand (e.g. crocheted afghans, wooden spoons, cane bottoms on chairs), patterns and traditions of work (e.g. from factory to office cubicle), the ways in which we express ourselves as members of our family, our community, our geographical region, our ethnic group, our religious congregation, or our occupational group)".

¹⁹¹ One might perhaps notice here that the AFC defines itself as a repository of *folklife* rather than *folklore* or *EoF*. AFC defines *folklife* as: "Folklife is part of everyone's life. It is the everyday and intimate creativity that all of us share and pass on to the next generation.... It is as constant as a ballad, as changeable as fashion trends. It is as intimate as a lullaby, and as public as a parade". This definition is interesting regarding the question of assessing different sensibilities of archival ethnographic materials. We are obviously dealing with a wide continuum between the intimacy of a lullaby and the publicity of a parade, which has implications for how we draft IP guidelines in this field. See also the *CoPAR Ethical Code* in Section II of this survey.

¹⁹² The collections are international in scope. Alan Lomax recording trip to the Bahamas in 1935 may have been the first instance of seeking folklife materials from outside the United States. During the 1940s and 1950s Arthur Alberts made remarkable recordings of West African music.

¹⁹³ Folklorists, ethnomusicologists, anthropologists and other researchers collecting and recording primary material in different field settings within and without the United States

¹⁹⁴ As well as oral history recordings with the "man on the street", attempting to preserve collective memory after epochal events in American history like the attack on Pearl Harbor in 1942 and more recently the 9/11 event in New York City in 2001.

¹⁹⁵ And later videotapes and digital ephemera

¹⁹⁶ Thus, a multi-format ethnographic field collection is a uniquely created assembly of materials brought together through the intentions and activities of the field collector. The representational concepts and techniques deployed by the fieldworker is key to understand that such a collection represents *both* the scholarly training, efforts and intellectual creativity of the fieldworker as well as it entails the content provided by the intellectual creativity of the people under study. Thus, we need to do away with any simplistic notions of one-dimensional *authorship* of ethnographic field collections, which needless to say have implications for the IP status of such collections. In the words of the AFC's reference librarian, Gerald E. Parsons: "The fieldworker takes a photograph of a musical instrument, makes a sound recording of it being played, and jots down notes on the recollections of a virtuoso player because the fieldworker has determined that photographs, sound recordings, and written text must be yoked together to fully represent the performance. Even if there is no intent to publish the

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the 1890s and the most recent are contemporary. However, the Guide to the AFC states that in 1950 “the pioneering phase of field collecting and the establishment of Archives has come to a close”¹⁹⁷. Finally, it is important to stress that indigenous materials only constitute a minor part of the holdings.

Search & Access:

Regarding the Ethnographic Thesaurus (ET) project at the AFC please see Chapter III, p.108-10.

IP Protocols & Procedures: The AFC has a document entitled *Collections Policy Statements: Folklife* (2002)¹⁹⁸ which deals with folklife as a subject rather than as an archival format (Section I). The main objective of the document is to outline the acquisition priorities and exclusions of new materials, relating this to the existing strengths of the collection. IP issues are not mentioned in this document.

AFC’s procedure with regard to copying unpublished recordings from their archives is the following: Permissions are not required before submitting a “Phonoduplication Order” if the material is to be used for private or research purposes.¹⁹⁹ However, if the recordings are to be used for profit or non-profit publication (film, radio or television broadcast, CD, CD ROM, Web-site presentation, etc.) then written permission or documentation of good-faith attempts to track the rights holders, is required. The policy is worded in the following way: “The Library retains no proprietary rights regarding the use of recordings in its collections. All performance rights remain with the performers or their estates. Upon your request, Archive reference staff will consult our files to see whether we have records of previous attempts to contact those performers or estates. We recommend that you send a certified, return-

documentation, there is, in every ethnographic collection, a conscious weaving together of different representational media to achieve a rounded statement. There is, in short, something that looks like authorship even though there may be no publication.” (*Memo to the American Folklife Center Board of Trustees, Jan. 7, 1991*, at: <http://www.loc.gov/folklife/ethno.html>) Extending Parsons’ argument, I would venture to say that we have to grapple with a notion of *multiple authorships* of ethnographic field collections and be cautious of reducing such collections to mere “documentary records”. An assessment of the contemporary “cultural sensibilities” (see the Code entitled *Native American Archival Protocols* in Section II for a definition) of a collection should first situate the history, social context and nature of content of such collections as a collaborative effort involving all stakeholders (see also the *CoPAR Code*, in Section II, as well as Peggy Bulger’s intervention at the Ninth IGC Session (April 2006), where AFC’s policy with regard to the Zuni Storytelling collection is outlined: “Both Pueblo members and AFC staff have determined that a detailed survey of the recordings must be made prior to the initiation of such projects [*Issues of cultural patrimony and limiting of access*] in order to determine the extent and number of recordings that may be considered sensitive. The aim is to ensure that recordings related to sacred matters or esoteric issues will have limited circulation if community elders deem it necessary, even within the Pueblo.”)

¹⁹⁷ *American Folklife Center: An Illustrated Guide*. Library of Congress. Washington, DC, 2004, p. 20.

¹⁹⁸ <http://www.loc.gov/acq/devpol/folklife.html>

¹⁹⁹ When you file a request you include a statement about how you plan to use the recording. Based on this, the AFC makes a determination whether permission is needed. But “in most cases making photocopies of materials is not a problem”. With regard to visuals, researchers may use digital cameras for most materials, but scanners are not permitted. The procedures are set forth at: <http://www.loc.gov/folklife/recording.html>

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receipt-requested letter to the address that you find or we supply. Should the letter be returned to you unopened, please forward it (still unopened) to us as proof of your good-faith effort to contact the appropriate persons. Please keep track of all contact attempts that you make. That information kept in our files will constitute documentation of your efforts.”²⁰⁰ When the permission is given the AFC’s Recording Laboratory charges comparable rates to a commercial studio in the Washington, D.C. area.

Head of Reference Services, Judith Gray conveyed that a donor cannot put any restrictions on in-house-listening. This is both a matter of principle and an administrative issue, she said. Firstly, restricted access runs counter to the AFC’s mandate as the open library of and for the American people. Secondly, the staff of AFC can not keep track of any particular and unique restrictions applying to certain of its collections. If we move from individual user listening to publication rights of audio recordings we also move into a whole different register of provisions. As stipulated above, AFC’s basic requirement here is that you must be able to demonstrate good faith effort in identifying the holders of the copyright: “The American Folklife Center at the Library of Congress has developed protocols and procedures for the use of cultural materials by researchers for non-commercial use. All commercial uses of these recordings or images are restricted and users must seek permission for use, or demonstrate a “good faith” effort to locate the rights holders.” (Statement by Dr. Peggy Bulger on behalf of the Delegation of the United States of America to the 9th session of WIPO’s Intergovernmental Committee in April 2006).

Relations to Source Communities: In 1980, under the official title of *The Federal Cylinder Project* and under the mantra of “Bringing the Voices Home” the AFC engaged in a comprehensive effort to reformat, preserve, catalog, disseminate and repatriate copies of field recordings made in the 1890s into the early 1930s of traditional music and lore²⁰¹. The project was supported by three key agencies of the Federal government: the Bureau of Indian Affairs; the Smithsonian Institution, and the National Endowments for the Arts and the Humanities. The project’s title *The Federal Cylinder Project*²⁰² was drawn from its raw material; namely federal wax cylinders.

²⁰⁰ <http://www.loc.gov/folklife/recording.html>

²⁰¹ Approximately two-thirds of these precious unique recordings document American Indian music and lore.

²⁰² Dorothy Sara Lee was the Director of the Federal Cylinder Project. For more detailed information about this pioneer project, please refer to: (A) Erika Brady, Maria La Vigna, Dorothy Sara Lee, and Thomas Vennum, Jr. (1984) *The Federal Cylinder Project: A Guide to Field Cylinder Collections in Federal Agencies*. Vol. 1: *Introduction and Inventory*. Studies in American Folklife, no. 3, vol. 1. Washington, D.C.: Library of Congress; (B) Erika Brady “Bringing the Voices Home: The Omaha Pow-Wow Revisited” in *Folklife Center News* 8:4 (October-December 1985): 7-10; (C) Judith Gray (1991), “The Songs Come Home –The Federal Cylinder Project,” 14(5):32-35, *Cultural Resources Management*. (D) Peggy Bulger’s intervention at the

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The AFC chose to initiate the project with the recordings made in 1896 by Alice Fletcher and Francis La Flesche featuring traditional Omaha songs, because of their technical quality and their contemporary value for the Omaha Indian tribe²⁰³. The AFC proposed to provide the Tribe with a complete tape copy of all the Omaha cylinder recordings in Federal repositories for the Tribe's own archives, and as a tool for Tribe's educational and cultural enrichment. The Director of the AFC phrased the rationale of the project in a letter to the Tribal Council: "If it is to live up to our dreams for it, it should make a special contribution to encouraging the living cultural traditions of the Omaha tribe today, at the same time that it educates others in Nebraska and around the country about the nature and richness of Omaha culture."²⁰⁴ We might say that the Federal Cylinder Project represented a policy shift from dealing with source communities as passive content providers to directly addressing these communities as coeval actors. As a consequence of this policy shift, throughout the 1980s the AFC made several visits to the annual Omaha pow-wow during which they returned copies of the wax cylinder recordings to members of the Tribe and embarked on new contemporary recording projects of Omaha music.

Reflecting back on the project, the Director of the AFC offers the following interesting comments about the unanticipated historical trajectories of archival ethnographic materials: "The documentation, one might say, had outlived the theories for which it had been accumulated, and had been put to cultural uses the earlier collectors never imagined. Though such collectors might have expected that future researchers would use earlier field data to develop fresh conclusions, they can hardly have foreseen that the field notes, photographs, sound recordings, and published descriptions they painstakingly created would re-enter the very cultural process they described, would be prized, studied, and at times readopted by the very people they had studied. To the later 20th century was reserved the gradually dawning realization that we are a part of and thus affect all we study."²⁰⁵

Head of Reference Services Judith A. Gray - the foremost expert on the Federal Cylinder Project at the AFC - stated that the project was the brainchild of Thomas Vennum, Jr. a Director of the Smithsonian Institution. The project represented his ideas about dissemination and exchange on a government to government basis. The Federal Cylinder project also embodied technical assistance and a "development

Ninth Session of the IGC, April 2006, where she gives considerate attention to the Federal Cylinder Project as "a key to success" in working with local communities.

²⁰³ The first published recording of the Federal Cylinder Project became the album featuring Omaha Indian music recorded by Alice C. Fletcher and Francis La Flesche about 1896.

²⁰⁴ Please see the correspondence between the Omaha tribe and the AFC made available under the heading of "Research Materials" at: [http://memory.loc.gov/cgi-bin/query/S?ammem/omhbib:@field\(NUMBER\(cor001\)\)](http://memory.loc.gov/cgi-bin/query/S?ammem/omhbib:@field(NUMBER(cor001)))

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component”, since in the beginning of the 1980s most tribes had no archival infrastructures or historical preservation programs. At the time there had been extensive internal debate about the project, because the AFC is a federal institution with a public mandate and as such it might be difficult to justify what could look like “preferential treatment”, i.e. that particular groups were provided with audio copies free of charge, whereas others would have to pay a fee for the same copies. As Gray put it, “being a federally funded institution, we cannot privilege any group. We’re not the Bureau of Indian Affairs”.

The Omaha Traditional Music website is in one sense a small sample of a much larger project. In its present form it represents a “historical composite”, i.e. the original wax cylinder recordings from the 1890s, the LP Album comprising a Pow Wow in Nebraska and the 1983 concert recorded in the Library of Congress. These recordings are supplemented with interviews with Omaha elders and tribal members also from the mid-1980s. In 1995, when the Library of Congress was looking for Native American material for the American Memory project, the Omaha collection seemed appropriate because all the rights had been cleared and the collaboration had been successful. However, Gray said, that the AFC was still getting questions of why the Omaha collection had been put on-line.

Two decades after the Federal Cylinder Project, the AFC continues its efforts to establish partner relationships with the contemporary descendants of its content providers. In 2003-5 the AFC staff hosted and visited a number of Native American groups, including Zuni and Cherokee tribal members discussing issues of archival practices. In particular, relationships were pursued with the community of Zuni Pueblo, New Mexico, from which the AFC holds two significant collections: the Doris Duke Zuni Storytelling Collection and the Curtis Cook Zuni Pueblo Storytelling Collection. This material was recorded in the 1960s. At that time the Zuni did receive cassette tape copies of the master recordings. However, these were either lost or deteriorated and in any case; the cassette tape medium is obsolete today. This is why the AFC is in the process of providing the tribal council with digital copies of this material. This venture is “a three way deal. There is the Zuni tribal council, there is the AFC, and there is the University of Arizona. The AFC took the initiative to create this outreach project and it is setting a model”²⁰⁶ Other issues being covered in the meetings between AFC and the Zuni Pueblo revolve around limiting access to culturally sensitive materials. Moreover, educational initiatives targeting the

²⁰⁵ “Director's Column” in the *Folklife Center News* 6:2 (April-June 1983): 2-3.

²⁰⁶ Group interview at the AFC (Peggy Bulger, Michael Taft and Catherine Kerst) March 2006. Michael Taft is here speaking about the Zuni partnership.

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local level of intergenerational transmission of intangible culture are being discussed and implemented. Such educational programs feed into cultural revitalization processes in the practicing communities/holders of traditional knowledge. These contemporary working relations represent a different approach from the federal cylinder project, which was essentially a “top-down model”, as Judith Gray said, which is “out of date”.

Digitization Projects: The AFC is working on the critical 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. At the time of writing (October 2006), the AFC provides online access to six carefully selected portions of its own collections²⁰⁷. Moreover, as an integral part of the Library of Congress the institution participates in the strategic program and activities defined in the *Plan for the National Digital Information Infrastructure and Preservation Program* (NDIIPP). The Library of Congress spearheads this program which sets forth eighteen objectives for 2004-8 all directly pertaining to how one of the world’s largest libraries manages the transition from “a print culture” to a networked digital environment within the global knowledge economy. The two online resources *American Memory*²⁰⁸ and *Global Gateway*²⁰⁹, which the AFC partly participates in, represent answers to this transitional challenge.

Within the scope of this section, I cannot review the plethora of IP questions, which the Library of Congress has struggled with in the process of putting these materials on the World Wide Web. But let me just briefly touch on some of the issues, which will be dealt with more elaborately in the next Chapter on “Current Challenges”. As the title signals, the *Global Gateway* project is universal in scope and outlook. It builds on the fact that approximately two-thirds of the printed records in the Library’s collection is not in the English language. In fact, the Library of Congress’ Chinese, Russian, Japanese, Korean, and Polish collections are the largest outside of those countries, and the Arabic collections are the largest outside of Egypt. The collection of Luso-Hispanic materials is the largest in the world; and its collection of Judaica ranks among the largest anywhere. *Global Gateway* is an attempt to provide

²⁰⁷ The online content may include audio samples of music and stories, digital images of rare letters and photographs, and video clips. Please refer to: <http://www.loc.gov/folklife/onlinecollections.html>

²⁰⁸ Please see: <http://memory.loc.gov/ammem/index.html>

²⁰⁹ Of the 64 online exhibitions listed under “International Exhibitions”, none of them features exclusive traditional cultural expressions or expressions of folklore. Please see: <http://international.loc.gov/intldl/intldlhome.html>

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universal access to some of these resources. The individual collections within this project are often arranged bilingually and created with different partner libraries around the world: the National Libraries of France, Spain, the Netherlands, Russia, and Brazil. Each partnership is negotiated individually to accommodate specific needs and to comply with IP legislation in the U.S.²¹⁰ as well as in the partner country.

A single collection may serve as illustration of the *Global Gateway* project: *The South Asian Literary Recordings Project*²¹¹ website was launched in 2002. The project was conceived by the Library's New Delhi office and aimed at recording the voices of prominent authors from South Asia reading excerpts from their works. The New Delhi office had recorded eighty authors in India, Bangladesh and Sri Lanka representing a sample of different styles, trends, and languages of the region. At the website, the recordings are available in Realmedia and MP3 formats and the works from which the readings are drawn are identified, with a short biography and a photograph of the author taken during the recording session. The decision to digitize the entire collection and make it available on the Library's web site is in step with the Library's founding principle to make available its collections to the American people and the world at large. The project is a work-in-progress and new readings will be added to the digital collection as more authors are recorded and as earlier recordings made in the seventies and eighties are digitized. Since we are dealing with single identifiable authors, the IP issues in this digital production do not differ significantly from the Library of Congress' general policy²¹².

²¹⁰ The general policy with reference to the Library of Congress' online collections is that whenever possible the Library provides factual information about copyright owners. Generally speaking, the Library does not own rights in its collections. Therefore, it does not charge permission fees for the use of its collections and generally does not grant or deny permission to publish material extracted from its holdings. The Library maintains that permission may be required from the copyright owner independently of the Library and the user may incur possible fees. It falls on the user to determine and satisfy copyright restrictions when publishing materials found in the Library's collections. The Library notes that reproduction of items in which copyrights subsist beyond the fair use doctrine requires a written permission from the copyright holder. Thus, the Library leaves it to the user to make his or her own assessments of copyright issues in light of the intended use of the material. For more detailed information please consult: <http://www.loc.gov/homepage/legal.html>

²¹¹ <http://www.loc.gov/acq/ovop/delhi/salrp/>

²¹² The particular copyright stipulations for this online collection read: "All the literary works recorded as part of this Project are protected by United States copyright law (Title 17 of the U.S. Code) and/or by the copyright or neighboring-rights laws of other nations.

Copyright owners have given the Library of Congress permission:

1. to reproduce and present the material recorded, or excerpts from it, in the Library of Congress's Internet offerings (or successor technologies), accompanied by the authors' photographs.
2. to reissue the material, or excerpts from it, in any other audio or printed format in a compilation of Project recordings.
3. to provide single-copy reproductions of the materials at cost in response to requests from educational and cultural institutions against written assurance from an official of the requesting institution that use will be limited to

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Perhaps more interesting for this survey, is the *American Memory* online project, where several of the collections include traditional cultural expressions²¹³. The striking feature with the three online collections featuring traditional cultural expressions is that the copyright to the materials (photographs, manuscripts, texts, audio recordings, unpublished archival materials) is either already in the public domain, owned by the partner libraries or owned by the library itself. A case in point is the Omaha Traditional Music collection: the AFC received permission in 1982 from the Omaha Tribal Council to reproduce the wax cylinders and issue them as LP albums. In 1999, the AFC collaborated once again with the Omaha and produced the online collection²¹⁴, which in addition to the digitized recordings from the 1890s also features recordings from the 1980s and an extensive textual corpus, which contextualizes these recordings. Regarding the Omaha digitization project, the Director of the AFC stated at the WIPO IGC Ninth Session (April 2006) that: “The 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.”

Other Projects or Initiatives of Potential Relevance for IP Questions:

- i. The AFC project entitled *Save Our Sounds: America's Recorded Sound Heritage*²¹⁵ is part of the NPS larger scale preservation project *Save America's Treasures*. The AFC collaborates with the Center for

educational and cultural purposes, and that no further reproductions or any public performance for profit or other commercial use will be made of the recordings.

The written permission of the copyright owners and/or other rights holders (such as publicity and/or privacy rights) is required for distribution, reproduction, or other use of protected items beyond that allowed by fair use or other statutory exemptions. It is your obligation to determine and satisfy copyright or other use restrictions when downloading or otherwise distributing the recordings from the South Asian Literary Recordings Project web site.” Source: <http://www.loc.gov/acq/ovop/delhi/salrp/copyright.html>

²¹³ See e.g. the *American Memory* online collections entitled: (A) *Edward Curtis: North American Indian Photographs*, which presents 2226 images of Native American Indians/Inuit of Alaska with original captions. The images are accompanied with an assembly of interpretative texts; (B) *Native American Culture, Pacific Northwest ~ Multiformat*, which integrates over 2300 photographs and 7700 pages of text relating to the American Indians in the Pacific Northwest Coast of the United States and Canada; and (C) *Omaha Indian Music ~ Multiformat*, which features ethnographic field recordings from the 1890s and 1980s, photographs of the performances and textual material documenting and interpreting the circumstances of the recording. Please refer to the following sites:

(A) <http://memory.loc.gov/ammem/award98/ienhtml/curthome.html>

(B) <http://memory.loc.gov/ammem/collections/pacific/>

(C) <http://memory.loc.gov/ammem/omhhtml/omhhome.html>

²¹⁴The online selection criteria were particular and depended on specific persons: The 1983 pow-wow had a rich documentation; the current (1999) tribal chairman was the chairman in 1983; one of the project staff (a recordist and photographer) was still employed by the Library of Congress; and that the head singer of the Host Drum in 1983 was available as a consultant.

²¹⁵ Please see: <http://www.loc.gov/folklife/sos/index.html>

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Folklife and Cultural Heritage in the Smithsonian Institution on this project to preserve audio recordings of America's music and the voices of her people. The program of the White House Millennium Council has awarded a grant of \$750,000 toward this effort, recognizing these recordings as irreplaceable American treasures.

- ii. The Library of Congress is completing construction of a 415,000-square-foot National Audio Visual Conservation Centre (NAVCC) in Culpeper, Va., that will be devoted to preserving and digitizing deteriorating audio recordings and moving image recordings.
- iii. The AFC is highly involved in the international debate concerning IP questions in relation to folklore, TK and TCEs. The Director, Peggy Bulger serves on the U.S. delegation to WIPO, and also attends meetings with U.S. government officials concerning the UNESCO 2003 Convention.
- iv. The AFC has in the past decade co-sponsored a number of important conferences and symposia at the intersection of cultural heritage and cultural policy, furthering the awareness of IP questions in relation to the collection management of traditional cultural productions. Two of the most relevant events to this survey were: *Folk Heritage Collections in Crisis* (2000) and *Ethnographic Archives, Communities of Origin, and Intangible Cultural Heritage* (2006).

ROYAL ONTARIO MUSEUM, TORONTO, ONTARIO (1912)

Representational Scope of the Holdings:

<http://www.rom.on.ca/>

IP Protocols & Procedures

Policies: <http://www.rom.on.ca/about/reports.php>

Libraries & Archives: <http://www.rom.on.ca/about/faqs/faqlib.php>

Permissions and Licensing: <http://www.rom.on.ca/about/faqs/faqsimg.php>

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Copyright: <http://www.rom.on.ca/about/boardpolicies/copyright.php>

SMITHSONIAN INSTITUTION, WASHINGTON, DC (1846)

Center for Folklife and Cultural Heritage

Representational Scope of Holdings:

http://www.folklife.si.edu/center/about_us.html

<http://www.folklife.si.edu/center/archives.html>

http://www.folklife.si.edu/center/archives/archives_collections.html

Search & Access:

http://www.folklife.si.edu/center/archives/archives_collections.html

http://www.folklife.si.edu/explore/online_exhibitions.html

IP Protocols & Procedures:

http://www.folklife.si.edu/center/cultural_policy/index.html

http://www.folklife.si.edu/center/Archives/archives_Using.html

Licensing Requests for Folkways Records:

http://www.folkways.si.edu/customer_service/licensing.html

Digitization Projects: The *Smithsonian Global Sound* (SGS) project was launched in February 2005. Initially the project makes almost the entire Smithsonian Folkways Recordings collection²¹⁶ available on

²¹⁶ The collection is an outgrowth of the vision and work of Folkways Records' founder Moses Asch (1905-86), who created a veritable encyclopedia of the human experience of sound, releasing 2168 album titles with field recordings between 1948 and 1986. The repertoire spans from the earliest American folk songs to contemporary groups performing traditional music from Europe, Africa, Asia and South America. In addition to performances of traditional music, aural traditions and other forms of verbal art, the collection encompasses animal sounds, beer-drinking at an African homestead; calypso; classical violin instruction; drama; poetry; sounds of the deep ocean, the ionosphere and the sound of a frog being eaten by a snake!

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the web for 99 cents a piece in MP3 format. The site also includes the holdings of two regional archives, one in South Africa²¹⁷ the other in India²¹⁸, which have been added to “give them a marketplace” as Richard Kurin, the Director of CFCH, phrases it.²¹⁹ Perhaps therefore the SGS initiative has been dubbed “the ethnographic answer to iTunes”²²⁰ The on-line user can search on criteria such as artist, geographic location, language, cultural group or instrument²²¹ in a database comprised of more than 35000 individual tracks of music, aural traditions, and natural sounds.

Regarding the IP issues involved in SGS, the Smithsonian will pay royalties to the artists calculated on different formulas depending on the original recording contract. In an interview for the Washington Post Richard Kurin touched on some of these IP issues: "There are world music stars who mine the traditional music, and the question is, what is the ownership, what is the moral commitment and how much is going back? When we give them the money, that establishes the intellectual property rights."²²² The Smithsonian Institution expressly prohibits the copying of any material (Text and image files, audio and video clips) on the SGS website, except for the purposes of “fair use” as defined by US Copyright law²²³. To use a recording found at the SGS website a Licensing Request Form, is to be completed, which is reviewed by SGS and permission is granted on a case-by-case basis at the discretion of the Smithsonian Institution.

The mission of the SGS project is “to make available the world's diverse cultural expressions via the Internet hereby helping to encourage local musicians and traditions through international recognition, the payment of royalties, and support for regional archives.” The initial funding was provided by the Rockefeller Foundation²²⁴, the Aga Khan Trust for Culture, Allen Foundation for Music and Folkways Alive! at the University of Alberta. To create the project the Smithsonian relied on Jon Kertzer, an ethnomusicologist and Microsoft executive and Anthony Seeger, an anthropologist, and former director of Smithsonian Folkways, who assembled a development team in Seattle.

In short: A universal museum of sound. Please consult the work by Peter D. Goldsmith *Making People's Music: Moe Asch and Folkways Records*. Washington, DC: Smithsonian Institution Press, 1998 for further information.

²¹⁷ Music recorded on the African continent by Dr. Hugh Tracey for the International Library of African Music (ILAM) at Rhodes University, Grahamstown, South Africa

²¹⁸ Material collected and recorded on the South Asian subcontinent held by the Archives and Research Centre for Ethnomusicology (ARCE), in New Delhi, India. This Center is sponsored by the American Institute for Indian Studies.

²¹⁹ Article by Jacqueline Trescott; *The Washington Post*; April 1, 2005; Page C01

²²⁰ Article by Brian Braiker; *Newsweek*; June 10, 2005

²²¹ Finer grained and more sophisticated navigational features are being developed.

²²² Article by Jacqueline Trescott; *The Washington Post*; April 1, 2005; Page C01

²²³ Please see the site: <http://www.si.edu/copyright/>

²²⁴ About \$800.000; this is to be returned if the SGS turns out to make a profit.

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NATIONAL MUSEUM OF THE AMERICAN INDIAN (2004)

Representational Scope of the Holdings: The National Museum of the American Indian (NMAI) was established by an Act of Congress in 1989, when President George Bush Sr. signed the NMAI Act. This piece of legislation enabled the transfer of approximately 800.000 objects from the Heye collection of the closing Museum of the American Indian in New York to three brand new state-of-the-art facilities operated by the Smithsonian Institution. The core of the collection of the NMAI came from the Museum of the American Indian, which was established by George Gustav Heye (1874-1957) in 1916. As the son of a German immigrant who became wealthy in the petroleum industry and himself a successful investment banker, Heye spent his fortune accumulating the largest private collection of Native American objects in the world. During a 45-year period he not only collected throughout North and South America, he also took annual trips to Europe through the 1920s, where he made large purchases of collections from dealers and auctions in Paris and London. In this way, Heye amassed what is today considered the single most comprehensive collection in the world representing indigenous peoples throughout the Western Hemisphere. However, since most of the collection was bought and not acquired *in situ* the ethnographic documentation is poor. As Jane Sledge said during our meeting: “Researchers are astounded and dismayed: Heye simply just bought it!” By implication, the NMAI does not hold many extensive field notes, ethnographic documents or archaeological surveys.

Today, the Smithsonian’s National Museum of the American Indian (NMAI)²²⁵ is an institution comprising three different facilities:(I) The George Gustav Heye Center (GGHC) of the NMAI situated down town Manhattan in New York City’s old customs house. This edifice opened in 1994, when Heye’s Museum of the American Indian in upper Manhattan closed. This new gallery presents exhibitions as well as music, dance performances, film festivals and symposia; (II) The new NMAI museum on the National Mall in Washington, DC, which broke ground in 1999 and was opened in the fall of 2004 orchestrated by the biggest Native gathering and procession in U.S. history; and (III) The Cultural Resources Center (CRC) in Suitland, Maryland, built from the summer of 1996 and completed in the fall of 1998.

²²⁵ Following the opening of the NMAI in September 2004, the U.S. Delegation made an elaborate presentation of the institution during their intervention in the IGC’s Seventh Session, November 1 to 5, 2004.

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Of most interest to this survey is the new Suitland facility, since this is the new repository of NMAI's object collections and archives. From 1999 to 2004, the NMAI moved its 800.000 objects and associated archives from the NMAI Research Branch, a crowded warehouse in the Bronx in New York, to the CRC in Suitland designed as "the permanent home of the collection." In preparation for the move, museum staff conducted a complete inventory and condition assessment of the collection, and began to develop a comprehensive database that includes basic information as well as digitized images. Currently, the CRC facility conserves, preserves, manages, catalogues, researches and repatriates the NMAI's object collections and the photo and paper archives. Moreover, NMAI has a Community and Constituent Services department dedicated to providing services and programming to Native and Non-Native constituents throughout the Hemisphere. This department is an important component of NMAI's Fourth Museum, a museum without walls that extends NMAI's programs beyond its three physical locations in New York, Maryland, and Washington, D.C."²²⁶.

The mission of the NMAI is to "recognize and affirm to Native communities and the general public the historical and contemporary culture and cultural achievements of the indigenous peoples of the Western Hemisphere". This objective is to be achieved in "consultation, collaboration, and cooperation with Natives". Finally, the NMAI has "a special responsibility, through innovative public programming, research, and collections, to protect, support, and enhance the development, maintenance, and perpetuation of Native culture and community."²²⁷ The "Fourth Museum" is the key to achieve these objectives, through an Internship Program, Museum Training, Native Arts Program, Native Radio Program and a Repatriation Program all aimed at reaching out, sharing expertise and training the next generation of museum professionals, especially Native Americans.

The extensive collections of about 800.000 works encompass a vast range of material ranging from the extraordinary to the mundane spanning the Western Hemisphere from the Arctic Circle to Tierra del Fuego. Approximately seventy percent of the collection represents Native cultures in the U.S. and Canada, whereas thirty percent pertains to Native cultures in Mexico and Central and South America. Totally, the collection represents about 900 different cultural entities, ranging from pre-contact²²⁸ to contemporary pieces. However, the strength of the collection is the material assembled by Heye at the

²²⁶ "Message from the Director" in *Community Services Program Guide 2006-2006*; National Museum of the American Indian, Smithsonian Institution, Washington, D.C.23

²²⁷ Quoted from "Appendix A" in *Community Services Program Guide 2005-2006*. National Museum of the American Indian; Smithsonian Institution, Washington, D.C.

²²⁸ Paleoindian projectile points dating back about 10000BC-pre-Columbian pieces from Latin America

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turn of the twentieth century including masks from the Northwest Pacific Coast of North America; painted and quilled hides, clothing, and feather bonnets from the North American Plains; pottery and basketry from the southwestern United States; and eighteenth-century materials from the Great Lakes region.

Of particular interest to this survey are the NMAI's intangible holdings of textual records, photographic archives and its film and audiovisual collections. The Paper Archive documents the history and collections of the NMAI. It consists of approximately 300 linear feet of records dating from the 1860s to the present, including correspondence, exhibition planning materials, Board of Trustees meeting minutes, annual reports, museum publications, and financial reports. In addition to the records of institutional operations and governance, the Paper Archive's holdings contain information concerning the museum's objects and the persons who collected them. These materials include published and unpublished manuscripts; field notes with original drawings, site diagrams, and maps; scrapbooks; and catalogue lists.

The Photo Archive comprises approximately 90,000 images including some 47,000 negatives; 30,000 vintage prints, and 13,500 transparencies depicting *inter alia* the Museum's ethnographic and archaeological expeditions in North America, Mexico, and South and Central America. The images range in date from mid-nineteenth-century daguerreotypes to digital images of contemporary Native American artists and events, however the bulk of the images are shot between 1860 and 1930. The Photo Archive features multiple-formats comprising lantern slides, glass-plate negatives, 36mm B&W and color prints, color slides, 4X5 transparencies, and digital images of objects in the NMAI collection.

Search & Access: Currently, the functionality of search and access are very limited due to the so-called "Move Project". In 1999, the NMAI began to move its collections and archives from a warehouse in the Bronx in New York to the brand new state-of-the-art CRC facility in Suitland. In this move process objects are inspected by conservators and depending on condition, cleaned and stabilized. Imaging staff digitally photograph every single object in high-resolution images to minimize the need to handle the collection in the future and to improve access to the collections. Generally, the Archives provides reference, research, and printing services to Native Americans, publishers, scholars, museum staff, and the general public. To view the collections, researchers must make an appointment. The library

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collection is accessible through the *Smithsonian Institution Research Information System (SIRIS)*²²⁹ that is maintained by Smithsonian Institution Libraries.

The principles of stewardship practiced by the NMAI govern their approach to access: "...unprecedented levels of access and preservation are the third principle of stewardship. Proper access is to undo the century of exclusionary practices of Museums and academics in particular toward Native people and their cultural patrimony. But it is also about the intellectual access that creates a dialogue in regards to the collections and their meanings."²³⁰ Restrictions governing access to paper archives is in this institutional context set by the source community: "When an entire folder is restricted then the folder title will identify it as such, along with the proviso, i.e. "Restricted without permission of Cultural Preservation Officer" or "Restricted until 2040" etc. Access to that folder is blocked until permissions from the tribal authority or donor is obtained. The archivist will direct the researcher to the appropriate party. If a tribe or Native individual officially requests that material be restricted, NMAI Archives will review the request in conjunction with appropriate internal committees and protocols. If a portion of material within a folder is restricted, the archivist will remove the restricted material before researcher use, and alert the researcher to this fact."²³¹ Regarding visual materials the following policy applies: "Access to the photographic archives for viewing, study, and research may be restricted if such access offends the religious or cultural practices of Native American peoples. It is the responsibility of the researcher to obtain prior written permission from the respective tribal authorities if needed"²³².

IP Protocols and Procedures: The information available on the website about IP issues is diminutive. It is only stated that video/audio recording and flash photography at the CRC will be permitted for personal and research use only. During my consultation with the NMAI they referred to the founding Act of 1989 as their Code of Ethics. They follow the letter of this Act and do their best to embrace its spirit. Generally speaking, the institution takes a "non-codified approach, which constantly is redefined"²³³. The main challenge for the NMAI is the building of "relationships" and "respect" and

²²⁹ www.siris.si.edu

²³⁰ Quoted from NMAI's *Collections Policy and Procedure Manual*, September 2005; p. 35.

²³¹ Quoted from NMAI's *Collections Policy and Procedure Manual*, September 2005; p. 147.

²³² Quoted from NMAI's *Collections Policy and Procedure Manual*, September 2005; p. 151.

²³³ Consultation with NMAI staff at the Suitland facility, August 2006: During our meeting Jane Sledge critiqued what she called the "academic slipperage" in the IP discourse, which she found in part exemplified by George Nicholas' project *IP Issues in Cultural Heritage*. In particular, she thought the term "descendant communities" as set forth in this research project

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taking seriously their role as steward and caretaker of Native objects: “We never owned the IP” said Jane Sledge during our consultation, and she continued: “we are the stewards of the objects and the scarce information about them. The researcher asks for access by the tribe. The NMAI is about aligning the contexts between the wishes and sensitivities of the contemporary tribe and our caretaking of that material. Our mission is to align these two contexts”.

Relations to Source Communities: The NMAI Act (1989) governs to a large extent the relations to the Museum’s source communities. This piece of federal legislation sets out the procedures for: (1) the repatriation of Native American human remains and funerary objects; (2) the repatriation of objects of religious, ceremonial, and historical importance to Native American peoples, communally-owned tribal property, and other property acquired by or transferred to the Museum illegally; and (3) the treatment and display of Native American materials.

The Repatriation office, which forms part of the “Fourth Museum’s” outreach-service, provides consultation and assistance to domestic and international indigenous communities for the research and repatriation of specific kinds of culturally sensitive collections. Staff members work closely with community representatives to provide appropriate care and management for these collections, and the Museum sponsors workshops and publications that address repatriation issues.

NATIONAL MUSEUM OF NATURAL HISTORY (1910)

Department of Anthropology

The Department of Anthropology²³⁴ within Smithsonian’s National Museum of Natural History (NMNH) houses two prime repositories of intangible cultural heritage specializing in traditional cultural expressions: The National Anthropological Archives (NAA) and the Human Studies Film Archives (HSFA). Since they are housed within the same institutional edifice, I will treat them as one repository.

was problematic because it ran counter to the sovereign status of Native Nations. Please see Appendixes for a summary of this August consultation.

²³⁴ <http://www.nmnh.si.edu/anthro/>

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National Anthropological Archives (1968) & The Human Studies Film Archives (1975)

The Representational Scope of the Holdings: The foundation to the archive which was to become the National Anthropological Archives (NAA) was laid in 1879 by John Wesley Powell²³⁵, who declared his intent to institutionalize and "organize anthropologic research in America". The archive's institutional affiliation was with the Smithsonian's Bureau of American Ethnology (later the Bureau of American Ethnology). As part of the BAE, the archive received geological surveys (manuscripts and photographs), material concerning American Indian languages collected since the 1850s²³⁶; and material donated by "unpaid BAE contributors, an array of persons ranging from missionaries, frontier army officers, settlers, and travelers to gentlemen scholars and exploring scientists"²³⁷. Thus, the strength of the collection in a wider perspective is the ethnological and linguistic documents concerning North American Indian cultures collected by the Smithsonian Institution in the second half of the 19th Century. In 1965, the BAE merged with the Smithsonian's Department of Anthropology to form the Smithsonian Office of Anthropology. However, shortly after this merger the Smithsonian Office of Anthropology archives were transformed into the National Anthropological Archives in 1968. The NAA was created in response to a widely felt need to preserve unique field materials, a concern resulting to a considerable degree from the reluctance of some archives to accept the "raw materials of science". Since 1968, the NAA has sought to promote the preservation of anthropological field materials and assist in locating materials of specific anthropologists.

At present the NAA is the only archive in the United States dedicated exclusively to the preservation of unpublished materials produced by the four distinct sub-fields of American Anthropology: ethnology; linguistic anthropology; archaeology; and physical anthropology. With a mission to document the world's peoples and cultures, past and present, as well as the disciplinary history of anthropology, the NAA currently holds field notes²³⁸, unpublished manuscripts, expedition logs, maps, ethnological and

²³⁵ Among the earliest ethnographic collections are the diaries of John Wesley Powell, which recount his exploration of the Colorado and study of the region's Indians. Other significant manuscript collections include the ethnographic and linguistic research of Franz Boas, Frances Densmore, Albert S. Gatschet, John Peabody Harrington, and J.N.B. Hewitt, as well as the expedition logs, photographs, and film record produced on Matthew Stirling's explorations in New Guinea (1926-29).

²³⁶ These collections include the Smithsonian's earliest attempts to document North American Indian cultures begun in 1846 under Secretary Joseph Henry.

²³⁷ Quoted from *Guide to the National Anthropological Archives, Smithsonian Institution. Revised and Enlarged*, by James R. Glenn. (Washington, D.C.: National Anthropological Archives, 1996).

²³⁸ The NAA holds 8,250 linear feet of field notes, unpublished manuscripts, maps, drawings, and other ethnographic materials (2003)

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archaeological photographs²³⁹; drawings²⁴⁰; correspondence, journals, sound recordings²⁴¹, film and video²⁴² and other media produced primarily by American anthropologists. In addition to the papers of individual anthropologists, the NAA also preserves the records of anthropological organizations²⁴³ as well as materials of use to anthropologists²⁴⁴. The NAA also houses over 23,000 items of three-dimensional Native art, mainly of North American origin produced by Native people, but also from Asia and the Pacific. The repository also holds contemporary and complementary film, video, sound and photographic collections in the Human Studies Film Archives. During my interview with the Director, Robert Leopold related that the NAA has recently transferred the records of Indian organizations, most notably the Records of the National Congress of American Indians to the Archives of the NMAI. Later on, Leopold explained that: “The transfer of this important collection was made in acknowledgement of the distinctive collecting policies and research constituencies of the two Smithsonian archives, located within a few hundred yards of each other in Suitland, Maryland”.

The Human Studies Film Archives (HSFA) was founded in 1975 as the National Anthropological Film Center. In 1981, the Center became part of the Smithsonian's Department of Anthropology within the National Museum of Natural History. At this time it was renamed the Human Studies Film Archives. The HSFA collects, preserves, documents and disseminates a broad range of historical and contemporary ethnographic and anthropological moving image materials. The bulk of the material could be characterized as “field footage”, i.e. the material that comes from the making of film (and photographic) records in association with ethnographic fieldwork. However, HSFA also collects related documentation including sound recordings, still photographs, manuscripts and other associated texts, field notes, camera and sound logs and production logs. Whenever possible, synchronous audio commentaries (annotations) are obtained from the creator, other persons associated with the material, or from an individual with knowledge of the contents.

²³⁹ The collection of photographs amounts to 635,000 items consisting of original glass film negatives and vintage prints including some of the earliest images of indigenous people worldwide (2006).

²⁴⁰ The world's largest and best documented collection of 19th century Plains Indian drawings on paper including ledger book drawings.

²⁴¹ The NAA currently holds 11,400 sound recordings (2006).

²⁴² The Archive has more than 8 million feet and 1,000 hours of original ethnographic motion picture, i.e. film and video materials (2006).

²⁴³ This includes the American Anthropological Association; the Society for American Archaeology; the American Ethnological Society.

²⁴⁴ Large portions of the Archives records serve to document the curators of the Department of Anthropology at the National Museum of Natural History (part of the Smithsonian Institution) field trips to virtually all parts of the world bringing home extensive ethnological, archaeological, and physical anthropology collections.

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The repository holds several seminal works of many well-known ethnographic filmmakers, an extensive collection of amateur and professional travel and expedition films and a wide range of educational films, documentaries, television broadcasts, and outtakes. In short: a world ethnographic film kaleidoscope. Quantitatively speaking, the collection encompasses approximately eight million feet of original ethnographic film and video²⁴⁵. From year 2000 and to the present the collection has grown at a rate of two- to three hundred thousand feet per year with the majority of the organization's fiscal and personnel resources being preoccupied with the preservation and archiving of the footage. The institutional affiliation with the Smithsonian implies that a number of films in the HSFA repository are believed to be the first such moving images produced on particular indigenous peoples²⁴⁶. Such film documents both enable scholars to understand how particularly cultures have changed over time and can provide the inspirational raw material for contemporary indigenous film production²⁴⁷.

Search & Access: Each year, the NAA and the HSFA are used by several thousand scholars, graduate students, journalists, television and film producers, and many others. Individuals researching their own culture and history are among the archives' largest constituencies. Most of the 73.000 digital images of archival materials are currently available through Smithsonian's online catalog entitled SIRIS²⁴⁸.

IP Protocols & Procedures: The general policy is that materials are available for duplication on a case-by-case basis depending on restrictions and other archival issues. The NAA asserts that all materials on its web site are copyright protected by the Smithsonian Institution and their respective copyright holders. In case of reproduction requests it urges the user to inquire in writing about the status of particular texts and images. The general rule is that texts and images on the NAA web site may be reproduced in accordance with the fair use doctrine for "non-commercial, educational and personal use only. Students, teachers, and individual users may download, print, photocopy, and distribute these materials for personal or classroom use without prior permission, provided that the files are not changed and the Smithsonian Institution copyright notice is included. The reproduction of images and

²⁴⁵ This includes materials in virtually all formats — 35, 16, 9.5, and 8mm film, black-and-white and color, silent and sound; 2-inch, 1-inch, 3/4-inch, 1/2-inch and Hi-8 video in open reel-to-reel, U-matic, PAL, and NTSC formats.

²⁴⁶ See Pierre Jordan (1992), *Premier Contact-Premier Regard: Les 100 premiers films tournés en Afrique, Océanie, et Amérique*. Centre de la Vieille Charité, Marseille, France.

²⁴⁷ The production of the video *Warrior Chiefs in a New Age* (1991) by Crow filmmaker Dean Bearclaw incorporates the original footage shot in 1908 by the Photographer Joseph Dixon (****-1926). In somewhat the same vein, *Pathways Productions* (a production group owned by Kevin Costner), has similarly drawn images from both the NAA and HSFA repositories to explore and revise popular representations about the American West and Native Americans.

²⁴⁸ Please consult <http://www.siris.si.edu/> The principles of cataloguing and information taxonomies are available at: <http://sirismm.si.edu/siris/siris-about-siris.htm>

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texts on a Web site or CD-ROM is prohibited without written permission. Please acknowledge the National Anthropological Archives as the source of these materials whenever they are reproduced.”

Any commercial use is strictly prohibited without prior written permission from the NAA. The licensing policy is set out in the document entitled *Rights and Reproductions Guidelines*. A use fee is charged for images the NAA supply for publication, distribution or exhibition in any format both in print and electronic media. In return for the use-fee payment²⁴⁹, the NAA grants permission for one-time, one-language, non-exclusive, worldwide use of an image. Re-use or resale of any image in another publication, edition, format or language is prohibited. With respect to electronic media, "one-time use" means that once an electronic product has been published, distributed or exhibited, it may not subsequently be reformatted, redesigned, or otherwise altered on the discs or screens on which the image appears. The user is responsible for securing any required third-party permissions, moral rights or publicity or privacy rights of any person or entity. The NAA may request such permissions and may ask users to sign the Use Agreement Form.

During my interview with Robert Leopold, the Director of the NAA, he revealed that some of the restrictions which applied to archival access were stipulated by the donor. He mentioned an interesting case where the anthropologist Frederica de Laguna (1906-2004) had requested a fifty-year time restriction of access to all her field notes from Alaska. After a long conversation between her and the Director, it turned out that her primary intention was to conceal the names of individuals who had been accused of witchcraft. during her field work among the Tlingit in Southeastern Alaska. Accordingly, Leopold and Laguna agreed to restrict access to this specific segment of her field notes for 50 years and make access to the rest of her field notes unrestricted. Other times, Leopold explained during the consultation, donor restrictions are intended to protect the anthropologist’s privacy rights as well as his or her rights to draw on the material for scholarly publications. Generally speaking the NAA applies restrictions to medical records, such as Rorschach Tests and different varieties of IQ tests. Leopold also related that some donors wished to only grant access to “serious scholars”. He explained that this was very problematic for the NAA, because they neither could nor would assess who qualified as a “serious scholar” and who did not. Leopold further stated that the NAA and its collection donors impose restrictions on public access on a case-by-case basis and a Guide in the IP field would be of much use to the institution. The NAA has no general codified policy, but discusses restrictions on access to

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culturally sensitive materials with collection donors and native communities. Access is otherwise universal.

Relations with Source Communities: The NAA and the Museum of the Cherokee Indian are currently collaborating on a two-year project to digitize 8,000 pages of Cherokee language manuscripts. The collection includes songs and musical transcriptions; lists of Cherokee personal names and place names; early maps and censuses; copies of Cherokee treaties; and a wealth of ethnobotanical material. The Cherokee Museum will make high-resolution digital images of Cherokee linguistic manuscripts created by the NAA available to the Eastern Band of Cherokee Indians through an online system housed at the museum, and will also carry out fieldwork with elders and native speakers in order to assess these materials, translate them, and develop ways to use them in Cherokee language preservation programs. Portions of the collection will also be available to researchers through the Smithsonian's online catalog. The NAA also worked closely with members of the Lakota community in the development of the online exhibit *Lakota Winter Counts*²⁵⁰.

The sister archive HSFA is currently engaged in three projects with descendants of the source communities depicted and captured in some of the archival field footage: (A) A native oral history project, which draws on the footage shot by the Jesuit priest and filmmaker S.J. Bernard Hubbard (1888-1962) during the 1930s and 1940 of the *Ugiwangmiut* people, the former *Inupiat* inhabitants of King Island (Alaska). This project re-uses film footage of traditional Ugiwangmiut dance to elicit concepts of performance and choreography, creating a sense of cultural continuity and revitalizing social reproduction in the local community. The project is funded by the National Science Foundation; (B) A somewhat similar project draws on the film footage shot by Joseph Moore in 1957 on an African-Jamaican ritual tradition known as *kumina*. Using compact video-playback equipment in the field, two anthropologists will work with contemporary *kumina* practitioners — some of whom are represented in Moore's original footage — to explore concepts of performance, innovation, variation, and change in this tradition over the past five decades. This project is funded through the Smithsonian's Collection-Based Research Fund; (C) Deploying the same cultural revitalization model, a similar project is drawing on the field footage shot by anthropologist Robert Zingg on the Huichol Indians of Tuxpan de Bolanos (Northwest Mexico) in 1933-4. This footage is the earliest known motion picture

²⁴⁹ These are calculated on two different scales; one for still images depending on the print run and one for film-and video calculated on a per-second basis, where the rate depends on the intended media outlet.

²⁵⁰ <http://wintercounts.si.edu/>

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documentation of the Huichol and depicts the distinctively indigenous aspects of Huichol culture as well as various Catholic syncretic aspects²⁵¹.

Digitization Projects: The NAA and the Rosetta Project²⁵² are working on making a collection of historic sound recordings of Native California Indian languages available online for purposes of language revitalization and scholarly research. The sound recordings were originally produced on wax cylinders and aluminum disks by John Peabody Harrington (1884-1961) and his associates between 1912 and 1941. The material selected for digitization number more than 1.300 items and includes the languages, myths, legends, stories and songs of thirty-five Native American tribes. The digitized sound recordings will appear on the Rosetta Project language portal and in SIRIS²⁵³, the Smithsonian's online public access catalog.

During my interview with the Director, he told me about the digitization project of the about 50.000 images in the NAA. The rationale of the project was to provide web access to every single image, but NAA was aware of the cultural sensitivity of some of the images. However, it was very difficult to establish any general criteria for restricting online access to photographic images because cultural sensitivity is defined differently by various communities. As Leopold said: "Photographs depicting ancestors or unclothed individuals, for example, may be considered appropriate for online display in one community but not in another". If the NAA had any policy, it was to consider image by image in consultation with the culturally affiliated group. Leopold related that NAA had digitized 1100 photos depicting Navajo life and put them up on the web. The Navajo had requested that 24 of these images be removed, because they depicted sacred ceremonies. The NAA removed these digitized images from the website, but explained the absence of these images and the reasons why they were not publicly accessible. It was important to the NAA to communicate that the institution was not being "selective", but was honoring the request of the Navajo. Leopold stated that the NAA would prefer to establish rapport and engage in consultation with every tribe, but a limited staff and resources prevented this. In

²⁵¹ The Huichol footage captures the "first fruits ritual" at the ceremonial center of *Ratontita*, temple officers returning from a successful deer hunt, a peyote dance, parched corn ceremony, rain-making rituals, Easter Week activities (including the stations of the cross and a procession of the "saints"), and the *cambio de las varas*, an annual ceremony performed to sanctify the changing of Huichol government officials.

²⁵² The Rosetta Project is a global collaboration of language specialists and native speakers working to build a publicly accessible digital library of human languages. Please see: <http://www.rosettaproject.org/>

²⁵³ Please see: <http://www.siris.si.edu/>

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fact, he said that the Navajo Nation had financed the digitization project of the 1100 images pertaining to their tribe.

UNIVERSITY OF BRITISH COLUMBIA, VANCOUVER, BC (1915)

Museum of Anthropology, UBC (1949)

Representational Scope of the Holdings:

Institutional History: <http://www.moa.ubc.ca/history/history.php>

Mission: <http://www.moa.ubc.ca/history/mission.php>

Object Collections: <http://www.moa.ubc.ca/collections/index.php>

First Nations Collections: http://www.moa.ubc.ca/collections/fn_collections.php

Archival Holdings: <http://www.moa.ubc.ca/collections/archives.php>

Search & Access:

<http://www.moa.ubc.ca/collections/access.php>

http://www.moa.ubc.ca/pdf/Cdn_museum_and_archives.pdf

Online exhibits: http://www.moa.ubc.ca/exhibits/online_exhibits.php

The archives are open to the public by appointment only.

IP Protocols & Procedures:

Licensing policy: http://www.moa.ubc.ca/pdf/Behind_the_scenes.pdf

Cultural Sensitive Materials: http://www.moa.ubc.ca/pdf/Sensitive_materials.pdf

Deposits: http://www.moa.ubc.ca/pdf/Aquisitions_policy.pdf

First Nations Maps: http://www.moa.ubc.ca/pdf/Application_FN_maps.pdf

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Filming Permission: http://www.moa.ubc.ca/pdf/Filming_Application.pdf

Photography Permission: http://www.moa.ubc.ca/pdf/Photography_application.pdf

Relations with Source Communities:

Repatriation: http://www.moa.ubc.ca/pdf/Repatriation_guidelines.pdf

Community outreach: <http://www.moa.ubc.ca/community/index.php>

OTHER IMPORTANT INSTITUTIONS

Alutiiq Museum and Archaeological Repository, Kodiak, Alaska²⁵⁴

The Museum preserves and shares the cultural traditions of the Alutiiq people through exhibits, educational programs, publications, anthropological research, and the care of traditional objects. The Alutiiq Museum is an outgrowth of the Kodiak Area Native Association's (KANA) Culture and Heritage program. In 1987, the KANA Board of Directors resolved that the exploration and celebration of Alutiiq heritage was essential to the health of Alutiiq communities, and they initiated a set of heritage programs designed to promote awareness of Alutiiq history, language, and arts. Efforts to establish a professional museum were realized in 1993 when KANA received a \$1.5 million grant from the Exxon Valdez Oil Spill Trustee Council to develop a state-of-the-art repository and regional research facility. The Alutiiq Museum & Archaeological Repository opened its doors to the public on May 13, 1995.

The Museum has two interesting collection policy documents, which both directly and indirectly addresses IP issues:

<http://www.alutiiqmuseum.com/pdfs/CollectionsPolicy.pdf>

<http://www.alutiiqmuseum.com/pdfs/SpiritualCareOfObjects.pdf>

²⁵⁴ <http://www.alutiiqmuseum.com/index.htm>

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Bishop Museum, Honolulu, Hawai'i²⁵⁵

The Archives and Library holds one of the most extensive collections concerned with Hawaii and the Pacific, including manuscripts, photographs, oral histories, sound recordings, maps, etc. However, there is currently no general IP policy for the institution in place, but terms of use and access are described here:

<http://www.bishopmuseum.org/research/library/libarch.html>

The Museum also has extensive experiences with the vices and virtues of NAGPRA governing its relations to the Native Hawaiian communities:

http://www.bishopmuseum.org/Final_NAGPRA_Guidelines.html

The Museum also has a number of on-going digitization projects:

<http://www.bishopmuseum.org/research/onlinedata.html>

Cline Library at Northern Arizona University²⁵⁶

In 1991, the Cline Library at Northern Arizona University and the Hopi Tribe 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.

Colorado River Indian Tribes Library & Archive²⁵⁷

The Colorado River Indian Tribes Library/Archive began in 1958 as a Community Development Experimental Pilot project, spearheaded by Dr. Spencer Hatch. 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

²⁵⁵ <http://www.bishopmuseum.org/>

²⁵⁶ <http://www.nau.edu/library/speccoll/speccollections.html>

²⁵⁷ <http://critonline.com/critlibrary/>

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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, the Colorado River Indian Tribes Library/Archive, applies a disclaimer to “problematic” acquisitions and “derogatory labeling” in the holdings of the Library/Archive, which states: *We do not endorse this publication.*

Field Museum, Chicago, Illinois²⁵⁸

One of the significant natural history museums in the U.S., but without any policy document on IP.

Getty Museum, Los Angeles, California²⁵⁹

One of the leading art museums in the world with an extensive photography and archives collection, which is governed by the following codified policy:

http://www.getty.edu/research/conducting_research/institutional_archives/policy.html

Glenbow Museum, Calgary, Alberta²⁶⁰

The Museum houses Canada's largest non-governmental archival repository, with extensive holdings of unpublished documents and photographs related to the history of Western Canada. Areas of special strength and focus include First Nations (especially Blackfoot), Mounted Police, pioneer life, ranching and agriculture, the petroleum industry, politics (especially the farmers' movement), labor and unions, women, the arts (especially theatre), and businesses. There is no codified IP policy in place:

<http://www.glenbow.org/collections/archives/>

²⁵⁸ <http://www.fieldmuseum.org/>

²⁵⁹ <http://www.getty.edu/>

²⁶⁰ <http://www.glenbow.org/>

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However, online data are subject to the following IP policy: <http://www.glenbow.org/copyright.cfm>

Hearst Museum & Folklore Program, University of California, Berkeley²⁶¹

The Hearst Museum at the University of California, Berkeley, was founded in 1901 by Phoebe Apperson Hearst who envisioned the museum as the cultural cornerstone of one of the world's leading research institutions. In the 1980s, the Director, Richard Keeling initiated the "California Indian Project", which was conceived in opposition to the Federal Cylinder Project. The guiding principle of the Hearst project was to return copies of old audio recordings straight from repository to local individuals and not from institution to institution like the Federal Cylinder Project. Today, the Hearst Museum serves the community through exhibitions, educational programs, and research opportunities that promote the understanding of the history and the diversity of human cultures. The Museum has no overall IP policy, but rules governing credit and copyright²⁶² as well as rights and reproductions.²⁶³

Archive of Traditional Music, Indiana University²⁶⁴

The Archives of Traditional Music at Indiana University is the largest university-based ethnographic sound archive in the United States. Its holdings cover a wide range of cultural and geographical areas, and include commercial and field recordings of vocal and instrumental music, folktales, interviews, and oral history, as well as videotapes, photographs, and manuscripts. The Archive does not have a general IP policy, but does have rules regarding in-house listening and duplication for non-profit scholarly purposes²⁶⁵

Peabody Museum, Harvard University²⁶⁶

Founded in 1866, the Peabody Museum is one of the oldest museums in the world devoted to anthropology and houses one of the most comprehensive records of human cultural history in the

²⁶¹ <http://hearstmuseum.berkeley.edu/>

²⁶² <http://hearstmuseum.berkeley.edu/collections/services.html>

²⁶³ <http://hearstmuseum.berkeley.edu/media/rights.html>

²⁶⁴ <http://www.indiana.edu/~libarchm/>

²⁶⁵ <http://www.indiana.edu/~libarchm/services.html>

²⁶⁶ <http://www.peabody.harvard.edu/>

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Western Hemisphere. The Archives Department of the Museum does not have an IP policy, but adheres to the ethics set by the SAA. Regarding the Photographic Collections, fees, rights and reproductions have been stipulated.²⁶⁷ In addition to this, the Peabody Museum at Harvard has developed statements, which inform researchers of community concerns and the existence of Native research protocols. The Museum has encouraged culturally affiliated communities to provide context for the collections from their perspective. The museum has supplemented descriptive materials with cultural sensitivity statements.

PRELIMINARY CONCLUSIONS

Roughly, we could plot institutional conduct on a continuum with the Library of Congress vision of the public domain at one end and the Colorado River Indian Tribes Library & Archive at the other. All the surveyed institutions come down somewhere on this continuum with regard to their IP policy. Running through this range of institutional conduct is the definition and status of “public domain materials”²⁶⁸, which TCEs currently fall under according to most IP laws. Their “public domain” character of course makes them particularly vulnerable to various forms of appropriations and misuse by third parties. Indigenous people often argue that “their culture” was involuntary taken by field researchers during colonialism and never intended for public consumption. For instance, Black & White photographs of Hopi religious ceremonies taken before 1922 are considered a public domain resource in the United States, but the contemporary Hopi Nation may claim that the photographs were taken without prior and informed consent from the Elders, which held the customary authority to alienate such practices or permit photography. In the case of publication of such photographs, the absence of an acknowledgement of source, misrepresentations of the people depicted and violation of Hopi customary laws of restricted knowledge are for obvious reasons a source of grave concern for the community, as well as more generally for many Indigenous peoples²⁶⁹. In this survey of institutional

²⁶⁷ <http://www.peabody.harvard.edu/photo/permissions.html>
<http://www.peabody.harvard.edu/photo/fees.html>

²⁶⁸ In fact, the notion of “public domain” is often conceived of as a cultural specific construct of the European Enlightenment, and on these grounds not recognized by many Indigenous representatives.

²⁶⁹ The issue has been raised more generally with regard to Edward S. Curtis legendary photos published in *The North American Indian*, 20 volumes, Seattle, NY and Cambridge, 1907-30. The Library of Congress has digitized the entire collection and made it available on the web: <http://memory.loc.gov/ammem/award98/ienhtml/curthome.html> One complete set of the volumes was recently (May 2006) estimated by Swann, an auction house in New York City, for \$250,000. The images often depict what is considered “culturally sensitive” by contemporary Native American Tribes, but the material is under current U.S. IP laws considered a public domain resource.

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conduct we have seen three ways to address this problem: The Edward Curtis project of the LoC²⁷⁰, where an entire collection of photographs is digitized and published without considerations of “cultural sensitivity”, the NAA approach with the Navajo, where consultation with the tribe resulted in certain images being restricted, but with explanation of why these images were removed in order not to be “selective” and finally the NMAI approach, where no vintage photographs are made available on the web and access is granted by the tribe.

²⁷⁰ <http://memory.loc.gov/ammem/award98/ienhtml/curthome.html>

PART 2: CURRENT CHALLENGES

CHAPTER III: CHALLENGES

Intangible cultural heritage is not just the memory of past cultures, but is also a laboratory for inventing the future.

Koïchiro Matsuura

UNESCO's Director-General,

UNESCO Press Release No. 2002-64

INTRODUCTION

Throughout the legal history of copyright, the conjunction of technological innovations (in our time and for our purview the digitization of cultural heritage²⁷¹) and the ascendance of new right holders (in our time and for our purview the political sovereignties of the Third and Fourth World²⁷²) has forced the legal institution of copyright to make amendments. However, what is perhaps particular about the contemporary conjunction is that we seem to be moving from a print culture, in which the Western institution of IP was conceived, to a new type of global information culture of which we are only beginning to see the contours. Our ideas and norms (both legal and ethical) about IP seem bound up and tied to the era of print culture. It is an open question and subject of heated debate whether these ideas are obsolete in a networked digital technology connecting most of the globe instantaneously into one big marketplace of ideas. In the following, I am attempting to look at the specific challenges posed by TCEs to this backdrop of a new global information economy enabled by the internet and other communication technologies.

Museums have tried to put Native Peoples on the spot to codify things to the extent that people are saying:

Do you want to tell us if this is more sacred than that! Well it's all sacred!

Patricia Nietfeld, Collections Manager, NMAI, SI, Consultation August 2006²⁷³

²⁷¹ We face a range of institutional initiatives, such as the i2010 Digital Libraries Initiative of the European Commission, geared at making collections digitally accessible.

²⁷² Native Nations and Indigenous communities worldwide have voiced a number of concerns about the access, control and circulation of traditional cultural materials recorded in the first half of the 20th Century.

²⁷³ The following staff were present during the consultation at the NMAI's CRC facility in Suitland, August 4th 2006: Terry Snowball, John Beaver, Patricia Nietfeld and Jane Sledge.

I) REFINING THE SCOPE OF THE SUBJECT MATTER

What is the subject matter of “traditional cultural expressions”? There is no universally accepted answer to this question. Opinions differ, from them who regard TCEs as “Expressions of Folklore”, which is to say the subject matter of a number of Western scholarly disciplines²⁷⁴ and a derogatory term in many ears, to those who regard TCEs as “Indigenous Culture” capitalized alluding to autonomy and writ large comprising both tangible and intangible cultural heritage. The conventional answer to the question is that TK/TCEs cover “an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world”²⁷⁵. However, a number of definitional questions face a set of IP Guidelines if they are to be effective and serve their purpose.

The first question is whether and if so how to distinguish between the tangible and the intangible. A WIPO report on this question provides the following answer: “TCEs for IP purposes include both tangible and intangible components. A separation between the two is artificial, as it may be said that tangible expressions are the “body” and intangible expressions the “soul” which together form a whole. That said, tangible and intangible expressions of culture may require different measures for their legal protection.”²⁷⁶ The most conspicuous difference between tangible cultural properties *per se* (such as archeological artifacts and ethnographic objects) and intangible cultural properties *per se* (such as songs, oral narratives and rituals) is that a physical object can only be at one place at a time, whereas a song is susceptible to copying, dissemination, reproduction and sharing in radical different ways. As many have argued, this fact speaks in favor of the argument of a differential approach to tangible and intangible cultural properties. However, of late there has been a growing tendency within the museum community to conceive and recognize that tangible museum objects embody a “fourth dimension”, understood as the very ideas embodied by the piece²⁷⁷ and the knowledge about the object held by the community with which it is affiliated. This issue about the fourth dimension of museum objects often came up

²⁷⁴ Ethnology, Ethnography, Folklore Studies, Anthropology, etc., which emerged out of an extension of the culture concept in 19th century Romanticism, from High Art defined in the Western bourgeoisie sense, to the Art of the People, including storytelling, folk art and music, legends, lore and myths, etc..

²⁷⁵ Quoted from *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore* WIPO; Geneva; 2003. A detailed discussion on questions of terminology is provided in document WIPO/GRTKF/IC/3/9.

²⁷⁶ *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*; p.25; WIPO; Geneva; 2003.

²⁷⁷ Canadian copyright law recognizes that a physical object embodies the ideas of its creator and that these are copyrightable.

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during my consultation with the NMAI in August 2006. What transpired in this forum was that sacred medicine bundles have a configuration of intangible properties associated with them, including rituals, songs, myths, medicines, dances, and technical knowledge. In the communities of origin, there are different rights, obligations and methods of transfer associated with clan medicine bundles and personal medicine bundles. The same goes for certain designs for teepees, sacred robes, shields and certain women's art, which also hold intangible properties and may have songs and stories associated with them. These facts point towards the need of a more adequate comprehension of the full scope of material culture, which hold obvious implications for IP questions. In other words, defining the subject matter of IP Guidelines requires a more advanced notion of the relation between the tangible and the intangible than what we have currently. Such an advanced notion would have to grapple with and come to terms with the question of the intangible ownership aspects of cultural heritage, i.e. the intellectual property component of the full scope of material culture.

A distinction equally important to come to grips with regarding the subject matter of IP Guidelines is how to draw a line between pre-existing TCEs and contemporary TCE production. Pre-existing TCEs is typically defined as multi-format ethnographic materials (paper, photographic and audio-visual resources, etc.) recorded and collected *in situ* throughout the past centuries, but culminating in the era of European colonialism (1880s-1960s). This definitional category is often juxtaposed with contemporary TCEs, which are said to include folk tales and songs, dance, rituals, poetry and riddles, signs, words, symbols, as well as other traditional practices with more tangible expressions such as drawings, paintings, carvings, mosaic work, pottery, textiles, crafts, musical instruments, and architectural forms. This register of contemporary TCEs is defined as (1) a matter of inter-generational continuity as well as innovation and adaptation; (2) characteristic of a community's cultural identity and heritage; (3) produced collectively, by "unknown authors", or by local creators recognized as having the authority to do so; and (4) not made for commercial purposes, but serving ceremonial and religious life. Pre-existing TCEs are under most IP systems considered a public domain resource, whereas contemporary TCEs are more susceptible of protection by current IP laws²⁷⁸. Given this legal fact, a set of IP Guidelines would need to pay special attention to pre-existing TCEs. This survey has established that the "cultural sensitivity" of pre-existing TCEs is a matter of serious concern both for institutions and Indigenous communities.

²⁷⁸ *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*; p.26; WIPO; Geneva; 2003.

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Thus, the question of the exact scope of the subject matter of a set of IP Guidelines faces a number of definitional options of conceptual, generic and substantive character. Perhaps the best way of approaching these questions is to ask what constitutes the subject matter of other IP Guidelines²⁷⁹ and International Conventions in this field. How does, say the UNESCO 2003 Convention demarcate the province of TCEs? In this instance, it seems clear that the subject matter intended for protection is defined by the kind of perceived problems to which the Convention is a response. One definitional option is therefore to begin with the problem area under consideration, instead of grappling with a generic answer to the question of what TCEs could possibly include. In other words, if indeterminacy is the ultimate feature of TCEs, we probably need to reformulate the definitional question so that it can be answered in an empirical way. Thus, if I turned the definitional question around and asked: is the *mvett* of the Fang in Gabon a TCE? Most knowledgeable observers would without any hesitation answer affirmatively. This seems to indicate that even though we cannot define the scope of the subject matter of TCEs we apparently quite clearly know what makes some answers plausible and others not. This would point in the direction of some kind of concrete and substantive definitional standards, which allows for verification based on facts, rather than more general generic rubrics.

II) REFINING OUR NOTION OF CUSTOMARY LAWS

What is in fact “customary law” or “indigenous judicial institutions”? Referral to Indigenous customary laws and institutions governing intangible cultural property has become rather common place in the IP discourse. We are told that traditional legal systems are based on ideologies and practices that recognize communal ownership of both tangible and intangible property. This certainly holds true, but it is not a precise and specific enough notion for a set of IP Guidelines. Moreover, in this working notion indigenous notions of law and jurisprudence are made into something eternal and beyond historical change, when in fact what we today call “customary laws” are often hybrid products of long histories of interactions between European legalities and pre-colonial indigenous social institutions of property and governance (Mamdani 1996). Perhaps more importantly, customary judicial institutions that were utilized in the dispute settlement process prior to the adoption of the Western court systems, have a long history of scholarship in anthropology, which is often overlooked. In 1937, Alexander Goldenweiser wrote: “The fact that there are such things in the modern world as infringement of a

²⁷⁹ Please refer to the section on Consultative Resources and the Bibliography in the Annex.

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patent or copyright, stealing of someone's play, plagiarizing another's ideas, quoting from another's writing without quotation marks, and the further fact that these things or acts are generally condemned by the modern conscience, indicate that the concept of ownership of property other than material has gained recognition among us, or is headed that way. It may be added, however, that this entire field of our culture, as well as the fights and litigations to which it has led, would impress the primitives as very strange and perhaps incomprehensible. To them these things are perfectly obvious, and they might well be inclined to condemn us as crude, undiscerning, or unsophisticated, for making so much fuss about it.”²⁸⁰ I think one of the major challenges is to properly understand the contemporary judicial institutions of source communities and to do this we also need to rely both on anthropological scholarship as well as Indigenous consultation. We need to examine how people live by their own customary protocols and laws with respect to intangible property and we need to incorporate a fine-grained knowledge of this into the IP Guidelines. An excellent example which points in this direction is the NAA, where the anthropologist Frederica de Laguna restricted access to some of her field notes, because she knew the material could be used in local witchcraft accusations. De Laguna knew about this sensitivity, because she had studied Tlingit customary laws first-hand (see Chapter II, p. 86-92). One of the great challenges is to understand the centrality of the notion of property and propriety in particular cultural contexts and intangible property in particular in cross cultural perspective. When the intangible property systems of a particular cultural group are seen in this light, we can better understand the basic principles and objectives underlying their protection within the appropriate cultural frameworks. It seems to me that we need to link more advanced and finer grained notions of “customary laws” (WIPO's own work on customary laws²⁸¹ is important here) with the initiative on IP Guidelines for intangible heritage.

III) REFINING “MISAPPROPRIATION”

It seems to me that a set of IP Guidelines is faced with the following crucial question: What kind of appropriations of TCEs advances knowledge and understanding of Native cultures and what kinds of

²⁸⁰ Alexander Goldenweiser (1937:149) The passage is taken from Alexander Goldenweiser (1937) *Anthropology: An Introduction to Primitive Culture*. New York: F.S. Crofts & Co. and reflects the unsound dichotomy between “them and us or the primitive and the civilized world” prevalent at the time. However, the quote illuminates that anthropology has a long tradition for documenting indigenous customary laws regulating intangible property in various community settings around the world.

²⁸¹ http://www.wipo.int/tk/en/consultations/customary_law/index.html

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misappropriations violate customary notions of obligation, authority and secrecy? In order to do that, we would first have to grapple with what we mean by “cultural appropriation”²⁸². This question is complex, because it straddles on the notion of “cultural sovereignty”, implying a concept of culture which is bounded, essential, territorialized and practiced within a closed dominion. This notion of “culture area” was prevalent in the 1920s in the discipline of anthropology, but is considered outdated today. The definitional question of what constitutes “misappropriation” is often put in brackets and halted by a set of derivative questions: What kinds of TCEs needs protection? What uses should “protection” protect against? What forms should such protection take? However, the answers to these questions are dependent on the very definition of “misappropriation”. One point of departure might be to let source communities define in quite concrete terms and examples the scope of the term “misappropriation”, which is certain to vary among traditional communities. Another point of departure could be the codes issued by Indigenous Heritage Organizations listed in Chapter I, p.45-53, in this survey. If a broad and representative sample of tradition-bearers were consulted individually and defined what constituted “misappropriation” for their community, the likelihood at arriving at some more general definition of the concept could perhaps be within reach. Ultimately, I think the key approach to refine our notions of “misappropriation of TCEs” is to strengthen our notion of customary laws. Finer grained notions of indigenous judicial institutions governing property would enable us to come to terms with the crucial concept of “misappropriation” and generate some answers to the ultimate question of what IP Guidelines should in fact protect against.

IV) BALANCING ACCESS

The question of how to define access has perhaps larger implications for pre-existing TCEs than for contemporary cultural productions. In any event, a set of IP Guidelines would be faced with the question of how to strike a balance between unrestricted and non-selective public access versus selective restrictions to TCEs, especially materials deemed “culturally sensitive”. The survey has established that two current institutional paradigms seem to prevail: The Enlightenment notion of free

²⁸² See Bruce Ziff and Pratima Rao’s chapter: “Introduction to Cultural Appropriation: A Framework for Analysis” in *Borrowed Power: Essays on Cultural Appropriation* (1997:1-27). However, the authors do not come up with a definition of “cultural appropriation” apart from that it is “a multidimensional phenomenon”, including but not limited to “steal their cultural soul, misrepresent them, silence their voices, purport to speak for them....sacred practices are trivialized...free ride on the property of others without proper compensation or recognition...Allied to this are claims of sovereignty in which

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and unrestricted access to the world of knowledge for every citizen of the world, which was appropriated by Thomas Jefferson in his defining vision for the Library of Congress: to make its resources available and useful to Congress and the American people and to sustain and preserve a universal collection of knowledge and creativity for future generations”²⁸³. The legacy of this paradigm is represented below:

We’re not a ware house. Our vocation is to provide access to the collections. So we would not accept a collection deemed sacred. We would say no! We want people to have access that is why we have the material.

Michael Taft, Head of AFC, LoC, Consultation March 2006.

Running counter to this paradigm is the one of the NMAI:

If an academic researcher shows up and would like access to material, we would have to defer to the community and have their approval in writing on official tribal letter head paper stating that they have access, even if they’re a member of the Native community.

Patricia Nietfeld, Collections Manager, NMAI, SI, Consultation August 2006²⁸⁴

We seem to have two paradigms of access here: The first holds unrestricted access for the general public as *raison d’être*, the latter accords the source community the role as the defining gatekeeper. In fact, the question of how to calibrate a balance between protecting the rights entailed to creators²⁸⁵ and the rights of the public to have access and learn from those cultural products in an effort to advance and enrich the debate in civil society say about religious beliefs, cosmologies and cultures is at the heart of the institution of copyright. A key issue here is of course the procedures for defining “culturally sensitive materials”. During my consultation with the NMAI, the staff told me that they had a flexible

these assertions are heard: We conceive of these cultural goods as ours and so have the right to control their use. Through appropriation, these sovereign claims are ignored.” (p.24).

²⁸³ Quoted from the leaflet *25 Questions Most Frequently Asked by Visitors* (Library of Congress; 2004).

²⁸⁴ The following staff were present during the consultation at the NMAI’s CRC facility in Suitland, August 4th 2006: Terry Snowball, John Beaver, Patricia Nietfeld and Jane Sledge.

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non-codified definition of “culturally sensitive materials”, because only the source communities could define the realms and parameters of “cultural sensitivity”. Across a broader spectrum of cultural institutions in the U.S. there has been a tendency to let the NAGPRA material taxonomies²⁸⁶ subject to repatriation define what constituted sensitive cultural materials to which access was restricted.

One point of departure in attempts to define and perhaps reconcile the balance between the two paradigms of access regarding pre-existing TCEs may be to look at the National Anthropological Archives (NAA) model. In this instance, the institution intended to make its entire collection of 1100 photographs of Navajo life publicly available online. In consultation with the tribe, the NAA learned that the Navajo found 24 of these images “culturally sensitive”, because they depicted sacred ceremonies. The NAA removed these images from the website, but stated the absence of these 24 images and the reasons why access to this material was restricted. This meant that the NAA vocation of not being “selective” was met and the Navajo request was honored (please see Chapter II, p. 86-92 for further information). This seems to me a possible “model of best practice”, which could be further emulated and perhaps developed in the IP Guidelines.

V) FINDING A COMMON INDEXICAL LANGUAGE

How can you protect something you cannot identify, and how can you search and acquire access to something you cannot name? Recognizing the fact that until now there has been no consistency with regard to inventorying ethnographic materials and no standards for describing TCEs in a controlled agreed-upon vocabulary, the IP Guidelines face a tremendous challenge. Given this indexical shortcoming, fulfilling Article 12 on the establishment of inventories of TCEs in the UNESCO 2003 Convention may seem a far cry. However, as the question above accentuates, protection of traditional cultural expressions is inextricably coupled with standardized inventories. However any such inventory or registration requirement depends upon an adequate indexical language. This survey has shown that there is currently a number of thesaurus projects underway responding to the lack of any common indexical language for TCEs. They face a number of technical and indexical challenges such as:

²⁸⁵ In this instance, to protect the sensibilities of the Tribe regarding their cultural identity.

²⁸⁶ NAGPRA defines the following categories: Funerary Objects; Associated Funerary Objects; Sacred Objects and Objects of Cultural Patrimony as potentially subject to repatriation.

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Categorization, Taxonomies, Thesauri, Controlled Vocabularies, Classification, and Metadata Generation.

AFC has in partnership with the AFS initiated a project to develop an Ethnographic Thesaurus (ET) – a comprehensive controlled language of terms that folklorists, archivists, and librarians can use to classify the enormous variety of literature about cultural practices and expressions produced by folklorists, ethnomusicologists, anthropologists, and other cultural researchers. Over a century of collecting and archiving ethnographic recordings and accompanying material has created a contemporary demand for a coordinated archival description of this body of work. The project is expected to be completed in June 2007. The Co-Chair of the ET project’s Review Board, Catherine Kerst, conveyed during my consultation with AFC in August that UNESCO has shown considerable interest in the project’s abilities with regard to the intangible heritage as have the prominent sound archives in Vienna and Berlin. Catherine Kerst also said that the cataloguing system at the Library of Congress was based on books, i.e. print culture. The groundwork came into place in the 1890s, but it was conceived for books not *knowledge*. The ET project is meant to reinvent the system of the 1890s and create a language for a multi-format collection of traditional knowledge for the 21st Century. As such, the challenge is epochal.

The AMNH in New York is also developing what they call an “Anthropology Thesaurus” (AT)²⁸⁷. It provides a controlled vocabulary for use in searching across the collections of the DoA. The goal of the AT is to allow users to browse through a hierarchical indexical architecture to locate individual objects and to see broader, narrower, and related terms rather than having to perform a new search on individual terms. The DoA’s AT is based upon the Art & Architecture Thesaurus (AAT)²⁸⁸ developed by the Getty Research Institute in Los Angeles and follows as closely as possible its theoretical model for the organization of concepts. The basic principle of the cataloguing system is that for every catalog

²⁸⁷ Please consult the DoA’s Anthropological Thesaurus at <http://anthro.amnh.org/anthro.html>

The version of the AT presented at the URL should be considered a "beta" version designed to demonstrate the capabilities of a thesaurus in searching across the AMNH anthropological collections and to generate feedback from researchers and the public. It is still under development and additional features will be added over time. For a detailed description of the AT please consult the article “The Development of a Local Thesaurus to Improve Access to the Anthropological Collections of the American Museum of Natural History” published in D-Lib Magazine; April 2006: <http://www.dlib.org/dlib/april06/devorsev/04devorsev.html>

Note also that the American Folklife Center is currently working on their Ethnographic Thesaurus (ET) and the National Museum of the American Indian is also developing a thesaurus with indigenous terms based on the Australian model in Canberra: <http://www.nla.gov.au/niac/libs/thesaurus.html> Please see an assessment of these different approaches to a standardized indexical language for TCEs in Section III of this report.

²⁸⁸ Please see the: http://www.getty.edu/research/conducting_research/vocabularies/aat/

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number the following information is included: accession number, nature of accession (e.g.: expedition, gift, purchase), collector, provenience, object name, materials, dimensions, condition, and storage location.

A whole different approach to the search and retrieval of TK and TCEs is taken by the NMAI and represented by their on-going development and search for indexical tools to manage Indigenous knowledge systems. In brief, the fundamental ambition in Suitland is to index TK and TCEs on their own terms, so to speak. This approach of course differs significantly from the AFC and the AMNH ethnographic thesaurus models. In collaboration with Jane Hunter, Professorial Research Fellow at the School of Information Technology and Electrical Engineering at the University of Queensland, Australia, Associate Director for Assets and Operations Jane Sledge has developed a research project to investigate how information technology tools and standards could be refined and extended to enable Indigenous communities to preserve and protect their unique cultures, knowledge and artifacts locally whilst supporting traditional protocols and facilitating better cross-cultural communication and understanding. Hunter has developed a proof of concept open source data base²⁸⁹ for which she developed metadata models and schemas which satisfied international standards as well as the indexing, search, retrieval and access-control requirements of Indigenous communities along with appropriate IT security mechanisms (encryption, authentication, digital signatures etc.) to enable Indigenous communities to easily describe, annotate and control access to resources in their collections. The proof of concept also implemented a search and retrieval interface to Indigenous collections which enforce tribal protocols by restricting access and retrieving search results depending on the user's profile and authority. During my consultation with NMAI staff in August, Jane Sledge envisioned what she called a "layer model", where "documentation is not authoritative, but an ongoing dialogue". That is, the NMAI actively continues to gather information about their collections in different formats (video clips of the object being used in a performance, contemporary manufacturing techniques, oral narratives about objects, etc) and this new layer of documentation is then added to the existing layers, such as the context of acquisition, geography, affiliated tribe, etc.

These three different institutional approaches to the management of TK and TCEs highlights the challenges involved and perhaps illuminate my own concern that we may be building new Towers of

²⁸⁹ Please see: <http://www.archimuse.com/mw2003/papers/hunter/hunter.html>

For Australia more generally, please consult Heather Moorcroft and Alana Garwood's *Aboriginal and Torres Strait Islander Thesaurus*. Canberra: National Library of Australia, 1997.

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Babel. However, if different thesauri or TK/TCE databases could be linked with various search engines and made inter-operational it could ultimately benefit scholars, tradition bearers, indigenous groups, museums, libraries and governments in protecting TK and TCEs against disappearance or misappropriation. However, before we can link databases, we must have a common digital language and a way of describing TCEs that conforms across cultural lines. For this purpose I think we would have to begin by recognizing that we need other languages than English. It is beyond doubt that in the drafting process of IP Guidelines, a thesaurus baseline for TCEs will be essential. The number of different institutional efforts surveyed here, enabling search and retrieval operations in relation to ethnographic collections, needs to be taken into account for the purpose of developing such a baseline. Ultimately, the question looms large whether a universal indexical language for TK and TCEs will ever be established.

CHAPTER IV: RECOMMENDATIONS

INTRODUCTION

This final chapter of the survey considers possible next steps within the framework of the WIPO Initiative *Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage*. These possible next steps are crafted as a set of recommendations, which all aim at the short and intermediate term.

When you start to handle a guidebook to indigenous communities around the world

in a sense you're setting the new rules of the game for them.

Jane Sledge, Associate Director for Assets and Operations, NMAI, SI, Consultation August 2006

REFINING THE SCOPE AND FOCUS

As a first next step, I would recommend that the WIPO initiative *Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage* limits and refines its scope and focus. We have behind us a broad, encompassing, rich and useful collection of materials. This global compilation constitutes a necessary foundation for further work, but also enables a more narrow focus and refinement of the problem scenarios which the IP Guide seeks to address. To facilitate such a limitation and refinement, I would recommend drawing on Annex II: Additional Consultative IP Resources. Here special attention should be given to similar projects in outlook, such as George Nicholas' magisterial seven-year project entitled *Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics*. I would recommend that the WIPO initiative carefully study the research design and expected output from this project and differentiates its scope and approach accordingly. It seems to me, that what this project leaves open is exactly where WIPO has developed its strongest expertise: The IP protection of intangible TCEs. Nicholas' project aims at the IP issues related to the tangible cultural heritage (archaeological artifacts, built environment, heritage sites, etc.). I would recommend that WIPO refines

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its project particularly in relation to these kinds of projects and more generally vis-à-vis the resources covered in Annex II: Additional Consultative IP Resources. WIPO's initiative should cover what these consultative resources seem to leave open: How the cultural heritage sector should deal with intangible TCEs in relation to intellectual property issues.

Folklife is part of everyone's life. It is the everyday and intimate creativity that all of us share and pass on to the next generation. It is as constant as a ballad, as changeable as fashion trends.

*It is as intimate as a lullaby, and as public as a parade.*²⁹⁰

American Folklife Centre, 2006

DEFINING THE PROBLEMS RATHER THAN THE SUBJECT MATTER

The definition of *folklife* or TCEs above poignantly illustrates how elusive this subject matter is. Any normative instrument, be that enforceable law or non-binding IP guidelines, needs precise definitions and a certain stability in these definitions over time to be incisive and effective. This seems unattainable with regard to TCEs, although the various projects on ethnographic thesauri²⁹¹ may change this situation somewhat. However, I would recommend that WIPO's IP Guidelines circumvent this current definitional predicament and reorient its preoccupation with definitional subject matters (and their conceptual IP conundrums) to key problem scenarios and issues reflecting and responding to factual institutional needs. To the extent generic terms are deployed, these should be defined substantively²⁹². Briefly stated, a new set of IP Guidelines should gravitate more towards the practical and less towards the technical. As a next step, WIPO could aim at collecting a sample of seminal problem scenarios from various stakeholders such as:

²⁹⁰ The AFC defines the expressive register of *folklife* as: "...traditional songs, fairy tales, stories, ghost tales, personal histories, riddles, proverbs, figures of speech, jokes and special ways of speaking, childhood games and rhymes, the way we celebrate life from birthing our babies to honoring our dead, the entire range of our personal and collective beliefs (religious, medical, magical, and social), handed-down recipes and everyday mealtime traditions, ways in which we decorate (e.g. patchwork patterns on quilts, plastic flamingoes in yards, tattoos on bodies, crafts made by hand (e.g. crocheted afghans, wooden spoons, cane bottoms on chairs), patterns and traditions of work (e.g. from factory to office cubicle), the ways in which we express ourselves as members of our family, our community, our geographical region, our ethnic group, our religious congregation, or our occupational group)".

²⁹¹ Please Chapter III, Section V entitled *Finding a Common Indexical Language* (p.108-12) for more information on controlled vocabularies to describe ethnographic materials.

²⁹² See here Chapter I, p.39-42 on the *CoPAR Guidelines*.

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- i. A museum seeks to digitize a collection of ethnographic field notes recorded by a recently deceased anthropologist as part of a research project. How should they proceed?
- ii. A publisher proposes to produce a pay-per-view website with images of a collection of sixteenth-century engravings of Native Americans. How should she proceed?
- iii. A folk society requests permission to include a rare recording of a 20th century storytelling from a Pacific collection on a CD they hope to release next year. How should they proceed?
- iv. An Indigenous community wanting to disseminate their music in digital form for wider recognition, while allowing them to retain control of it, and that the processes involved in its digitization are cost-effective and does not put the material at risk of misappropriation. How should they proceed?

In approaching such problem scenarios, WIPO's Guidelines could list the relevant Codes to consult (please see Chapter I on Codes, p. 25-59), list institutional experiences and "best practice" in the specific problem field in question (please see Chapter II on Conduct, p. 60-100), and state the various IP issues and options to take into consideration and let the final answer rest with the institution.

ASSESSING AND COMPARING EXISTING CODES

Reading through the many codes surveyed in Chapter I, a strong pattern emerges that libraries and archives want to share TCEs and publishers want to sell them. Museums strive to preserve and exhibit TCEs and source communities to (re-)create, remember and perform them. The general public wants access, regardless of where or how content is held. What all of these stakeholders share is the need to (1) identify content and its owner(s); (2) agree on the terms and conditions of its use and reuse; (3) be able to share this information in ways that make it easy to find. There are many reasons to believe that only partnership models could achieve this. To reach such partnership models, I would recommend that a possible next step in the WIPO initiative would be to establish a comparative matrix of codes at a global level. WIPO's earlier work in this field (WIPO 2003) and other materials constitute excellent departures for such a comparative template, which could incorporate the following parameters:

- a) Policy context and objectives

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- b) Definition of subject matter covered
- c) Definition of misappropriation
 - c1) Criteria
 - c2) Scope
 - c3) Terms (retroactivity; application in time)
 - c4) Exceptions
- d) Definition of protection
 - d1) Criteria
 - d2) Scope
 - d3) Terms (retroactivity; application in time)
 - d4) Exceptions
- e) Holder of responsibilities
- f) Responsibilities conferred
- g) Beneficiaries
- h) Procedures for review of requests
- i) Enforcement mechanisms
- j) Interaction with customary laws, other codes and IP regimes

Such a comparative matrix would facilitate the drafting process of WIPO's IP Guidelines and make on-line search and problem solving at WIPO's own website more feasible.

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DISTILLING BEST INSTITUTIONAL PRACTICE

Going over the variety of institutional experiences and conduct surveyed in Chapter II (p.60-99), I would recommend WIPO to create an on-line experience bank of best practice. I think sharing institutional experiences about key problem scenarios is indispensable for making headway. My own survey at the institutional level also registered a need and willingness to learn among and between institutions. WIPO could – perhaps in partnership with ICOM – facilitate this. Take for instance NAA’s project of digitizing 1100 photos depicting Navajo daily life and publishing them on the web. The Navajo had requested that 24 of these images be removed, because they depicted sacred ceremonies. The NAA removed these digitized images from the website, but explained the absence of these images and the reasons why they were not publicly accessible. It was important to the NAA to communicate that the institution was not being “selective”, but was honoring the request of the Navajo. Such resolutions of digitization problems are worth while sharing. WIPO’s IP initiative could facilitate such a sharing parallel to the developing of IP Guidelines. Such a supplement could also prevent the IP Guidebook to be outdated, because a listing and sharing of institutional experiences in an on-line databank would be able to accommodate and respond to new problems created by new communication technologies.

The concept of intangible or intellectual property, as is it designated in Western law, is well developed among the Tlingít and continues to be significant despite their limited ability to protect its ownership outside of their own society in the present-day period.

Rosita Worl, *Tlingit At.oow* - Tangible and Intangible Property (1998)²⁹³

KNOWING, TRANSLATING AND INTEGRATING CUSTOMARY LAWS

As mentioned in Chapter III, Section II, p.104-5, our working notions of customary laws are often inadequate. A future set of IP Guidelines should be developed in collaborative and inclusive ways and recognize the relevant customary laws of indigenous communities. A first step would be to know indigenous customary laws governing community relations with respect to intangibles identified as

²⁹³ Unpublished PhD Thesis, Dept. of Anthropology, Harvard University. Many thanks to Rosita for permitting me to quote from her unpublished work.

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property. Study should be directed towards the legal precepts and social and religious behavior as they apply to intangible properties. This research should be guided by the basic premise that indigenous peoples should contribute with this knowledge and that anthropological scholarship should also be consulted. Intangible properties include crests and spirit designs, names, songs, stories, etc. The research should arrive at finer grained notions of communal ownership of intangible properties and gain an understanding of customary property laws and their application in the present period. A further step would be to translate indigenous legal precepts into the English language substantiating such concepts as perpetual rights, negative fixation requirements, retroactive and restorative forms of protection, inalienable moral rights of paternity (Right of Paternity: guaranteeing that the creator is credited), and right of integrity (Right of Integrity: protecting creations from distortions, alterations, or misrepresentations). Such a codification of indigenous customary laws governing intangible properties could then in turn be integrated to a set of IP Guidelines giving substance to concepts such as prior approval of the community for all reproductions, attribution of proper labeling and credit if reproduced²⁹⁴ and possibly a “right of publication”, enabling creators of sensitive TCEs to decide whether to make their works public or not. Ideally, and if drafted in a comprehensive and precise manner, such IP Guidelines could possibly make legal instruments such as causes of action for libel, defamation, invasion of privacy, intentional infliction of emotional distress and breach of contract superfluous. It would be advisable to conduct this suggested research project in close coordination with WIPO’s own project on customary laws²⁹⁵.

MANAGING PAST LEGACIES AND REFASHIONING FUTURES

The WIPO Initiative *Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage* is a remarkable and timely project. It faces steep challenges and holds great promises. It is both a remedial and prospective instrument. Remedial in the sense that during the first half of the 20th century, Western anthropologists ventured to the rest of the world collecting and documenting what we today refer to as “traditional knowledge and cultural expressions”. Local knowledge about the pharmaceutical properties of plants was recorded; secret-sacred rituals were described and

²⁹⁴ This of course raises the pertinent question of royalties or collecting fees for authorized use and adequate means of enforcement in terms of misuse (including injunctive relief for dissemination of unauthorized or inaccurate works or content).

²⁹⁵ http://www.wipo.int/tk/en/consultations/customary_law/index.html

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photographed; epics, proverbs and storytelling was transcribed; the sounds of musical instruments and songs were recorded on wax cylinders; and graphic designs on pottery, woodwork and the human body was photographed or copied by drawing techniques. This transfer and fixation of indigenous knowledge took place in a variety of contexts, circumstances and situations. However, most of these transfer contexts were colonial situations, making questions of “prior and informed consent” the exception, rather than the rule. This grandiose documentation and fixation of traditional knowledge and practices was in part published in anthropological monographs and predominantly housed in Western Museums and Archives. The founding rationale of these institutions was most often preservation, presentation and dissemination of knowledge, primarily for scholars and the public in Western metropolises. The WIPO initiative is remedial in the sense that it needs to grapple with and resolve these past legacies.

However, the WIPO initiative also looks forward towards contemporary and future cultural productions by Indigenous communities and local cultural centers around the world. These contemporary cultural productions are viable and often stored in different digital formats. Initiatives are underway for local communities to build local capacity so they could eventually undertake their own recordings and distribute, protect and promote them as they see fit. In the longer run, one could perhaps foresee the establishment of an online collection of suitably protected recordings of traditional cultural expressions (music, art, photographs, performances, manuscripts and audio-visual materials), which would be readily searchable and accessible to the public in ways that involve local museums and source communities as active partners and owners, and on terms that meet their aspirations and wishes. With regard to contemporary and future indigenous cultural productions, the possibility exists to establish IP rights in new recordings of TCEs, including new rights in digitized versions, and use them to promote the interests of source communities. IP rights could be vested in or shared with the source communities or content providers, the rights could be exercised in ways that take into account the cultural sensitivities as well as the economic interests of the source communities. In this sense, the WIPO initiative on IP Guidelines is prospective.

Looking both back upon colonial legacies and forward to new ways of vesting IP rights in the recording, preservation and dissemination of TCEs, WIPO’s IP Guidelines face a formidable task. They need to accommodate existing ethnographic materials recorded during the 20th Century with contemporary and future recordings and digitizations of TCEs into a working notion of intangible

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cultural heritage. On top of that, they need to accommodate and align a wide set of stakeholders with diverging interests, outlooks and sensitivities. I hope and believe this survey has established a foundation for facilitating decision-making on what next steps to consider in order to make progress with this task and successfully achieve a new set of IP Guidelines for the 21st Century. However, I am also aware that we have just begun to identify the principal questions for such a set of Guidelines. I would like to close with Rosita Worl, the President of the Sealaska Heritage Institute, in Juneau U.S.A. who has adequately given voice to the humbleness and unassuming nature which I believe we should all bring to the task: “The laws of the American society classified our traditional cultural expressions and knowledge systems as part of the “public domain.” Today indigenous communities throughout the world are reclaiming their traditional cultural expressions. They are asserting rights to how and on what terms elements of their intangible cultural heritage are studied, recorded, re-used and represented by researchers, museums, commercial interests and others. But the overarching question remains as to how our traditional cultural expressions and traditional knowledge are to be recognized and protected largely remain unanswered.”²⁹⁶

²⁹⁶ Personal communication with Rosita Worl, quoted with her permission.

PART 3: ANNEXES

ANNEX I: QUESTIONNAIRE FOR NORTH AMERICA²⁹⁷

Specific Institutional Profiles of Repositories (museums, archives and libraries)

Please note: Only intended for restricted institutional circulation.
--

I) REPRESENTATIONAL SCOPE OF THE HOLDINGS

- a) Rough sketch of the institutional history
- b) Rough sketch of the history of acquisitions
- c) What are the representational strengths of the collection? (time periods; geographical regions; cultures ; formats; genres; etc.)
- d) What are the current holdings of intangible cultural heritage (ICH)?
- e) What is the mission and mandate of the institution?
- f) Who provides the funding?

II) SEARCH & ACCESS

- a) What are the principles of cataloguing?
- b) What are the taxonomies used to register items?
- c) What type of information is included in the taxonomies? (Circumstances of acquisition and/or *in situ* recording situation; provenience; provenance; contemporary cultural affiliations; cultural sensitivities, etc.)

²⁹⁷ This Questionnaire builds directly on and incorporates certain elements from Wend Wendland's Draft Questionnaire 2 (April 5, 2006). Wend Wendland is Deputy Director, Global IP Issues Division and Head of the Traditional Creativity, Cultural Expressions and Cultural Heritage Section, World Intellectual Property Organization, Geneva, Switzerland.

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- d) What are the indexical search criteria? Are these offered on-line or in-house?
- e) Does the institution restrict or condition access to its collections?
- f) Is the access to the collections regulated by any codified document? If affirmative, what type of document?
- g) Is the institution involved in the preparation of inventories of ICH as provisioned by Article 12 of the UNESCO 2003 Convention?

III) IP PROTOCOLS & PROCEDURES

- a) Has the institution identified IP issues? If affirmative, what are these issues and how are they managed?
 - b) Does the institution have a general codified IP policy? If affirmative, what concerns are addressed and what balances are struck in this document?
 - c) Does the institution have a stand-alone licensing policy? If affirmative, what concerns are addressed and what balances are struck in this document?
 - d) Does the institution have a history of dealing with intellectual property issues? If affirmative, have the issues and available options shifted over time?
 - e) Does the institution restrict the use of its collections? If affirmative, can permissions be sought? How are these reviewed? What conditions must be met?
 - f) Does the institution use ad hoc deposit agreements? Or does it operate under a general set of deposit regulations?
 - g) To what extent do IP options form part of the institution's revenue activities? What institutional operations are these revenues covering?
-

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- h) Would an IP guide including “best practice” in this field be of use and relevance to the particular institution in question?

IV) RELATIONS TO SOURCE COMMUNITIES

This cluster is crafted to ascertain what kind of relationships museums and other institutions have with indigenous and traditional communities and other bearers and custodians of cultural traditions and expressions.

- a) Does the institution deal pro-actively or indirectly with source communities? What projects has the institution been involved in with source communities? Who took the initiative to these projects? In what ways do these projects benefit the source communities? In what ways do they benefit the institution?
- b) How were the source communities participating in these projects identified?
- c) To what extent, if any, do source communities participate in the institution’s governance, decision-making and policy setting?
- d) To what extent do the IP-related concerns of these source communities with regard to access to, control over and ownership of ethnographic materials feature in institutions’ policies and practices? Are there any actual examples?
- e) Does the institution operate under any general codified document governing its relationships with source communities?

V) DIGITIZATION PROJECTS

- a) What are the institution’s current projects relating to digitization of TCEs?
- b) What is the purpose and objectives of the digitization efforts?
- c) Do IP issues arise in these initiatives and if so how are they addressed?

VI) OTHER PROJECTS OR INITIATIVES OF POTENTIAL RELEVANCE FOR IP QUESTIONS

- a) Does collection management (acquisition, cataloguing, inventorying, and making publicly available) undercut the IP-related interests of indigenous peoples and communities?
- b) Do we find examples of the vesting of IP rights in contemporary recordings and digitizations of TCE and TK collections, which are conceived and exercised in ways that benefit the communities where these collections originate?
- c) What relationships exist between institutions and researchers, academics and fieldworkers and how are issues of ownership of and control over cultural materials addressed and regulated, if at all?

ANNEX II: ADDITIONAL CONSULTATIVE IP RESOURCES

INTRODUCTION

This survey of consultative IP resources in North America is in fact more of a listing than an actual survey. Since we are often dealing with comprehensive information resources of several hundred pages, an actual critical assessment of the content and how it contributes to the WIPO project is a next step in this project. However, an immediate assessment of the material listed here is of the utmost importance, because it helps to refine the focus of the WIPO project. What emerge in the following section are lacunae as well as potential overlaps in current work being conducted on the relation between IP and TCEs. It is important that WIPO is aware of similar and parallel projects in this field, so the shape and focus of its initiative *Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage* can be adjusted adequately.

REPORTS & MAJOR RESEARCH PROJECTS

Aboriginal Intangible Property in Canada: An Ethnographic Review (2005):

Executive Summary available at:

<http://strategis.ic.gc.ca/epic/Internet/inippd-dppi.nsf/en/ip01202e.html>

CHIN Reports (1998-2003):

The Cultural Heritage Information Network (CHIN) is a Canadian national centre promoting the development, presentation and preservation of Canada's digital heritage content through the world of networked information. The centre has published 13 excellent reports and white papers directly addressing intellectual property management of cultural heritage. The resource comprises licensing guidelines, protecting images, partnership agreements, digital rights management, virtual exhibition agreements, and related resources. Among the most relevant reports for the WIPO initiative are the following:

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- i. Developing Intellectual Property Policies: *A How-To Guide for Museums* (2003)
- ii. The Price of Digitization: *New Cost Models for Cultural and Educational Institutions* - A Digitization Symposium Presented by NINCH and Innodata (2003)
- iii. Copyright Guide for Museums and other Cultural Institutions (2002)
- iv. Licensing Images: *Checklist for Museums and Other Cultural Organizations* (2002)
- v. Protecting Your Interests: *A Legal Guide to Negotiating Web Site Development and Virtual Exhibition Agreements* (1999)
- vi. A Canadian Museum's Guide to Developing a Licensing Strategy (1999)
- vii. Illustrating Options: *Collective Administration of Intellectual Property for Canadian Cultural Heritage Institutions* (1999)
- viii. Like Light Through a Prism: *Analyzing Commercial Markets for Cultural Heritage Content* (1999)
- ix. An Analysis of Economic Models for Administrating Museum Intellectual Property (1998)

All reports are available at: http://www.chin.gc.ca/English/Intellectual_Property/index.html

CLIR Reports (1999-2006):

The Council on Library and Information Resources (CLIR) based in Washington, D.C. has published 137 reports as of yet (October 2006), of which several deal directly with IP issues. Among those are the following:

- i. Capturing Analog Sound for Digital Preservation: *Report of a Roundtable Discussion of Best Practices for Transferring Analog Discs and Tapes* (2006)
- ii. Acquiring Copyright Permission to Digitize and Provide Open Access to Books (2005)
Survey of Reissues of U.S. Recordings (2005)

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- iii. Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives. (2005)
- iv. Access in the Future Tense (2004)
- v. A Survey of Digital Cultural Heritage Initiatives and Their Sustainability Concerns (2003)
- vi. Copyright Issues Relevant to the Creation of a Digital Archive: *A Preliminary Assessment*. (2003)
- vii. National Digital Preservation Initiatives: *An Overview of Developments in Australia, France, the Netherlands, and the United Kingdom and of Related International Activity* (2003)
- viii. The State of Digital Preservation: *An International Perspective* (2002)
- ix. The Evidence in Hand: Report of the Task Force on the Artifact in Library Collections (2001)
- x. Building and Sustaining Digital Collections: *Models for Libraries and Museums* (2001)
- xi. Strategies for Building Digitized Collections (2001)
- xii. Why Digitize (1999)

All the CLIR Reports are available at: <http://www.clir.org/pubs/reports/reports.html>

Considering Aboriginal Traditional Knowledge:

This report was conducted under the Canadian Environmental Assessment Act (Interim Principles) and is available at: <http://www.ceaa-acee.gc.ca/012/atke.htm>

First Nation Cultural Heritage in Canada:

is a major research project on the protection and repatriation of Indigenous Cultural Heritage, which has published a number of relevant research papers available at: <http://www.law.ualberta.ca/research/aboriginalculturalheritage/researchpapers.htm>

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Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics (2006-):

is an international collaborative research project directed by George Nicholas comprising a wide array of researchers and partner organizations "...ultimately concerned with larger issues of the nature of knowledge and rights based on culture – how these are defined and used, who has control and access, and especially how fair and appropriate use and access can be achieved to the benefit of all stakeholders in the past."²⁹⁸ The project defines "culture" primarily in the archaeological sense of cultural artifacts, i.e. material evidence embodying the pasts of specific cultures. This major project has recently secured funding and is projected to produce more than 70 articles and position papers on the relation between IP and cultural heritage for strategic dissemination to national and international bodies in the course of the next seven years. It is strongly recommended that the WIPO initiative follow and monitor this project closely in the years to come.

Intellectual Property, Markets, and Cultural Flows:

is a program area at the Social Science Research Council (SSRC) in New York, which has produced a number of relevant *Issue Papers* and *Briefs*. These are available at: <http://www.ssrc.org/programs/ccit/ip/index.page>

Of related interest is the SSRC program entitled *Digital Cultural Institutions Project*, which is available at: <http://www.ssrc.org/programs/ccit/dcip/>

Opportunities in Aboriginal Research:

The Results of the Social Sciences and Humanities Research Council (SSHRC) of Canada's Dialogue on Research and Aboriginal Peoples. This report was prepared by Craig McNaughton and Daryl Rock and is made available at: www.sshrc.ca/web/apply/background/aboriginal_background_e.pdf

²⁹⁸ Quoted from George Nicholas *Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics*. February 2006. (Unpublished preliminary funding proposal. Full proposal was submitted for the September 1st deadline)

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Report on Orphan Works (2006):

Orphan works are broadly speaking works whose term of copyright (timeframe) has not expired under US law, but whose copyright owner cannot be identified. This prevents - because of the high costs involved in finding the owner - potential creators from utilizing and building upon these works, even when they would be willing to pay to use them. In some cases the works were abandoned because they no longer produced any income. Three of the most important art museums in the United States defined the problem in the following terms: “Orphan works are a frustration and a risk for our institutions. None of us can easily afford the costs of defending a copyright infringement claim, on the one hand, or the costs of handcuffing an important scholarly project, on the other hand. Art museums spend a lot of time and energy trying to locate copyrights holders for rights to reproduce and distribute works in our collections and for the rights to use the important papers, photographs and letters in our archives.”²⁹⁹

To investigate the scope of this issue, the Copyright Office in the Library of Congress initiated a comprehensive survey and inquiry into the phenomenon of orphaned works. The results of this investigation were published in February 2006, concluding that the orphan works problem is “real”, but “elusive”, which makes it difficult to quantify and describe comprehensively. The report anticipated that some orphan works situations could be addressed adequately by existing copyright law, but many could not. One recommendation sketches a solution that would include an obligation for a reasonable search for the owner (due effort) and a corresponding limitation on liability. The US Copyright Office suggests that both provisions would need to be codified through legislation.

It should be noted, that Canada has a process for dealing with unidentifiable copyright owners administered through the Copyright Board of Canada (CBoC). People seeking to use a work who through a preliminary search have failed to locate the creator, apply to the Board. The CBoC relies on additional searches conducted by major collectives to determine whether or not any copyright holder is in fact unidentifiable and the Board subsequently issues a license scheme for the orphaned work in question. The European Commission, the civil branch of the European Union, is also currently looking into the orphaned works problem. In my own consultations with the American Folklife Center, Peggy Bulger conveyed that what she referred to as “recordings with no clear author” was an issue for the

²⁹⁹ Quoted from The Getty Museum, the Metropolitan Museum of Art and the Guggenheim Museum’s collaborative statement submitted to the Copyright Office in response to their survey on the problem and status of “orphan works”. Full statement (22 pages) is available at: <http://www.panix.com/~squigle/rarin/OW%20Comments.pdf>

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institution. She explained that the Sony Corporation buys the rights of small productions, which effectively “kills them, because they can’t be used”³⁰⁰. The entire report (207 pages) entitled *Report on Orphan Works* is available at: www.copyright.gov/orphan/orphan.report.pdf

Pathways to Excellence (1992):

A Report on Improving Library and Information Services for Native American Peoples issued by the U.S. National Commission on Libraries and Information Science in Washington, D.C., available at: <http://www.nclis.gov/libraries/nata.html>

Publications on Cultural Policy:

Issued by the Smithsonian Institute for Cultural Policy under The Center for Folklife and Cultural Heritage (CFCH) - a research and educational unit of the Smithsonian Institution. The CFCH conducts research and publishes reports of relevance to intangible cultural heritage, UNESCO and IP. A list of the publications is available at: http://www.folklife.si.edu/center/cultural_policy/publications.html

Report and Recommendations of the Consultation on Aboriginal Resources and Services (2003):

Published by the Aboriginal Heritage Initiative of the Library and Archives in Ottawa. The report is written by Dale Blake, Libby Martin and Deborah Pelletier and available at: <http://collectionscanada.ca/aboriginal/020008-5010-e.html>

Traditional Knowledge: A Challenge to the International Intellectual Property System:

This report was prepared by Daniel J. Gervais and is available at:

<http://www.cra-adc.ca/GervaisTKpaper.doc>

³⁰⁰ Consultation with the American Folklife Center, March 2006, Washington, D.C.

MANUALS, HANDBOOKS & GUIDES

A Community Guide to Protecting Indigenous Knowledge (2001):

Published by the Research and Analysis Directorate, Department of Indian Affairs and Northern Development (Ottawa) and prepared by Simon Brascoupe and Howard Mann. Editor: Edwinna von Baeyer. The guide is available at: http://www.ainc-inac.gc.ca/pr/ra/ind/gui_e.pdf

Ethnographic Collections in the Archive of Folk Culture: A Contributor's Guide (1995):

This is a practical guide for donors, i.e. field workers who have recorded and produced ethnographic materials in the course of their research. It explains the legal implications of giving a collection to the Library of Congress and describes how to organize, label, and document the material before transfer. It also includes advice on how collectors can protect ethnographic materials in their own keeping, or store them prior to sending them to a repository. The guide was prepared by Stephanie A. Hall and published by the American Folklife Center, Library of Congress. Available at: <http://www.loc.gov/folklife/cg.html>

First Nations Record Keeping Issues: A brief Resource Guide (1999; updated 2005):

Published by the Association of Canadian Archivists and prepared by the Special Interest Section on Aboriginal Archives and Copyright. The guide is available at: <http://archivists.ca/downloads/documentloader.aspx?id=4487>

Folklife and Fieldwork: A Layman's Introduction to Field Techniques (2002):

A standard guide published by the Library of Congress, American Folklife Center. This updated guide touches on new technologies for preserving, documenting and presenting traditional cultural expression and contains standard forms, e.g. release forms. Available at: <http://www.loc.gov/folklife/fieldwork/index.html>

Handbook on Creators' Rights (2003):

This handbook was prepared by Caldwell Taylor, Susan Crean and Greg Young-Ing and is available at:
<http://www.cra-adc.ca/handbookrights.doc>

**Image Collection Guidelines: The Acquisition and Use of Images in Non-Profit Educational
Visual Resources Collections (1999):**

This set of Guidelines is prepared by Kathe Albrecht and contains four sections: I) Acquisition; II) Attribution; III) Display; IV) Responsibility. Each section reviews in a simple and practice manner the institution's collection management policies.

Museum Guide to Copyright and Trademark (1999):

Published by the American Association of Museums, this guidebook introduces the legal regimes of copyright and trademark in a museum context and offers a series of best practices for identifying and administering intellectual property. Topics discussed include copyright law, trademark law, the World Wide Web, and licensing. The making of the Guide was a joint venture between the American Association of Museums (AAM) and the Getty Trust Foundation. AAM was also under some pressure from its membership for delivering some clarity on IP issues. Both were committed to produce a practical guide quickly and decided on a double approach: broad community input (several hundreds of comments on issues and difficulties were entered into a database); and in-depth discussion by focus groups represented all disciplines, sizes and types of museums. Two advisory committees (some two dozen museum and legal professionals) then reviewed outlines and early manuscript versions of the Guide to keep its content focused, timely, and accurate. The challenge was to make sure the Guide was representative of concerns expressed and to develop a structure and format that would be of greatest practical use to the profession.

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The National Park Service's Museum Handbook (2002):

Published by the Museum Management Program, Cultural Resources, National Park Services (U.S.), this work entails several relevant chapters on IP and cultural heritage institutions. The Handbook comprises three parts entitled “Museum Collections”, “Museum Records” and “Museum Collections Use”. Part II, Chapter 1 (13-pages) discusses documentation of collections including how to handle sensitive or confidential information. Part II, Chapter 2 (62-page) of the Handbook, has information on the accession of collections and discusses acquiring copyright as a distinct domain independent from tangible ownership. Part III, Chapter II covers legal issues related to use of collections, discussing copyright, patent, and trademark laws. Part III, Chapters 4 & 5 discuss reproduction of museum collections for exhibition, sale, research, or education: Specifically, Chapter 4 (86-pages) focuses on two-dimensional reproductions. It includes a comparison of the advantages and of disadvantages of different two-dimensional formats, a cost recovery chart for use in establishing a fee structure, and a few sample agreements. Chapter 5 (40-pages) discusses three-dimensional reproductions. It includes a glossary and several sample agreements for making reproductions.

The entire handbook is available at: <http://www.cr.nps.gov/museum/publications/handbook.html>

Traditional Knowledge Research Guidelines (2000):

This is a Guide for Researchers in the Yukon prepared by the Council of Yukon First Nations. The Guide is available at:

<http://www.contaminants.ca/done/guidelines/tkGuidelines/TK%20Guidelines.pdf>

Working With Indigenous Knowledge (1998):

This is a Guide intended for Researchers, developed by Louise Grenier. The resource is available at:

http://www.idrc.ca/en/ev-9310-201-1-DO_TOPIC.html

RESOURCES SPECIFICALLY ON DIGITIZATION

**Introduction to Managing Digital Assets: Options for Cultural and Educational Organizations
(2002):**

Published by the Getty Museum and looks at current and emerging methods for managing intellectual property, particularly in networked environments. It reviews the issues a museum should consider when developing intellectual property management strategies and selecting partners to assist in those strategies. As the use of electronic networks becomes more ubiquitous in the cultural and educational community, issues of management, communication, and distribution increase in complexity. The Guidebook is available at: http://www.getty.edu/bookstore/booksites/intro_mda/index.html

The Library of Congress:

This institution has published many supportive materials for digitization projects. Some notable resources include:

- i. *Challenges to Building an Effective Digital Library*, available at:

<http://memory.loc.gov/ammem/dli2/html/cbedl.html>,

- ii. *Lessons Learned: National Digital Library Competition*, available at:

<http://lcweb2.loc.gov/ammem/award/lessons/lessons.html>

Managing Museum Digital Assets: A Resource Guide for Museums,

published by the International Intellectual Property Institute in Washington, DC and prepared by Michael S. Shapiro. The Guide deals with Museums and the Digital Future; Developing Museum Audiovisual Products; Database Licensing and Distribution; Museums and the Internet and features a number of Resource Materials such as a URL Resource List. The entire Guide (57-pages) is available at: http://www.iipi.org/topics/Arts_culture_music.asp

NINCH Guide to Good Practice in the Digital Representation and Management of Cultural Heritage Materials (2002):

The National Initiative for a Networked Cultural Heritage (NINCH) was established in 1996 and is a U.S.-based coalition of some 100 organizations and institutions from across the cultural sector: museums, libraries, archives, scholarly societies, arts groups, IT support units and others. The *NINCH Guide to Good Practice in the Digital Representation and Management of Cultural Heritage Materials* (hereafter the *NINCH Guide*) stands perhaps as a first attempt to set some standards in a daunting plethora of information regarding the emerging field of digitization of cultural heritage. The *NINCH Guide* proposes an initial definition of best practice by distilling six core principles, of which the Fifth one reads: “Investigate and declare intellectual property rights and ownership: Ownership and rights issues need to be investigated before digitization commences and findings should be reported to users.”³⁰¹ The recommendations under this Fifth principle are very straightforward: If an investigation shows that the institution in question does not itself hold the copyright in the material it seeks to digitize, then the institution has three options: (a) abandon plans to digitize the material; (b) secure permission to digitize the material; (c) proceed with the project anyway under one of the exemptions to the exclusive rights of the copyright owner found in U.S. copyright law, such as the fair use exemption, but on the understanding that this involves an assessment of the risks of doing so. Option (b) would include investigating the duration of protection of the material in question under U.S. copyright law. Option (c) would include exploring the array of exceptions to exclusive rights such as the fair use doctrine, which is framed by four key factors: (1) the purpose and character of the use (e.g. whether such use is of a commercial nature or is for not-for-profit educational purposes; whether the use is transformative); (2) the nature of the copyrighted work (e.g. whether it is based on facts or is an imaginative work); (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole (a portion of a book rather than the whole, for example); (4) the effect of the use upon the potential market for the copyrighted work.³⁰²

Other issues addressed by the *NINCH Guide* are “moral rights”³⁰³, involving the protection against derogatory treatment of “works”. To avoid this, the *NINCH Guide* advises to link the name of the

³⁰¹ <http://www.nyu.edu/its/humanities/ninchguide/I/>

³⁰² <http://www.nyu.edu/its/humanities/ninchguide/IV/#ftn1#ftn1>

³⁰³ In the U.S., moral rights are limited to the 1990 Visual Artists Rights Act, which recognizes visual art authors’ right of attribution, their right of integrity, and their right to prevent the destruction of copies of the work.

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content provider to his, her or their creation, that the “works” be used in their entirety, and that “works” not be amended (e.g. digital copies should not be cropped or edited).

As a whole, the NINCH Guide gravitates towards questions about whether different types of digitization of collections infringe copyright laws revolving around if the institution can demonstrate that it has acted with due diligence to identify the holder of rights. The Guide does not really go beyond the question of legal liability. When the Guide addresses extra-legal domains such as ethics, morals, confidentiality, cultural sensitivities, etc. the recommendations are fairly vague, such as: “...ensure that the material is handled with responsibility, sensitivity, and care”³⁰⁴. (The entire Guide is available at: <http://www.nyu.edu/its/humanities/ninchguide/>).

The Southern Oregon University Library Digital Archives:

This institution has made several resources available on digitization of Indigenous material, please consult the

- i. *First Nations Tribal Collection*, made available at: <http://soda.sou.edu/tribal.html>
- ii. *Copyright Issues*, made available at: <http://soda.sou.edu/Copyright.html>

Technical Guidelines for Digitizing Archival Materials for Electronic Access (2003):

Published by the U.S. National Archives and Records Administration (NARA). These guidelines (87-pages) are available at: <http://www.archives.gov/preservation/technical/guidelines.pdf>

STANDARD FORMS & SCHEMES

Introduction

Licensing is a mechanism by which the rights of a copyright owner can be transferred for a limited or unlimited time, exclusively or nonexclusively, to another party. There are many forms used in this field

³⁰⁴ <http://www.nyu.edu/its/humanities/ninchguide/IV/#ftn1#ftn1>

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taking the form of contracts, letters, faxes, contracts, agreements, etc. The content is flexible and changeable according to specific circumstances and needs. Cultural heritage institutions often have a standard template, which they may tailor to a specific relation. What is provided here is a sample of such Rights and Reproductions Forms.

Canadian Artists Representation Copyright Collective Inc (CARCC)³⁰⁵

is a copyright collective that licenses and administers copyright for visual and media artists in Canada. CARCC has a number of valuable standard forms and agreements for licensing available at: <http://www.carcc.ca/forms.html>

Copyright Term and the Public Domain in the United States (2006)

is a useful scheme listing copyright expiration terms in the United States. Please consult: http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm

Definitions of Words and Phrases Commonly Found in Licensing Agreements

published by Yale University is a very useful glossary in drawing up licensing agreements. The list is available at: <http://www.library.yale.edu/~llicense/definiti.shtml>

The Rights and Reproduction Information Network (RARIN)

is a taskforce of the Registrars Committee - a Standing Professional Committee of the American Association of Museums³⁰⁶. The Network has made a sample of forms available for Personal Use; Museum Use; License Requests – Internal Processing and Third Party Use³⁰⁷. RARIN also hosts a website with useful links to museums that include Rights and Reproduction related pages on their

³⁰⁵ Their website is available at: <http://www.carcc.ca/>

³⁰⁶ Their homepage is available at: <http://www.panix.com/~squigle/rarin/01rcsite.html>

³⁰⁷ Please consult: http://www.panix.com/~squigle/rarin/AK.pm/00forms_intro.html

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websites. These pages may prove useful as standard models as they include order forms, fee schedules and usage statements pertaining to websites, transparency rentals, etc.³⁰⁸

³⁰⁸ Please consult: <http://www.panix.com/~squigle/rarin/samplepages.html>

**ANNEX III: LIST OF RESOURCE PERSONS CONSULTED IN THE COURSE OF THE
SURVEY**

John Beaver

Cultural Protocols

National Museum of the American Indian

Peggy A. Bulger

Director

American Folklife Center; Library of Congress

Rosemary Coombe

Tiers One Professor

York University

Judith Gray

Head of References Services

American Folklife Center; Library of Congress

Jim Pepper Henry

Director of Community Services

National Museum of the American Indian

Catherine Hiebert Kerst

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Archivist

American Folklife Center; Library of Congress

Robert Leopold

Director

National Anthropological Archives and Human Studies Film Archives

Smithsonian Institution

John McAvity

Executive Director

Canadian Museums Association

Patricia Nietfeld

Collections Manager

National Museum of the American Indian

Guha Shankar

Folklife Specialist

American Folklife Center; Library of Congress

Daniel Sheehy

Director

Smithsonian's Folkways

Recordings and Smithsonian Global Sound

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Jane Sledge

Associate Director for Assets and Operations

National Museum of the American Indian

Terry Snowball

Cultural Protocols

National Museum of the American Indian

Michael Taft

Head of the Archive of Folk Culture

American Folklife Center; Library of Congress

Rick West

Director

National Museum of the American Indian

Rosita Worl

Director

Sealaska Heritage Institute

**ANNEX IV: CONSULTATION ON IP ISSUES IN COLLECTION MANAGEMENT
WITH NMAI STAFF**

Terry Snowball, John Beaver, Patricia Nietfeld and Jane Sledge at the NMAI's CRC facility in Suitland

August 4th 2006

Track Index of the Recording

Track 1: NAGPRA; Proactive international repatriation of human remains and the related issues of sovereignties and cultural affiliation.

Track 2: The integrities of material culture regarding medicine bundles; Criteria of repatriation and IP; The community owns the IP.

Track 3: The documentary status of the NMAI collection; NMAI's stewardship role includes IP; The status of culturally sensitive materials; Concerns about the wording of the WIPO Questionnaire.

Track 4: The limits of contextual information in the archival records; Procedures of digital imaging; Procedures for defining sensitive objects; Problems with IP as a western construct.

Track 5: The problems with codification; The destructive "western experience" and the contemporary Indigenous "renaissance"; The Waitangi Tribunal (NZ) as model for contemporary recovery of Native sovereignty.

Track 6: The challenges of reconstructing Indigenous languages and traditional practices; The intellectual properties are there, but remains unclaimed; Contextual IP issues in contemporary exhibition practice; IP issues for the NMAI are coupled with the repatriation mandate; Procedures and principles for access to the collection.

Track 7: Many of the contexts of IP remains to be defined; NMAI's stewardship role and mission; A case from another institution of public access to the imaging and documentation of a sacred medicine bundle.

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Track 8: The predicament of balancing civil liberty against religious freedom for a federal institution; The need to understand IP in a much wider context; NMAI's differential sets of care and stewardship of materials depending on their sensitivity.

Track 9: How NMAI manages its collections for access; NMAI principles of physical curation and storage of sensitive objects.

Track 10: IP conceived as traditional practices and beliefs not to be shared; Re-conceptualizing IP as an "un-conveyable asset".

Track 11: Communities should define the realms and parameters of "cultural sensitivity"; Touchstones in a discussion about the complexities involved in the definition of Indigenous materiality.

Track 12: A case from another institution about contested definitions of the significance of an object; Concerns about future IP Guidelines issued by WIPO.

Track 13: NAGPRA as a context for IP; Recognizing cultural sovereignty; IP cannot be separated from the full scope of material culture; The NMAI cannot and will not assert any authority in how to handle cultural sensitive materials: the indigenous communities should exercise that authority.

Track 14: Respect as relational practice; NMAI cataloguing principles serving the advancement of knowledge and understanding of Native cultures; Redefining what a "catalogue record" means through high-end technology.

Track 15: The principles of making information publicly available on the web; Sensitive materials relationally defined.

Track 16: Adding content to the catalogue as an on-going process; IP standard licensing agreements already in use; Rights and Reproductions Forms.

Track 17: Rationales for digitization of the collection; Principles and practices of digital imaging; Contextual on-line exhibitions.

Track 18: IP issues related to contemporary digital imaging; Taxonomies of registration; The Heye legacy.

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Track 19: NMAI's principles of cataloguing; A multiple layered documentation system.

Track 20: Principles of documentation should allow for the preservation of Native languages; Cataloguing system documenting shifting interpretative prisms; Documentation is not authoritative, but an ongoing dialogue.

Track 21: NMAI as "non-codified museum"; Strong concerns about an IP-guide in terms of it encompassing the full scope of material culture and its recognition of cultural sovereignty.

Track 22: NMAI Questions about the WIPO survey.

ANNEX V: BIBLIOGRAPHIC RESOURCES

Copyright and Traditional Music:

http://rhw.ul.ie/~iwmc/research/anthonymccann/thesis_links.html

Cultural and Intellectual Property Rights: A Pathfinder for Native People, Students, Educators and the General Public. Annotated Bibliography of Pathfinder Resources:

<http://www.gslis.utexas.edu/~vlibrary/edres/pathfinders/eckenrode2/bib.html>

Ethics of Exhibiting Culturally Sensitive Materials Online:

http://voom.si.edu/LEOPOLD/culturally_sensitive_materials_online.htm

Resources for understanding current debates about the legal status of indigenous art, music, folklore, biological knowledge, and sacred places. The website is designed to supplement Michael Brown's book "Who Owns Native Culture?" (2003):

<http://www.williams.edu/go/native/index.htm>

Special Issue on Digital Technology and Indigenous Communities with bibliography at:

<http://www.dlib.org/dlib/march02/03contents.html>

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