Intellectual Property Issues in Heritage Management

Part 2: Legal Dimensions, Ethical Considerations, and Collaborative Research Practices

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Cultural heritage is comprised of a wide array of expressions of human knowledge and creativity, ranging from stories, songs, and traditions — and the language by which they are conveyed — to the various physical manifestations of human enterprise. It is a melding of the tangible and the intangible. Although substance and meaning are inseparable in cultural heritage, it is the tangible that has been given the greatest attention in heritage management. This is not surprising given that the conservation of objects and localities may be grounded in physical necessity or juridical laws that strive to balance economic interests with varied rationale for heritage preservation; intangible heritage arises, transforms, and takes on priority and meaning with individual and collective knowledge systems, legal orders, preferences and aesthetics.

The focus on tangible cultural heritage in law and policy, often at the expense of the interlinked nuances and inseparable relations between the tangible and the intangible, has much to do with the physicality (and hence visibility) of the tangible. For instance, a building or a ceremonial object is much easier to recognize and identify than an idea or a system of knowledge structures. This matters not only in terms of "identifying" the cultural heritage object, but also — for the purposes of management — monitoring its movement from place to place and/or any anticipated threats to the preservation of the object/s. With tangible cultural heritage it is much easier to measure loss and/or the potential for damage. With intangible cultural heritage, this is much more difficult, which is why a new set of management strategies for intangible cultural heritage is needed.[1]

Most or all tangible cultural resources have intangible components in the form of associations and significance. Likewise, many intangible resources have tangible components and in some instances, and among some societies, the distinction between tangible and intangible, or cultural and "other property" is incomprehensible, inappropriate, or inadequate (Bell and Napoleon 2008b:7). In short, without recognizing the intangible dimensions of heritage, tangible "cultural property" or "heritage" has little or no meaning or value (Hollowell and Nicholas 2009:144).

This is the second of a two-part contribution to Resources that explores the nature of intellectual property (IP) issues affecting cultural heritage and identifies sources of information that will be useful to archaeologists, cultural and archaeological resource managers, and other heritage stewards, including members of source and descendent communities and peoples. In Part 1, we outlined the general nature of IP in the realm of cultural heritage, and

then recommended readings and web sites dealing with longstanding and emergent management issues. We also provided resources directed to four specific areas of cultural heritage where IP issues have become prominent: 1) Appropriation and Commodification of Cultural and Intellectual Property; 2) Access, Control, and Dissemination of Heritage Information; 3) Intellectual Property Issues in Bioarchaeology and Genetics; and 4) Intellectual Property and Related Issues in Cultural Tourism.

The themes reviewed in Part 1 explored where and why IP issues have emerged, both in the public arena and within the realm of professional heritage management. In this concluding piece we consider some of the overarching issues that frame those developments and guide efforts to resolve or avoid problems encountered in heritage management. We also explore the legal and ethical dimensions of IP, as well as the collaborative research approaches that constitute good practice. Our use of "legal" here is not limited to conventional understandings of law (e.g., statutes, codified law and judicial interpretation). Rather, we recognize that the concept of law is not a universal one; ultimately "what is law is entirely bounded by culture" (Bell and Napoleon 2008b:5). The concept of law adopted in our work thus includes Indigenous legal systems (often referred to as "customary law"), other rich forms of "custom" or "law" evidenced through practice, convention, adherence or reasoning processes (e.g., international norms), and vernacular systems for discriminating right from wrong (including ethical guidelines, codes of conduct and cultural protocols). As in Part 1, the resources recommended here are offered as samplers to illustrate the types of issues that may be encountered in heritage management, and to suggest avenues for further exploration and discussion.

Why Are Legal, Ethical, and Practical Issues Important?

The challenges we face in dealing with IP issues in cultural heritage are the result of complex webs of societal encounters, power relations, and historical circumstances. In many parts of the world, the politically dominant society has roots elsewhere, creating potential for competing worldviews, values, and legal and cultural systems. In the context of so-called settler societies (such as Australia, Canada, New Zealand and the United States), heritage management emerges as a site for a type of cross-cultural dialogical endeavor,

albeit one "rife with methodological and ethical challenges" (Liamputtong 2008:3). Indeed, with regard to Indigenous peoples within these states, there are outstanding questions of jurisdictional authority within their territories, such that the methodological challenges are also constitutional if not inter-political ones. The challenge is not just dealing with the practicalities of doing fieldwork with communities (Watkins and Ferguson 2005) or assessing site significance (Hardesty and Little 2000), but of understanding the very nature of heritage — that is, what constitutes "heritage" or the relationship between tangible and intangible heritage (Bell and Napoleon 2008b; Watkins and Beaver 2008; Watkins 2005), and of understanding that there may be contested authority over what may count as "heritage."

There are at least two broad reasons for considering intangible cultural heritage in the context of heritage management. The first reason derives from human rights principles, ethical considerations, and common sense (Coombe 2009). Consider, for example, the National Historic Preservation Act (NHPA 1966), and the U.S. Congress' explicit purpose in creating this legislation.[2] Paraphrased here, the NHPA's first section is one of the earliest statements of principles to guide heritage management in the United States, notably:

- History and culture are the foundations for national and communal spirit, direction, and orientation;

- Cultural heritage deserves conservation as a vital element of living communities;

- Preservation of irreplaceable cultural heritage serves national, educational, aesthetic, scientific, and economic interests; and

- Collaborative partnerships among governments at all levels, corporations, institutions, and individuals are required to expand and enhance cultural heritage management.

In more explicit terms, when management decisions affect cultural heritage, they also affect people and communities — sometimes in direct and damaging ways. A combination of bureaucratic expediency and market forces has redirected much heritage management practice to a comparably sterile cultural resource management (CRM) emphasis on buildings, sites, objects, and undertakings (King 1998:6–19; Smith 2006). Nonetheless, cul-

tural heritage, especially places, objects and traditions linked to the spirits and vitalities of distinctive communities and peoples deserve protection — or at a minimum, careful consideration before being altered, destroyed, or appropriated for new uses. Normative and practical considerations, including those articulated above, are rarely offered in isolation, and vary among peoples and places. Of particular significance is the connection between cultural heritage and identity. Cultural heritage is an important expression not only of individual creative processes but also of individual and group spiritual, cultural, and political life. It is for this reason that "controlling, removing, and destroying cultural heritage is such an effective tool of domination" (Harding 1999:335; also Bell and Napoleon 2008b; Pettipas 1994) and why "destruction and degradation of cultural heritage is so central to oppressive regimes around the world" (Kymlicka 1989:175–176).

Where Indigenous peoples' cultural heritage is in issue, efforts to protect land and other physical representations of their heritage is often part of a broader project of decolonization that acknowledges the inextricable link between cultural heritage and the maintenance, strengthening, transmission and renewal of Indigenous peoples' identity, knowledge, laws and practices (Daes 1995). For example, contemporary issues in cultural heritage management of Blackfoot tribes in Canada and the United States are increasingly connected to preservation, stewardship, and protection of significant places and landscapes within their traditional territory, ongoing social and spiritual obligations to the landscape and associated Blackfoot knowledge and other intangible heritage and all that this embodies.[3] Progress has been made to protect and recover knowledge associated with material culture through repatriation[4] and some significant places have been protected through special designation.[5] Still, protection, retention, and communication of knowledge inherent in special landscapes, including archaeological sites, continues to be of pressing concern where significant resource (and other) development activity affecting the land poses an ongoing and increasing threat. Of equal concern is recognition of treaty rights and the question of Canada and the United States' unmet obligations in such people-to-people formal alliances.[6] Jurisdiction is an abiding issue in any discussions of how heritage resources are to be considered and handled.

This leads to the second reason to consider intangible cultural heritage in the context of heritage management; that is, the existence of statutes and regulations more familiar to heritage management professionals.

Legal mandates — especially those affecting the complex relationships among Indigenous and non-Indigenous groups — exist in federal and local statutes, regulations, court decisions, and policies, including those codified by tribes, bands and other Indigenous communities (Welch et al. 2009). Many of these rules carry implications for professional practice by requiring the identification and assessment of cultural heritage values in the course of government planning and decision making, however. Most procedural requirements boil down to looking (and consulting) before you leap, rather than specific protections (Zellmer 2001).[7] That said, with regard to Indigenous peoples, we need also to apprehend emergent and shifting interaction of such laws and protocols with their laws, and with treaty-related obligations.[8]

Recognizing and Protecting Intangible and Tangible Heritage

Although historic conservation and heritage management legislation, such as the U.S. National Historic Preservation Act, are not generally created to protect intangible cultural resources, the view that conceptual, oral, and behavioral traditions may be disregarded in the course of government-sponsored projects and programs is increasingly indefensible. In countries such as Canada, consultation with a view to accommodating these concerns is constitutionally protected and legally mandated. Nonetheless, even in regimes where some legal protection is given, it is not uncommon for matters of cultural heritage to be considered by non-Indigenous decision makers to be of less significance than "way of life rights" (e.g., hunting and fishing), or for destruction or site excavation necessary for resource development (e.g., mining, forestry, hydro) to be allowed for the benefit of the broader public, of which Indigenous occupants of a given area are only considered a part (Bell 2001; Ziff and Hope 2008). Only in limited instances do Indigenous peoples have a role in the final decision-making process.

United Nations' Initiatives

Not all of the relevant codified law is as local as these statutory frameworks suggest. There have been extensive efforts in international law and policy to develop new rights, norms, and standards for recognizing, protecting, and

safeguarding Indigenous and community cultural heritage that deserve the attention of heritage management professionals. Unfortunately, these are found in a number of distinct legal instruments, rather than in one holistic regime (Marrie 2009). The two most important benchmarks are the 2007 United Nations *Declaration on the Rights of Indigenous Peoples* (the *Declaration*) and the 1989 ILO *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169). Both of these instruments make it clear that Indigenous peoples have rights to be consulted and to participate in decision-making activities that involve their cultural heritage and, more particularly, their essential rights to traditional territories, to maintain their lifestyles and retain their cultural identities, all of which may be implicated by heritage management.

The *Declaration* contains numerous provisions expressed as rights that, when put into effect by the states that have signed it, will provide extensive protection for intangible cultural heritage. Some of the most pertinent of these recognize Indigenous peoples' rights to (1) "revitalize, use, develop, and transmit to future generations their histories, languages, oral traditional philosophies… and to designate and retain their own names for communities, places, and persons"; (2) "maintain, protect, and develop the past, present, and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies, and visual and performing arts and literature"; and (3) "maintain, control and develop their IP over such cultural heritage, traditional knowledge, and traditional cultural expressions."[9]

Indigenous peoples and the their political organizations have already adopted and are acting upon the most salient provisions of the *Declaration*, especially those associated with free and prior informed consent (FPIC).[10] Principles of FPIC provide minimum standards to be followed by any party seeking to approach Indigenous peoples and communities on matters concerning their heritage. Moreover, they may constitute incipient means of asserting jurisdiction in instances where encompassing states have been intransigent in recognizing the authority of Indigenous peoples to control their own cultural knowledges and practices. The over-arching issue here is the modernist presumption that the statist form of society has political status and that Indigenous groups do not. However, this position is one that is gradually but increasingly being challenged by scholars and activists alike.[11]

Other International Initiatives

Indigenous collective heritage rights also enjoy normative support of many of the world's international policy-making bodies, even if national legislation has not widely ensued. Although the *Declaration* contains the most expansive set of principles and provisions for recognition and protection, recent initiatives undertaken by the World Intellectual Property Organization (WIPO), the Conference of the Parties to the Convention on Biological Diversity (CBD), and UNESCO all indicate that these principles are becoming internationally accepted as norms to guide state conduct. Hence, even those states that have not ratified the *Declaration* or put legislation implementing its principles in place have, through their international practices, shown adherence to principles governing state obligations to Indigenous peoples. For example, the CBD is an international legal treaty with more than 193 state signatories, including Canada and the United States. It has three objectives: 1) the conservation of biological diversity; 2) its sustainable use; and 3) the fair and equitable sharing of the benefits arising from the utilization of genetic resources. The Convention of the Parties (the group made up of all states that have ratified the Treaty) have called upon member governments:

> …with the approval and involvement of Indigenous and local communities' representatives, to develop and implement strategies to protect traditional knowledge, innovations and practices based on a combination of appropriate approaches, respecting customary laws and practices, including the use of intellectual property mechanisms, *sui generis* systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice.

The Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) of the CBD, concerned with access to and fair and equitable benefit sharing of genetic resources, is also obliged to address potential components of a *sui generis* (unique) regime for the protection of traditional knowledge (CBD 1998). Reference to a *sui generis* regime means that new law will not necessarily take the form of Western intellectual property law. Indigenous peoples participating in these meetings have argued that Indigenous customary law provides an important, if not primary source of norms and means for protection (e.g., Solomon 2004) and all guidelines on Article 8(j) have recognized the importance of customary laws in establishing governing protocols.

Other examples of international support include the work of WIPO and the Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC). WIPO, the UN body responsible for the administration of intellectual property rights, has become an important forum for the negotiation of principles to protect traditional knowledge and intangible cultural heritage through the work of its Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC).[12] Representatives of Indigenous peoples have had a voice in this process. However, neither WIPO (nor its Committees) make law or even legally binding treaties. It can only establish principles based upon negotiations amongst the member states to which it owes primary allegiance and accountability. State governments are not obliged to pass laws based upon these principles, but because WIPO does extensive research into the "best practices" for states to meet their obligations under other international legal treaties, such as the CBD, TRIPs, and international human rights treaties, their work is very influential.

More recently, over 87 state parties became signatories to the Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC) in 2007, which, although it provides less clear protection for Indigenous peoples specifically, clearly aims to identify, document, research, preserve, protect, enhance, and revitalize cultural heritage with the participation of communities, ensuring access to intangible cultural heritage while "respecting customary practices governing access to specific aspects of such heritage" (Article 12 (d) (ii)). Indeed, state parties are obliged "to ensure the widest possible participation of communities, groups, and where appropriate individuals that create, maintain and transmit such heritage and to involve them actively in its management" (Article 15) (Ahmed et al. 2008; Blake 2009).

Despite these developments, there remain a range of pressing questions about the translation of evolving international rights norms and heritage principles back into national and local contexts (Noble 2007). For example, what does it mean to responsibly do research involving cultural heritage given these new and developing international standards? Who is accountable for developing appropriate strategies that adhere and reflect these newly articulated relationships between rights and (tangible and intangible) heritage? Without new national legislation or policy, where can information or guidance be found that reflects best practices and begins the process of incorporating Indigenous values and perspectives into cultural heritage research and management processes?

Surveying the spectrum of interests and parties currently engaged with cultural heritage and cultural heritage management issues, multiple sites appear. These range from individual and collaborative research processes to university ethics review committees to institutional management approaches. However, different practices may need to be incorporated and re-evaluated at various stages. This might mean, for example, that the local community sets some guidelines for the process, ownership of the research, and delivery of the results, including updated information about use of research results, where results are being kept and who will be responsible for managing information in the future. Correspondingly, it might mean that a cultural institution (e.g., a museum, library, and or archive) manages a specific collection of material with regard to Indigenous cultural values alongside those of the "public." Further, it might mean that universities or other institutions that sponsor cultural heritage research provide practical workshops about IP law and the relationships to Indigenous cultural rights before researchers enter the field. The latter may help researchers come to terms with the legal and ethical responsibilities that they have, not only to the communities with whom they work, but to their own research practice.[13]

Some Recommended Practices in Collaborative Research

This section discusses strategies and practices that facilitate the identification of IP issues and the avoidance of conflicts between and among professionals and local or descendent communities. The value of public and community-based collaborations is well established for transforming relationships between cultural heritage professionals and peoples affected by their research, and for understanding and jointly addressing concerns relating to protection and control of cultural heritage as understood by affected communities, and for sharing benefits (Hollowell and Nicholas 2009). As Greenhill and Dix explain, "a reflexive approach is essential because it promotes community inclusion and confronts the traditional exclusivity in academic culture of research expertise. By sharing experiences and fostering a collaborative culture through research, we can learn from communities and we can undertake more meaningful research" (2008:49).

Collaborative community-level projects (or case studies) have proven both necessary and beneficial to understand how, when, and why IP issues

emerge when researchers are dealing with the intersection of different world-views, value systems, and legal regimes (see Bell and Napoleon 2008a; Bell and Paterson 2009; and others).

Increasingly, cultural heritage professionals working within and outside of academia are being compelled by professional and institutional codes of ethics, research protocols of Indigenous communities and organizations, and policies of funding agencies to engage in collaborative research, particularly in the context of research that affects Indigenous lands or engages Indigenous peoples through interviews or other means of research involving humans. For example, the Australian Institute of Aboriginal and Torres Strait Islander Studies developed its Code of Ethics for Indigenous Research in 2002. It has since become the benchmark for any research involving Indigenous peoples within Australia and currently sets the standard for such research in university, government and industry contexts. In Canada, an overarching policy, the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans,* governs university research funded by the three federal granting councils. Having recently undergone an extensive revision, the second edition of the *Tri-Council Policy Statement* has specific chapters on research involving Aboriginal peoples and qualitative research that underscore the importance of collaborative approaches in research involving communities.[14] While still held within the decision-making and legal structures of the state, such initiatives allow the possibility of acting upon Indigenous peoples' authority in regard to intangible heritage.

The widespread call for collaborative research is generally in response to concerns expressed by Indigenous communities that standard research practices have facilitated the project of colonization. Moreover, there is a growing appreciation by non-Indigenous cultural heritage professionals of biases and harms inherent in old methodologies and the mutual knowledge benefits of collaborative work. Through the very framing of historical knowledge gathering projects, many western scientific and social scientific research projects have functioned to further projects of colonization (e.g., Bowrey and Anderson 2009; Flessas 2008; Tsosie 1999).[15] Geared to non-Indigenous audiences, the standard premise was that research on Aboriginal peoples was of universal benefit and so direct local impacts need not be considered. The concept of the universal or "public" did not include Indigenous peoples as they were the "subjects" and "objects" of study. These studies were not benign and often led to legislative and policy decisions that have had devastating effects on

Indigenous communities, identities, and cultures. As the constant demands for the return of human remains (which were rarely taken with permission or care) illustrate, this is an uncomfortable and disturbing history that has implications in the contemporary present. Many Indigenous communities have more than enough evidence and reason to be skeptical and hostile to research and researcher agendas developed without community discussion, input, and participation — or without their agreement as political communities within their territories. If this history is to be meaningfully overcome, we need greater attention to the logics that facilitated this kind of research practice, as well as the means to reconfigure these to include Indigenous perspectives, participation, and authority as both legitimate and necessary.

In contrast to the past practices of research and study, a collaborative and decolonizing approach to research typically has at its core meaningful participation,[16] respect (for individuals, community, and difference), equality (including different ways of knowing), empowerment of participants and inclusiveness, and in some instances with a view to social change concerning protection and control over cultural heritage (see Bell and Napoleon 2008b: 9; Brant Castellano 2004; L.T. Smith 1999). Critical questions in collaborative approaches include "Whose research (or products of research) is it? How should this be negotiated and when? How will this be explained and in which language? Who owns it culturally? Who owns it legally? Whose intentions does it serve? Who will benefit from it? Who has designed its questions and framed its scope? Who will carry it out? Who will write it up and disseminate it? Where will the research go? Will it be archived and if so where? Who will have control over it? How will it be accessed in the future? What permissions for use now and in the future need to be developed? Who can speak for this material? How will any future rights be negotiated?" (Anderson 2007, 2009; Bell and Napoleon 2008b, L.T. Smith 1999).

Perhaps even prior to these questions, we need to ask "Who has authority within the territory in which the heritage is sourced? and what are the appropriate ways to have a conversation about such heritage when peoples meet to discuss, handle, translate, and properly respect that heritage?" What might happen to our approach to collaboration when the Indigenous or other descendent community has "exclusive" authority over heritage? Indeed, Michael Asch (2008) asks the reasonable and simple question that is rarely asked: "What could be more fundamental than knowing that the care of your heritage is in your hands?" In such instances — as is quite defensible in the case

of First Nations in much of Canada where the premises of settler-state sovereignty remain contested — one could readily imagine collaboration taking a new form (cf. Asch 2000; Borrows 1996; Coulthard 2007; McNeil 1989). Such collaborations would demand alliances not simply between Indigenous persons and researchers and their ways of knowing, but between them as respective members of distinct political communities. Though rarely tried in relation to heritage, there is ample evidence from First Peoples themselves to suggest that this is precisely the inter-peoples collaborative relation that they have continually sought (Noble 2008). Paraphrasing Asch, "Can this be a place to dialogue and build relationships?" (Asch 2008; also Little Bear 1986).

Although there is today greater awareness of, and guidelines for ethical practice in archaeology (e.g., Vitelli and Colwell-Chanthaphonh 2006; Zimmerman et al. 2003), it seems that archaeologists most frequently encounter ethical issues in the context of heritage management-related activities. Nonetheless, as the case studies relating to CRM in Colwell-Chanthaphonh et al. (2008) suggest, valuable new approaches are being developed. Another volume edited by Stephen Silliman looks at how archaeologists integrate community issues within their research with the explicit intent to "redirect contemporary archaeology in many ways that are more methodologically rich, theoretically interesting, culturally sensitive, community responsive, ethically aware, and socially just" (2008: 4–5). This suggests that archaeology can contribute to integrate community goals with academic ones.

Closing Thoughts

The challenges that researchers face here are many. For our purposes what is especially important is learning what the heritage management needs and concerns of the community are, relative to both tangible and intangible property, and then learning how to successfully address these. This means that researchers must utilize research methods that (a) will yield information on cultural and intellectual property concerns, and (b) are appropriate to the cultural context (Denzin et al. 2008; Bell and Napoleon 2008b: 9–18). A third and dynamic new responsibility rapidly coming to the fore is to understand and engage in the most robust ways both stabilized and emergent jurisdictional-political relations (Borrows 2002; United Nations 2007).

As professionals from all sorts of academic and professional spheres interested in IP issues within cultural heritage, we must take advantage of every

possibility to gain understanding about the various ways of protecting and dealing with heritage. Often there will be conflict between cultural groups and the ways each group conceives of and deals with heritage, and some of these perspectives might diametrically oppose each other. We realize that we will not be able to provide answers to every situation, nor are we attempting to do so. Instead, what we are hoping to provide is information that can help practitioners, Indigenous populations, and professionals alike make informed decisions about "heritage" and its many manifestations.

Acknowledgements

Notes

1. There is already significant movement towards this through such initiatives as "Project for the Protection and Repatriation of First Nation Cultural Heritage in Canada" (see Bell and Napoleon 2008; Bell and Paterson 2008), and the "Intellectual Property Issues in Cultural Heritage (IPinCH) Project" (www.sfu.ca/ipinch).

2. www.achp.gov/nhpa.html (accessed March 21, 2010). Similar rationales are offered in Canada, Europe, Asia, and other countries that have laws concerning heritage resource management and protection.

3. See, for examples, Bell et al. (2008); Noble (2008); Blood and Chambers (2006); Yellowhorn (1996); and Zedeño (2007)

4. For example, the province of Alberta recently passed legislation to facilitate the repatriation of "sacred ceremonial objects" without conditions to First Nations in Alberta (see *First Nations Sacred Ceremonial Objects Act*, R.S.A. 2000, c.F-14). However the Blackfoot are still actively engaged in international repatriation efforts, as well as

repatriation of objects within Canada that are of great significance to them but that fall outside the scope of the provincial legislation.

5. This could be through designation as a provincial or federal park or historic site or UNESCO World Heritage Site, such as Head Smashed in Buffalo Jump and Writing on Stone Provincial Park, both located on Blackfoot traditional territory in southern Alberta.

6. Noble 2002; also see Asch 2001; Battiste and Henderson 2000; Henderson 2007; Miller 2009; Treaty 7 Elders and Tribal Council 1996.

7. For example, federal and provincial legislation and policy in Canada and federal and state legislation in the United States (e.g., the *National Historic Preservation Act, Section 106*) require consultation with affected Indigenous peoples (e.g., closest tribe or First Nation, descendent group) where gravesites, human remains, and other significant archaeological resources are inadvertently discovered through excavation or development before development can continue.

8. This includes determining and then honoring whose authority takes precedence or how we ought to interact with that legal authority in practicing heritage management.

9. See, for example, Articles 11.1, 13.1 and 31.1. Notably, against the 143 votes for the Declaration, the four negative votes were cast by Canada, Australia, United States, and New Zealand. Of these four countries, Australia (in 2009) and now New Zealand (in 2010) have since endorsed the Declaration.

10. See the *United Nations Declaration on the Rights of Indigenous Peoples*, Articles 10, 11, 19, 28, 29, 30, 32; the Convention on Biological Diversity, Article 8j; and Tamang's (2005) presentation to the UN Permanent Forum on Indigenous Issues, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices" for these provisions.

11. Asch 2002, 2005, 2009; Chakrabarty 2000; Coulthard 2007; Foucault 2003; Noble 2008; Pinkoski and Asch 2004.

12. The IGC has been careful to produce an inclusive definition of *traditional knowledge* so as not to preclude any potential subject matter, including "the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems." Also see Rikoon (2004).

13. A good comparative example of how these types of considerations have been incorporated into national policy in Canada is found in the area of Aboriginal health research. See, for example, the Canadian Institutes of Health Research (CIHR) Guidelines for Health Research Involving Aboriginal People (2007) at http://www.cihr-irsc.gc.ca/e/29134.html

14. The second edition of the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* is anticipated to replace the first edition in late 2010. A draft version is available at: http://pre.ethics.gc.ca/eng/policy-politique/tcps-eptc/readtcps-lireeptc/

15. Current debates about a cultural commons that assume that all knowledge has historically been free and available to all to use illustrate some of the logics that still govern research rationales. Societies in which not all knowledge is free or available to all rightfully point to the cultural particularity of this kind of conception of the "commons."

16. Including through culturally informed advice, meetings with researchers prior to the actual research, activities and participation at all levels of the research program including input on interpretation of outcomes and equitable distribution of benefits. In Australia, cultural protocols have been incredibly useful in setting key concerns that reflect Indigenous cultural views in a variety of contexts including arts, performance, writing, and other forms of documentation including photography (see Janke 2006; Janke and Mellor 2006).

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Thematic Resource Sets

IP and Heritage Rights: Customary, Conventional, and Vernacular Realms

Proposals for the application of intellectual property law to intangible cultural heritage have attracted considerable attention and controversy, while provoking advocacy for alternative models for protecting, promoting, and maintaining cultural heritage goods. This is an emerging field of legal pluralism that includes the co-existence and intersections of conventional intellectual property (e.g., common law, statutory forms of protection), customary legal systems, international legal systems (e.g., Indigenous and cultural rights), and informal intellectual property norms. The latter are increasingly referred to as "vernacular" intellectual property, and might be described as moral economies for the management of cultural forms and properties. Many stakeholders thus face an inter-jurisdictional geography of cultural rights, resulting in a sometimes bewildering set of expectations, protocols, regulations, and value systems. What is thus needed are both cross-cultural approaches to determine what constitutes cultural heritage in various settings, and cross-disciplinary approaches to broaden our understanding of legal and customary processes in its protection.

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Ethical Dimensions of Heritage Protection

Ethics is fundamentally about seeking resolution to situations where there is
a disagreement about what to do. The course of action each party may take
is guided by cultural values, social mores, codes of professional conduct, and
historical circumstance, among other factors. In the realm of cultural heri-
tage, ethical dilemmas frequently emerge when members of descendent com-
munities have little say in decisions about the "management" of their heritage,
as well as when the needs and/or wishes of multiple stakeholders differ. While
there is no one-size-fits-all approach to resolving ethical issues, fortunately
there is growing awareness and use of tools that assist in successful negotia-
tion and the development of good practice, including consultation, collabora-
tion, and benefit-sharing models.

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Collaborative Research Practices

Within the domain of heritage management, consultation is the most common context for forging the collaborative relationships necessary to reconcile and harmonize the diverse and often divergent values linked to cultural heritage. A host of questions are at play here, including whose heritage is it?, and who benefits from it? — unfortunately it is often not the same parties. Collaborative research practices aid in building a fuller understanding about the scope and limitations of intellectual property laws, protecting the intellectual aspects of cultural heritage, and promoting fair and culturally appropriate uses of intellectual property. Collaborative research strives for full and meaningful involvement of members of descendent communities in all aspects of projects pertaining to their heritage — from project design to defining what constitutes "significance" to evaluation and dissemination of results. While they may be difficult to initiate, such projects tend to be far more relevant and satisfying to all parties than other modes of research.

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