Intellectual Property Issues in Heritage Management

Part 1: Challenges and Opportunities Relating to Appropriation, Information Access, Bioarchaeology, and Cultural Tourism

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What is heritage?—a pictograph of human figures and animal forms painted on a rock face?; a photograph of the same pictograph in a scientific journal?; the traditional songs, stories, and beliefs that still may be associated with that image?; or the image of the pictograph on a t-shirt? How is "heritage" conceived of in today's digital and multicultural world, especially considering that the line between tangible and intangible cultural property is often blurred or nonexistent. And how do the meanings associated with "heritage" differ among cultural descendants and archaeologists in various cultural contexts and legal regimes? Today we face a variety of new challenges relating to cultural and especially intellectual property in the realm of heritage management.

The role that intellectual property plays in cultural heritage management is still a relatively new topic. Fortunately, there is already an impressive literature

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on intangible dimensions of the past (e.g., Anderson 2006; Battiste and Henderson 2001; Bell and Napoleon 2008b; Bell and Patterson 2009; Daes 1993; Greaves 1994; von Lewinski 2004). These sources provide examples of the range of situations in which intellectual property issues emerge, the possible costs and benefits to communities and researchers, the types of ethical concerns that may accompany, possible resolutions, and good practices.

In our two-part contribution to "Resources," we identify some of the general categories where heritage managers might encounter intellectual property issues. In Part 1, we review some key sources relating first to the general nature of intellectual property in cultural heritage, and then to the more specific topics of appropriation and commodification; access to information; bioarchaeology; and cultural tourism. Part 2 will provide resources relating to ethical and legal dimensions of intellectual property in cultural heritage, as well as collaborative research approaches that constitute good practice. These are meant primarily as samplers to illustrate the types of issues that may be encountered in heritage management, and to provide for further exploration and discussion.

New Challenges in Heritage Management

The term "heritage management" generally denotes a process—namely, the identification, evaluation, and protection of evidence of past human lives.[1] For archaeologists and others, the focus has been on material culture and tangible aspects of the past, ranging from artifacts and assemblages to sites and archaeological landscapes. These elements of "cultural heritage" have been the subject of intensive scientific and historic inquiry for centuries in a grand quest for knowledge about the past. For many, these elements have also played a vital role in identity, memory, spiritual life, political consciousness, and nation building.[2] Material culture has also been at the center of debates over "who owns the past?"[3] that have brought together (not always willingly) archaeologists, descendant and culturally or geographically affiliated communities, museums, and governments as they grapple with complex ethical, political, legal, and cultural issues surrounding repatriation, curation practices, the antiquities market, interpretations of the past, and the future of the past as a "commodity" to be managed. These debates raise questions of power and agency. They require ongoing reflection about the dominance of certain rationales and frameworks through which we make sense of objects and connect them in meaningful ways to a "past."

The complexity of contemporary heritage management increases when we also consider concerns over "intangible" aspects and products of cultural heritage, including issues of intellectual property (Brown 1998; Nicholas and Bannister 2004). Questions regarding who has legal rights, ethical responsibilities, access, and entitlements to benefit from information derived from or relating to someone else's cultural heritage are becoming the equivalents of the reburial and repatriation debates that arose in the 1990s (e.g., Fforde et al. 2002; Fine-Dare 2002) and which continue today (Bell 2009; Bell et al. 2008; Burke et al. 2008).[4] Concerns over intellectual property rights in the realm of cultural heritage have surfaced in a number of contexts,[5] and reflect general trends emanating from the so-called "information age," including calls for greater access to information and knowledge[6]; the rise of digital museums; emerging debates surrounding culture-based rights and responsibilities; and the use of cultural tropes in popular media, advertising, and the like.[7] Perhaps the best known example comes from ethnobiology, where public attention in response to "bioprospecting" of Indigenous plant knowledge, used to identify new medicines, came under scrutiny (see Bannister and Solomon 2009).

Adding to this heady mix are demands by Indigenous peoples for protection and control of cultural knowledge and the need to craft heritage management solutions within an intercultural context, which include striving to respect differences—in particular, different concepts of property, legal orders, and ways of knowing. At the heart of many heritage land management schemes is the need to balance resource development with scientific, heritage conservation and Indigenous peoples' rights or interests. However, the balance is tipped by a concept of private property that favors economic productivity, universal access to natural resources, and marketability over conservation (the latter concept is often interpreted as enabling excavation and removal of artifacts and remains before development). This way of thinking assumes that cultural items and knowledge associated with them can be detached from the landscapes in which they arise and ignores—or sees as less significant than economic benefit—the link between landscapes, cultural practices, and passage of knowledge between generations (e.g., Barsh 1999; Bell 2001).

Such approaches often operate in stark contrast to indigenous understandings of humanity, legal orders, and responsibilities for ancestral care. Relationships of descendant communities may also not be properly understood in Western dichotomies that separate the living from the dead, past from present, or a person from human remains. Heritage sites may be viewed by archaeologists as

valuable "non-renewable cultural" resources, requiring protection and investigation, but from an indigenous perspective they may be "sacred and spiritually potent," as "powerful ancestral places that must be protected out of respect for past generations" (McLay et al. 2008:165–166). The end goal of preserving the site without interference may be the same, but the concepts of humanity, law, and property informing the outcome are vastly different.

What is "Intellectual Property"?

Intellectual property is a legal concept that, over the last few years, has come to mean different things to different people and within different legal systems. Most simply, its legal definition is "intangible personal property in creations of the mind" (Dratler 1994: 12). Most "Western" legal systems provide legal protections for intellectual property that meets certain criteria in the form of specific commercial rights such as copyright, trademark, patent, design, and trade secret. One key criterion for assigning intellectual property rights to a creation is "fixedness"—transforming the intangible to tangible. For example, an intangible creation is a story narrated orally; a tangible expression of the story is that story in a written form. It is this tangible representation that can be protected by copyright. Similarly, an intangible creation is an idea; a tangible product of the idea could be an invention that could be protected by patent or trademark. Types of creations that can be protected by most current IP laws include music, dance, literary and artistic works, inventions, as well as words, phrases, symbols and designs.[8]

In many non-Western legal systems, however, what constitutes "intellectual property" and the mechanisms for its protection are substantially different. In some indigenous societies there is little distinction between "tangible" and "intangible" property (e.g., Bell and Napoleon 2008a). The value of an item may not be related to its physical form, but in the knowledge it represents or intangibles associated with it, such as is the case with songs, dances, or designs (Bell 2009: 22). Thus, cultural heritage usually includes things such as artifacts, as well as places, stories, and songs that are the manifestations in the present of things and times we consider "past," including creator beings and ancestral spirits (WIMSA 2003). Concepts of "ownership," "property," "past," and "present" may well be inadequate to describe these relationships, and distinguishing between "cultural heritage" and other forms of heritage is in many contexts incomprehensible.[9] Although indigenous concepts are

not homogenous across peoples, communities, and societies, notions of "belonging" and "ongoing responsibility" may be more appropriate, since, unlike "ownership," they emphasize *relationship* rather than *commoditization* (Noble 2008a).[10] Furthermore, the language of ownership and intellectual property is often invoked (sometimes with discomfort) as a strategic device in negotiating development policies or management frameworks, where Western norms relating to cultural heritage typically prevail.

Important cultural knowledge, symbols, stories, songs, and language have at times been exploited by profiteers (Brown 2003; Johnson 1996), used inappropriately according to cultural norms, or used without proper attribution.[11] Indeed a variety of legal cases have challenged and frequently halted the unauthorized copying of cultural property for commercial gain (e.g., Janke and Quiggin 2005).[12] Examples include T-shirts with images of rock art, and food products that use cultural images or symbols in marketing. Indeed, advertising frequently turns to archaeological sites to sell products—from the *moa*, the giant stone heads, of Easter Island to promote tissue dispensers and cold remedies,[13] to the visage of "Tollund Man," the remarkably preserved body from a Danish peat bog to sell facial cream.[14] Sometimes uses of sacred symbols abuse or distort their original meaning, and result in diminished respect for the sacred, improper, or dangerous use of powerful symbols to both uninitiated tribal members and the general public. Of equal concern may be unauthorized use of designs or images considered by a community, family, or group as integral to cultural identity or authority. Cultural distinctiveness has also been appropriated and commercialized in the quest to promote niche "cultural tourism" markets (Hinch and Butler 1996).

In other instances, communities that participate in research projects or contribute vital knowledge to the development of a product (knowingly or not) have not benefited equitably from the process—if at all[15] (Posey and Dutfield 1996). Examples range from studying a community's DNA to determine relation to ancient human remains to using culturally important plants to develop commercial products, such as the use of San cultural knowledge of the slimming properties of *Hoodia gordonia* for commercial diet pills (Geingos and Ngakaeaja 2002; Wynberg et al. 2009). This becomes tricky when ancient technologies cannot be sourced to any single community of origin, as with the use of obsidian blades for modern surgery (Sheets 1989). In some cases, communities have lost access to landscapes that hold important meanings, to cultural items now in distant museums or exported to other countries (e.g.,

Bell and Napoleon 2008b; Bell and Patterson 2009), or to recordings and field notes gathered in the past by researchers.[16]

Identifying Approaches to Intellectual Property Issues in Cultural Heritage

The recovery, analysis, and interpretation of archaeological materials contributes new knowledge. However, researchers and CRM practitioners are today frequently encountering restrictions on access, use, or publication of scientific and cultural information in their dealings with employers, funders, and indigenous communities who may choose to limit access to or dissemination of certain types of information (e.g., WIMSA 2003). For example, many CRM archaeologists are bound by legal contracts that require they obtain permission from their employers to speak or publish on their field research findings, or even to agreeing to report back to communities on their findings, since they (the archaeologists) may not own the intellectual property derived from their efforts. In the case of archaeologists working under tribal permit, the tribe may claim full or shared ownership of all research products as part of their cultural heritage. It is thus not surprising that ethical frameworks and research protocols governing access to indigenous lands and sites are emerging that include specific provisions concerning data ownership and copyright (e.g., Kamloops Indian Band 1997). However, in the absence of a formal legal mechanism enforceable in Western law, such as a contract, most intellectual property regimes tend to protect the rights of the researcher and scientific community, rationalizing that such an arrangement is necessary to encourage productivity and promote the advancement of knowledge.

The overall result has been a complex web in which a range of legal and ethical obligations regarding intangible aspects of cultural heritage are at play for researchers—further complicated by the fact that intellectual property is understood, recognized, and protected in different ways among different cultural groups and under different legal orders. Even just within heritage management organizations, archaeologists may have to deal with provisions relating to community engagement and intellectual property within (a) the codes of ethics of the professional organization(s) to which they belong, (b) any relevant tribal, state or provincial, and federal laws, and (c) business practices and terms of employment to which they must adhere. Even within a single organization, the practioner may have difficulty in adhering to the code of

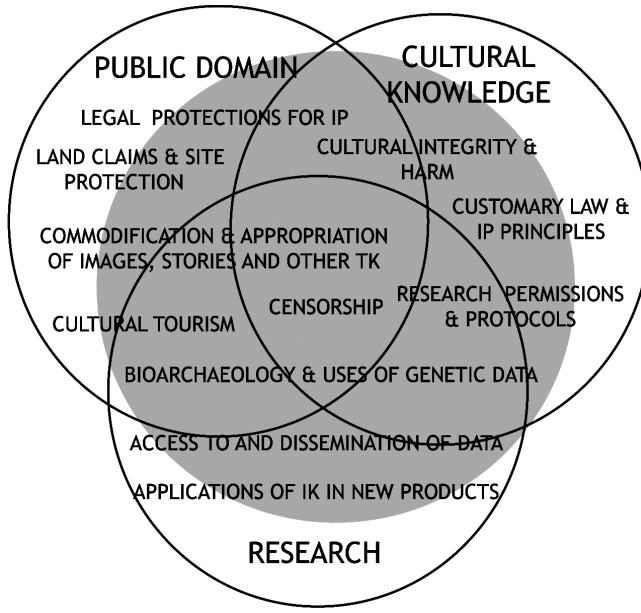
conduct when there are multiple provisions concerning expected practice. To take one example, a member of the Register of Professional Archaeologists (RPA) may face potentially competing intellectual property concerns of different parties when upholding these provisions:

> 1.1c [An archaeologist shall:] Be sensitive to, and respect the legitimate concerns of, groups whose culture histories are the subjects of archaeological investigations;
>
> 2.2d [An archaeologist shall not:] Refuse a reasonable request from a qualified colleague for research data;
>
> 3.1a [An archaeologist shall:] Respect the interests of her/his employer or client, so far as is consistent with the public welfare and this Code and Standards (RPA Code of Conduct)

Things can become interesting when one is a member of several organizations (e.g., Society for American Archaeology, RPA, *and* the World Archaeological Congress) that have different expectations of their members.[17]

While each country has its own intellectual property laws, with unique dimensions depending on legal tradition (common law vs. civil law for example), they all conform to the minimum standards set, for copyright, by the Berne Convention and, for patents, by the Paris Convention.[18] As a consequence, those involved in heritage management today face a host of new challenges. Furthermore, although all interested parties may confront challenges relating to intellectual property (including within the scholarly community itself),[19] it has typically been Indigenous peoples who have been most affected, and who have had the least resources and fewest opportunities to stem or seek restitution for the impact of appropriation and commodification of their cultural and intellectual property (Brown 2003; Riley 2004).[20]

Given this environment, a fundamental question for CRM practitioners is "What is the appropriate ethical and legal balance between respect for indigenous interests and legal orders, rights of individual researchers, and the public interest in encouraging creativity and the production of knowledge for the common good?" In answering this question, a wide range of research themes converge. The figure on the next page visually identifies some of the primary areas or topics in which intellectual property issues may arise within the three overlapping realms relating to cultural heritage and its management: the public domain research and development, and cultural knowledge.



Areas where intellectual property concerns appear in three realms relating to cultural heritage (IPinCH 2007). These may involve intellectual property (IP), intellectual know-how (IK), and traditional knowledge (TK).

Knowledge of the types of intellectual property issues that can and do arise in heritage management is the first step to understanding the cause of the problems, which may then point to possible solutions. What we offer here serves only as a entry into this still little-known dimension of heritage management.

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General Resources on Intellectual Property

The articles, books, and web sites listed here were selected to provide information, examples, and additional resources on intellectual property in general, and then on issues relating to Indigenous peoples and descendant communities interactions, experiences, and concerns and intellectual property. These lists are meant to be more illustrative than exhaustive.

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Appropriation and Commodification of Cultural and Intellectual Property

The appropriation and commodification of cultural knowledge and property—the taking and affixing a price to what many would consider inalienable and priceless—affects the cultural identity and integrity of contemporary Indigenous societies and others. What are the consequences—the harm, as well as the benefits—that may result? This topic reflects one of the most visible areas in which intellectual property issues relating to cultural heritage take

form because it is where public use of the past intersects with the interests of descendant communities. Is the use of rock art images in advertising clever and playful or intrusive and disrespectful? Should certain types of cultural and intellectual property be protected from such exploitation—from outside interests only or from *all* users, including Indigenous peoples themselves? What if Indigenous groups want to exploit their own past for commercial gain? Where is the line between exploitation and fair use? These are all questions that fall within the venue of heritage management.

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Access, Control, and Dissemination of Heritage Information

Information relating to cultural heritage may be part of a sacred trust, or it may be a commodity, a political tool, or a teaching device. Within different cultural contexts and legal regimes who has rights to view, to use, to distribute, and to benefit from information varies substantially, as do the means to protect knowledge and creative endeavours. There continues to be much scholarly and legal debate on the merits of open access to knowledge vs. the need to protect research results, as well as concerns raised by Indigenous and other descendant communities seeking protection of their traditional knowl-

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Intellectual Property Issues in Bioarchaeology and Genetics

Technological advances have increased substantially access to (and accordingly the value of) genetic and biological data obtained from both living and ancient populations. Today, such information is being used to define cultural relationships and affiliation, and plays an important role in issues over sovereignty, or rights to land, material objects, and intellectual property. Human genetic material is also patentable in some countries. Those working in the field of heritage management must recognize that human biological and genetic materials may fall within their mandate. They also need to be aware of what is potentially at stake for both archaeologists and descendant communities when genetic and biological data are used in contexts outside the realm of heritage studies. What makes heritage management especially interesting here is that it operates at the interface between two often diametrically op-

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Intellectual Property and Related Issues in Cultural Tourism

Cultural tourism and archaeo-tourism emerged as a means to make tourists into faux anthropologists, exposing them first hand to the diversity of the world's cultures, both past and present. It has thus become an important educational tool and a richly rewarding experience for visitors when done well. Cultural tourism has many positive benefits, ranging from being able to educate outsiders about the culture or archaeological site that is showcased, to capacity building, to economic and other gains. But problems also emerge, especially when local or descendant communities are not fully involved or are being exploited and cultural integrity is put at risk. Cultural tourism has become big business and there is much at stake for governments, the tourism industry, and communities. However, economic benefits from tourism may not be equally shared with communities, and control over what is and isn't included in the tour, and how their culture is portrayed or marketed, may be outside of their control. Intellectual property issues associated with cultural tourism range from marketing of information derived from oral histories to access to archaeological and ethnographic research results (such as rock art locations) to the recreation of traditional activities and replicated sites. Tourism has become one of the primary means by which cultural heritage is commodified today.

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Notes

1. However, heritage management schemes may also enable the destruction of a site and the removal or alienation of heritage.
2. This extends at least back 5,000 years to the Babylonian King Nabonidus who used archaeology and its display to bolster his unpopular regime.
3. This is a popular question in academic literature (e.g., Fitz Gibbon 2005; McBryde 1985), but "ownership" is too often defined according to Western legal constructs only. When imposed in an intercultural context, notions such as "property," "ownership," and even "culture" may be incomprehensible, inadequate, or inappropriate to describe the nature, complexity and range of relationships between people and "things" (see Bell and Napoleon 2008a; Noble 2008). In addition, claims of cultural affiliation, origins, and ownership vary substantially, including the use of markers to identify certain items manufactured for sale as being of Native Alaskan manufacture (Hollowell 2004), and the current effort of the Egyptian government to restrict the manufacture and sale of copies or images of Egyptian antiquties and sites (El-Aref 2009).
4. Although ostensibly about access to tangible items (including human remains), fundamentally these were about the intellectual property attached to certain items, and who controls specific classes of objects because of their intellectual

significance. In this sense, reburial on repatriation can be viewed as forerunners of a greater focus on intellectual property aspects of things, which mandate how tangible property (in this case artifacts and cultural objects) should be treated.

5. IP concerns emerged in both international and national sites in the late 1960s and early 1970s. In 1967, for example, India made an explicit request for the inclusion of a provision to protect cultural heritage of an anonymous variety (at the time understood through the neologism of "folklore") in the revision of the Berne Convention (Senfleben 2004: 81). In the Australian context, especially in relation to specific concerns relating to Aboriginal art, the Australian Government initiated a governmental working party to investigate whether copyright would be viable tool for protecting Aboriginal interests in art and cultural heritage (Anderson 2009; Janke 1998). In the 1980s, further questions emerged in relation to biodiversity and patents, while in response to growing technological capacities from the late 1990s, onwards new concerns have emerged regarding the increased possibilities for knowledge circulation and dissemination.
6. Promoters of this include Creative Commons (see http://creativecommons.org/), and the A2K (access to knowledge) movement (see http://www.cptech.org/a2k/).
7. See Anderson and Bowrey 2006; Bowrey and Anderson, forthcoming)
8. For an account of these developments in Western law, see Anderson 2009; Sherman and Bently 1999.
9. See Bell and Napoleon (2008a: 6–7) for discussion of definition of cultural property in case studies; also Noble 2008b; Overstall 2008).
10. However, the latter understanding may be emphasized where the issue is one of benefit sharing.
11. An important example here is the Snuneymuxw petroglyphs case in British Columbia, Canada, in which the Snuneymuxw First Nation successfully registered ten ancient petroglyphs as "official marks" with the Canadian Intellectual Property Office to prevent them from being copied and reproduced (AP 2000).
12. For discussion on such cases as *Yanggarrny Wunungmurra v. Peter Stripes* (1985), *Bulun Bulun v. Nejlam Pty Ltd* (1989), *Bulun Bulun v. R & T Textiles* (1998), and others, see Anderson 2005.
13. The contemporary use of moa images is extensive. In addition to the notorious tissue dispenser (a Google search will reveal several different forms), they are used for postcards, tourism advertising, t-shirts, keychains, cartoons, and much more.
14. See advertisement for Moor Mud at http://www.moornatural.com/ (accessed April 25, 2009). A more contemporary example concerns the use of the name and image of Crazy Horse to sell malt liquor; in this case, there was a successful—and very interesting—conclusion to the case; see http://cita.chattanooga.org/chml.html (accessedd June 28, 2009).

15. Much less a sharing of, or lead in the development of, the research agenda.
16. See, or example, the current efforts of the Ngadjuri of Australia to obtain information on their ancestors recorded by anthropologist Ronal Berndt [Copley et al. 2008], also the Hindmarsh Bridge case [Bell 1998]).
17. Although it is beyond the scope of this paper, a comparison of the provisions of different heritage-related organizations, as they relate to the topics discussed here, is revealing. For one compilation of ethical codes relating to cultural heritage, see http://www.saa.org/AbouttheSociety/AnnualMeeting/EthicsBowl/EthicsResources/CodesChartersPrinciples/tabid/199/Default.aspx
18. For Berne Convention, http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html; for Paris Convention, http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html. Berne sets the minimum standards for protection and each signatory essentially has the same concept of intellectual property (i.e., author, ownership, property, etc.). What is different is in the details regarding duration, and the extra frills like moral rights. The point is that over time copyright, patents designs, and trademarks have been designed to be standardized.
19. There have been legal challenges amongst scholars regarding access to information (e.g., the Dead Sea Scrolls [Carson 1995]).
20. For some, the issues are clearest when originator communities can be traced, but there are many instances (e.g., the cultivation of maize, blues music) in which there is no specific community to claim it (see Ouzman 2005). Do these then constitute "common" intellectual property? However, the clarity produced by tracing links in time or through DNA may not hold the same meaning for members of descendant communities as it may for archaeologists and others.