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ARTICLE

Documenting Indigenous oral traditions: Copyright for control

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Abstract

Similar to the other forms of cultural heritage, Indigenous oral traditions are collected and held often by outsiders to the community. There are a number of instruments addressing this problem, but none of them provide complete control over such works. This article will focus on the possibility and instances of copyright being used to control oral traditions, both by outsiders and the Indigenous communities. The article will first provide an overview of the applicable legal areas (cultural property law, Indigenous rights, and intellectual property rights), and then it will assess different stages in the treatment of oral traditions. It will discuss the copyright implications for not only the traditions themselves but also their documented versions, subsequent copies, adaptations, and new works in order to provide a full picture of the relationship between control and copyright.

Introduction

Among all the instances of cultural heritage of Indigenous people being collected and kept by outsiders, oral traditions are in one of the most vulnerable positions. Ranging from stories, songs, and teachings to prayers and daily conversations, such traditions can be documented (either in written form or as sound recordings and films) and shared with ease, with the possibility of distorting the meaning and inflicting bias on them. The risks are amplified when these recordings are shared in the digital environment. Such reuse and reinterpretation of oral traditions will then impact both the communities from which they originate and the non-Indigenous public at large who might come across these oral traditions in the heritage institutions and learn about them outside their true form and context. This does not mean that the law around it is completely oblivious to this problem. There are different, sometimes overlapping, areas of law that determine the allowed actions and actors to engage with heritage. Their fragmentation and overlaps are very significant in how the oral traditions will be controlled. But the more specific problem that this article will address is the control of the multiple forms that oral traditions can take throughout their (potentially indefinite) lifetime.

The first section of this article will introduce and compare the legal areas of (1) cultural property law; (2) Indigenous rights; and (3) intellectual property law. Although they are all beneficial in different ways, this section will show that these instruments are intentionally vague about who will control the traditions and their documentations, as aiming for "control" is not always the same as aiming for "safeguarding." The first two of the legal

areas focus more on heritage as a whole and less on the subsequent documentations. For the third legal area, it is understandable to argue that intellectual property rights are incompatible with the oral traditions themselves, but it is also worth noting that multiple "works" emerge when these traditions are documented. While it is not always to the advantage of the community from which they originate, it is always necessary to recognize the copyright law status in all of the forms that heritage can take, which will then play a direct role in establishing "control." It might seem counterproductive to focus on the outputs instead of the oral traditions, but the analysis in the next section of the article will show that their ownership and control also affects Indigenous communities.

The second section of the article will focus on the different stages in the treatment of oral traditions to evaluate the impact of copyright in each of them: (1) collection by outsiders; (2) the treatment of documented versions in institutions; (3) institutions making and providing copies upon request; and (4) the practices of independent Indigenous projects. By analyzing these stages separately, the article will not only focus on the copyright implications of the oral traditions themselves but also their documented versions, their subsequent copies, adaptations, and newly created works. Two disclaimers should be added here. First, the chosen term will be "oral traditions," as it is a neutral term, instead of the terms "intangible cultural heritage," "folklore," or "traditional cultural expressions" that are used in different instruments.[1] Second, the article's subtitle "copyright for control" refers to both (1) outsiders relying on copyright for controlling Indigenous oral traditions and (2) the Indigenous communities noticing and avoiding the impact of copyright or relying on it if they prefer.

Legal areas for safeguarding and controlling oral traditions

There are many instances of the cultural heritage of Indigenous peoples,[2] both in tangible and intangible form, being collected and kept by outsiders to the communities. This section will analyze the three different legal areas and how they address the issue of controlling oral traditions: cultural property law, Indigenous rights, and intellectual property law. First, it should be recognized early on that protecting or safeguarding oral traditions is not necessarily the same thing as controlling them. Control over oral traditions could mean various things, ranging from knowing which copies exist and where and when they were created to determining which ones will be accessed, shared, returned, or deleted. Although similar concerns exist for all intangible heritage held elsewhere, what makes Indigenous oral traditions more vulnerable is how outsiders can use them to change the narrative of the past events and even rewrite the history.[3] Second, as it will become more visible in this section, these overlapping legal protections also foresee different stakeholders enjoying the control that they provide, ranging from the entire humankind, to groups/communities, to individuals. Most of the instruments discussed here refer to Indigenous heritage, but a fuller picture of which stakeholder is going to control what is only going to be achieved after the analysis of the different stages in the second section.

[1] For the shortcomings of these terms, see Aikawa-Faure 2009.

[2] While acknowledging that it is a wide term (more than 370 million Indigenous people spread across 70 countries worldwide), this article will use the term without focusing on a specific Indigenous community and instead use examples from multiple regions. United Nations Permanent Forum on Indigenous Issues, *Who Are Indigenous Peoples? Fact Sheet*, 2015.

[3] Emily Hudson also explains what makes Indigenous collections unique as the history of their creation and collection, their informational content, and the lack of information regarding the existence and location of the collection items. Hudson 2006, 3–4.

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Cultural property law

The key instrument with respect to cultural property law is the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH).[4] The earlier approach of the United Nations Educational, Scientific and Cultural Organization (UNESCO) has been either providing guidance on the protection of a set of tangible property[5] or making inventories of heritage based on the predetermined criteria.[6] While the CSICH also embraces an inventory-making approach, its scope and provisions on participation makes it the most relevant cultural property law instrument for oral traditions. Article 2 refers to intangible heritage that is recognized "by communities, groups and individuals"; therefore, putting the creators at its center but creating both national and international responsibility,[7] as also mentioned in the preamble. In the second paragraph of the same article, the CSICH describes intangible heritage in five domains: (1) oral traditions and expressions, including language as a vehicle of intangible cultural heritage; (2) performing arts; (3) social practices, rituals, and festive events; (4) knowledge and practices concerning nature and the universe; and (5) traditional craftsmanship.[8] This definition certainly includes oral traditions, but it also leaves a wide scope for many forms of expression.

To ensure a higher degree of participation from the member states, the CSICH is not very strict about the processes. But Article 2(3) still indicates the steps for safeguarding as "measures aimed at ensuring the viability of intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of various aspects of such heritage." While documenting oral traditions can be a form of safeguarding, as intended by the CSICH, it does not automatically mean that communities will be in charge. Kate Hennessy gives the example of digital practices to revitalize the endangered Tagish language.[9] Projects like this not only achieve safeguarding targets such as revitalization but also need to be carefully planned due to the connection to the "wide-ranging discourse on political authority, land, and cultural identity, facilitated by a digitally mediated space for Carcross-Tagish control over representation."[10]

The CSICH also recommends "establishing documentation institutions for the intangible cultural heritage and facilitating access to them,"[11] but it does not address the details. However, under the Operational Directives, it is recommended that state parties shall share the documentation of intangible heritage with other state parties, who shall share it with communities, groups, and individuals as well as with experts and research institutes and also recommends the centers holding heritage employ information and communication technologies to communicate the meaning and value of intangible heritage.[12] Although the directives are beneficial for such dissemination, further re-sharing with "experts and

[4] Convention for the Safeguarding of Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 1 (CSICH).

[5] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231 (1970 UNESCO Convention).

[6] Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972, 1037 UNTS 151 (World Heritage Convention); Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity, Doc. UNESCO 29 C/ Resolution 23, 12 November 1997 (Proclamation of Masterpieces).

[7] Blake 2009.

[8] CSICH, Art. 2.

[9] Hennessy 2012, 349.

[10] Hennessy 2012.

[11] CSICH, Art. 13(d)(iii).

[12] Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage, Doc. 9.GA(2022), 8–10 September 2020, 87, 109 (Operational Directives).

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research institutes" might potentially weaken the community's control[13] and cause further intellectual property questions, as discussed in the second section of this article.

Similar to the 1997 Masterpieces Proclamation, the CSICH also aims for participation (Article 15) but places the responsibility of managing intangible heritage on the member states.[14] Despite references to "communities," the only mention of Indigenous people is in the preamble: "Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage." It is suggested that, by defining "communities, groups and individuals" only in relation to the intangible heritage in question, the CSICH engages less with the potential conflicts between individuals and the community; however, an individual's wish to not be a part of this cultural identity or to claim multiple identities is still to be respected.[15] This idea can be further complicated if the community is not pleased with the individual member's dissemination, which is what occurred in the case *Yumbulul v. Reserve Bank of Australia*, where a community member painted and authorized the use of the Morning Star Pole on a bank note and received significant criticism from the community.[16]

In connection to the problems concerning the encouragement of participation, it is not guaranteed that the CSICH's inventory-making system will work in favor of Indigenous communities since the opportunity to make nominations is another form of control enjoyed by the state parties. The same issue has occurred in the 1997 Masterpieces Proclamation where candidature files were submitted by national representatives, who were encouraged to prepare the files with the persons belonging to the communities "as far as possible."[17] These nominations then went to juries applying vague criteria such as "outstanding value, roots in tradition, affirming cultural identity, application of the skill and technical qualities, being testimony of a living tradition and the risk of disappearing."[18] Similar (potentially biased) nominations also take place for the World Heritage List, where there are concerns that state parties do not nominate sites that are valuable for Indigenous communities and instead make nominations that strengthen their authority or choose a less complex natural area to increase their chances of gaining recognition from the jury.[19]

It should be noted, however, that the CSICH's Operational Directives "encourage" state parties to prepare tentative lists together with a wide variety of stakeholders, including Indigenous peoples, and even requires them to consult Indigenous peoples if it concerns their lands, territories, or resources.[20] Thus, while there is room for identifying what should not be on the list, there is no guaranteed push by the communities over what should be on the list in order that they can benefit from increased recognition and funding. The application of "outstanding universal value" depends on the person making the nomination or the evaluation, but, understandably, this qualifier is not included in the CSICH.[21] It is also worth noting the relationship between the places and the oral traditions, especially for

[13] Alexandra Xanthaki also notes that the 1970 UNESCO Convention refers to photographs, films, and sound recording archives that are important for archaeology, prehistory, history, literature, art, or science (Article 1), and it is quiet on unauthorized recordings of Indigenous heritage. Xanthaki 2017, 15.

[14] Forrest 2010, 373; Lenzerini 2011, 112; Proclamation of Masterpieces.

[15] Blake 2009, 54.

[16] Yumbulul v. Reserve Bank of Australia, [1991] FCA 332, (1991) 21 IPR 481; Blakeney 1995.

[17] *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity: Guide for the Presentation of Candidature Files* (2001), para. 11, https://unesdoc.unesco.org/ark:/48223/pf0000124628 (accessed 12 March 2022) (*Proclamation of Masterpieces Guide*).

[18] *Proclamation of Masterpieces Guide*, para. 22.

[19] Disko 2017.

[20] Operational Directives.

[21] Park 2013.

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Indigenous communities. This means that (1) the oral traditions that are added to the intangible heritage list could be closely tied to a location (for example, the Mapoyo's oral tradition and its symbolic reference points within their ancestral territory) and, thus, (2) the treatment of the places inscribed under the World Heritage Convention would also be crucial in ensuring the continuation of the oral traditions themselves.[22]

The CSICH's inventory-making approach can also be criticized for only having a limited view of the heritage inscribed. It takes the heritage out of the intended context, and the list-making process determines which items of heritage will receive funding and the recognition that comes with it. One way to approach this is to be realistic about the process: "Intangible heritage is both a dance-band and a hospital: a serious enterprise concerned with the life and death of traditions and communities and a fund-raising dinner dance party with colourful costumes, glaring spotlights, and rhythmic tunes."[23] Additionally, once listed, the traditions are frozen in time, which goes against the dynamic nature of these traditions, which need to be carried and enriched by the community. The inventoried version would survive, but this does not necessarily mean the oral tradition will live on as it was intended to be.

Finally, it should be kept in mind that the CSICH does not clash with other international obligations. Under Article 3, the CSICH determines its relationship with intellectual property and the World Heritage Convention. According to Article 3, the CSICH should not be interpreted as (1) altering or diminishing the protection foreseen in the World Heritage Convention (with which an item of intangible cultural heritage is associated) or (2) affecting the rights and obligations of state parties from any international instrument relating to intellectual property rights or the use of biological or ecological resources. The latter is significant as the focus on intellectual property "flips the logic of 2003 Convention and focus on the product of cultural processes, rather than the cultural processes themselves."[24] This clause was added to ensure that the CSICH avoids conflicting with the work being done by the World Intellectual Property Organization (WIPO) in this area.[25] As discussed later in this section, WIPO's definition of traditional cultural expressions also shares elements with the CSICH, but neither instrument fully solves the puzzle.

The CSICH was followed by 2005 Convention on the Protection and the Promotion of the Diversity of Cultural Expressions.[26] This instrument focuses on the treatment of cultural expressions in the light of mass media and is criticized for being unclear and focusing on cultural expressions as market goods instead of giving guidance on ensuring their diversity[27] and not going far enough to protect cultural expressions.[28] There is also the 2015 Recommendation Concerning the Protection and Promotion of Museums and Collections, Their Diversity and Their Role in Society, which recommends member states to build relationships between museums and Indigenous peoples for the management and restitution of their heritage.[29] UNESCO also recommends the preservation and digitization of

[22] World Heritage Convention. The International Indigenous Peoples' Forum on World Heritage represents the Indigenous input in the World Heritage List.

[23] Hafstein 2009, 108.

[24] Lixinski 2020, 116.

[25] Lixinski and Blake 2020, 118.

[26] Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311.

[27] Coombe and Turcotte 2012, 294.

[28] Brouder 2005; Graber 2006; Craufurd-Smith 2007.

[29] Recommendation Concerning the Protection and Promotion of Museums and Collections, Their Diversity and Their Role in Society, Doc. CLT/HER/MHM/2015/PI/H/1, 17 November 2015, para. 18.

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documentary heritage, defining documentary heritage as a document comprising content such as text, images, and sounds.[30]

This brief analysis of cultural property law shows that it is insufficient for Indigenous oral traditions and their further documentation due to (1) its delayed (until 2003) and incomplete definition of the subject matter and the relevant actors; (2) its intention to encourage participation that does not necessarily reflect real-life practice; (3) its inventory-making approach not being suitable for the dynamic nature of oral traditions; and (4) its relationship with other instruments since it does not reduce the impact of other areas of law on how oral traditions will be controlled, especially intellectual property law.

Indigenous rights

Compared to the cultural property law instruments described above, instruments focusing solely on Indigenous peoples provide more nuanced guidance on the needs of communities. The slow response and the fragmentation of the existing protection around Indigenous peoples demonstrate that "indigenous peoples have been mere observers for a long time, while experts from various disciplines have been deciding on their behalf how to protect their heritage."[31] Such instruments, such as the 1989 International Labour Organization's Convention no. 169,[32] the 1992 Kari-Oca Declaration,[33] the 1993 *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*,[34] and the 1995 *Principles and Guidelines for the Protection of the Heritage of Indigenous People*,[35] refer more to control over one's own heritage.[36]

In relation to the protection of oral traditions, it is important to note that Erica-Irene Daes has suggested using the term "Indigenous heritage" instead of "Indigenous cultural and intellectual property," as the latter can be seen as creating a "distinction between 'cultural' and 'intellectual', which is indicative of 'reductionist Western knowledge systems."[37]

Indigenous peoples' need to control their heritage is emphasized more in the 2007 United Nations Declaration on Rights of Indigenous Peoples (UNDRIP).[38] This declaration was the result of a process starting in the early 1970s with the commissioning of a study on the situation of Indigenous people and the establishment of a working group, thus recognizing Indigenous claims.[39] The UNDRIP includes references to "right to practice and revitalize

[30] Recommendation Concerning the Preservation of, and Access to, Documentary Heritage Including in Digital Form, Doc. UNESCO 38C/ Resolution 55, 17 November 2015.

[31] Xanthaki 2017, 9.

[32] International Labour Organization Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 1650 UNTS 283.

[33] "As creators and carriers of civilizations which have given and continue to share knowledge, experience and values with humanity, we require that our right to intellectual and cultural properties by guaranteed and that the mechanism for each implementation be in favour of our peoples, and studied in depth and implemented." Kari-Oca Declaration and Indigenous Peoples' Earth Charter, World Conference of Indigenous Peoples on Territory, Environment and Development and the United Nations Conference on Environment and Development, 25–30 May 1992, paras. 102–3.

[34] "It is not only the ability to possess a distinct heritage, but to share some aspects of this heritage from time to time with others that gives to each indigenous people its own dignity and value." Daes 1993, para. 25.

[35] Daes 1995, para. 12.

[36] Although outside the scope of this article, it is necessary to recognize the case law for a full picture of Indigenous rights such as Mabo and Others v. Queensland (No. 2), [1992] HCA 23, (1992) 175 CLR 1 FC 92/014 (3 June 1992); Delgamuukw v. British Columbia, [1997] 3 SCR 1010.

[37] Simpson 1997, 20.

[38] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess., Supp. No 49, UN Doc. A/61/49, 13 September 2007.

[39] Barelli 2015, 50.

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their cultural traditions and customs" (Article 11), states enabling "the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms" (Article 12), and the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts…and their intellectual property over such heritage" (Article 31).[40] The declaration also emphasizes the link between Indigenous people and the lands they occupy and control (Articles 25 and 26), therefore protecting the traditional knowledge applied and collected from the lands and resources.[41] While there is still a lot to achieve in the area of Indigenous rights, the UNDRIP reinforces the place of Indigenous rights within the human rights framework, and Article 31, in particular, connects Indigenous cultural rights with the intellectual property regimes in a way that "sets a model for future developments in the area."[42]

Another important and more recent instrument on Indigenous rights is the American Declaration on the Rights of Indigenous Peoples, which was adopted in 2016 and foresees the restitution of "cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs" in Article 13 and refers to "collective intellectual property" in an open list of heritage in Article 28 (that uses the same terminology as WIPO).[43]

If we look at the relationship between human rights, Indigenous rights, and the cultural property law instruments, cases from the Inter-American Court of Human Rights (IACtHR) can provide an indication of how the CSICH is taken into consideration by courts.[44] In three cases before the IACtHR (*Moiwana*, *Yakye-Axa*, and *Sawhoyamaxa*), the judge referred to the CSICH as "representing a concern with cultural identity of the liberation of peoples."[45] It is worth noting here the relatively recent Indigenous Data Sovereignty movement.[46] The right of self-determination foreseen in the UNDRIP supports the basis for Indigenous communities determining how the data will be collected, held, used, and accessed. It focuses on all forms of data, which could include oral traditions as well as data such as census results and DNA and could be a nuanced but a fragmented way of controlling Indigenous data.

Compared to the CSICH, there is more room for control under the instruments specifically addressing Indigenous rights. They are beneficial for the practice and revitalizations of heritage and for determining how the communities' intellectual property rights should be recognized. But there is less focus and guidance on the restitution of the previously documented oral traditions, which will be addressed in the second section of this article.

[40] Declaration on the Rights of Indigenous Peoples. See also Universal Declaration of Human Rights, UN Doc. A/810, 10 December 1948, Art. 27; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 27, International Covenant on Economic, Social and Cultural Rights (ICESCR) 16 December 1966, 993 UNTS 3, Art. 15.1.

[41] Barelli 2015, 59.

[42] Barelli 2010, 2015; Oguamanam 2014; Vrdoljak 2018.

[43] Organisation of American States, American Declaration on the Rights of Indigenous Peoples, Doc. AG/RES.2888, 15 June 2016, https://www.oas.org/en/sare/documents/DecAmIND.pdf (accessed 12 March 2022).

[44] Lixinski 2020, 113.

[45] Moiwana Village v. Suriname, IACtHR (Ser. C) No. 124 (15 June 2005); Yakye Axa Indigenous Community v. Paraguay, IACtHR (Ser. C) No. 125 (17 June 2005); Sawhoyamaxa Indigenous Community v. Paraguay, IACtHR (Ser. C) No. 146 (29 March 2016), separate opinion of Judge Trindade; Lixinski 2020.

[46] Kukutai and Taylor 2016.

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Intellectual property law

Moving on to the third legal area – intellectual property law – it is worth mentioning the difficult start. The idea of including the term "folklore" in the Berne Convention was first suggested by the Indian delegation in 1967; however, delegates had differing opinions on which aspects of "folklore" should be included in the public domain.[47] Initially rejected, this issue was addressed by adding the category of "unpublished works of unknown authors" in Article 15(4) of the Berne Convention.[48]

The cooperation between UNESCO and WIPO led to the creation of 1982 UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions and the 1984 Draft Treaty for the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. In terms of scope, the Model Provisions from 1982 recognized four types of folklore: verbal expressions (folk tales, poetry, and riddles), musical expressions (folk songs and instrumental music), expressions by action (dances, plays, and rituals), and tangible expressions (productions of folk art in drawings, designs, carvings, sculptures, musical instruments, and architectural forms).[49]

The Draft Treaty failed, and some participants argued that setting up a *sui generis* system needed more time and experience at the national level.[50] The cooperation ended, and WIPO added genetic resources to its scope.[51] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) was set up in 2000. At the time of writing, Draft Article 1 defines traditional cultural expressions (TCE) as "any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof."[52] Here, it should be noted that the most recent WIPO definition is not very different from the definition from 1982, showing that not much has changed in the envisaged scope of protection. The WIPO IGC also recognized early on that the subject matter of protection can exist in various forms, including fixed/unfixed, disclosed/undisclosed, and sacred/secular.[53] In relation to how it interacts with the other instruments, the Draft Articles acknowledged the UNDRIP and recognized the interests of Indigenous peoples in its preamble.[54]

In terms of its aims, the Draft Articles foresaw protecting TCE in the system of intellectual property laws and preventing their misuse (Article 2) and extended the protection to the TCE both (1) created by, and (2) linked to, the Indigenous communities, local communities, and/or other beneficiaries determined by the national law (Article 3). It was expected that

[47] Ricketson and Ginsburg 2006, 512; Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 1161 UNTS 3.

[48] "The main purpose of this provision is to cover works of what is called 'folklore' although the expression, very difficult to define, is not used in the Convention." *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Geneva: WIPO, 1978).

[49] United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Intellectual Property Organization (WIPO) Model Provisions and for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 28 June – 2 July 1982, section 2.

[50] Lucas-Schloetter 2008, 452.

[51] Logan 2017.

[52] WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles (2019) IGC on IP and Genetic Resources, Traditional Knowledge and Folklore*, 40th session, 17–21 June 2019.

[53] WIPO, *List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found (2010) IGC on IP and Genetic Resources, Traditional Knowledge and Folklore*, 17th session, 6–10 December 2010.

[54] WIPO, *Protection of Traditional Cultural Expressions.*

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the interpretation of "local communities" would have a big impact on the reach of this instrument.[55] The Draft Articles also left room for the signatories to embrace limitations and exceptions (Article 7) and to require or not require formalities (Article 9), which will change the level of impact of these provisions, depending on which alternative provision is in the final instrument.

Scholars in this area are divided on whether a *sui generis* system, such as the one discussed at WIPO, could be more compatible with the wishes of the communities with mostly intangible heritage. But creating such a new system also has its own challenges, as it is difficult to balance the conflicting interests of the involved parties and to navigate the uncertainties around it.[56] This can be observed from the length of the negotiations – it has been 22 years and 42 sessions since the WIPO IGC was set up. Additionally, this *sui generis* system would take even longer to be embraced by the relevant countries and to have an impact on national laws.

WIPO is sometimes criticized for assuming that "if most of today's IP-protected works are from developed countries, then the current IP system serves only them" and assuming that the method to better serve developing countries must rely on a *sui generis* right.[57] Similarly, instead of discussing the advantages and disadvantages of a *sui generis* regime and its suitability for oral traditions,[58] it might be useful at this point to revisit an existing type of intellectual property right and see the full scale of its role for oral traditions. If we look at the types of rights under intellectual property law, copyright seems to be the closest option for oral traditions. Trademark law, while beneficial for allowing collective registration, can be more suitable for controlling the documented versions of oral traditions as word marks or sound marks. Geographical indications can also benefit a larger group, but it is not suitable for oral traditions. Oral traditions do not necessarily carry the traits of trade secrets, although breach of confidence might work in some jurisdictions.[59] Designs are also not a suitable form of protection, as they are more about the visual appearance and only provide a short-term protection. Patent protection is less suitable for oral traditions and more suitable for traditional knowledge and skills, such as medicines and techniques used by the Indigenous people.

Compared to cultural property law and Indigenous rights, copyright law has enough clarity and strength when applied to oral traditions. As a further advantage, it is a logical fit for documentations and further copies, which also play a big role in the treatment and dissemination of oral traditions. It is also important to recognize the disadvantages of copyright early on. It is widely argued in the literature that intellectual property law at its core is incompatible with Indigenous heritage. The underlying reason is that systems like copyright focus too much on the knowledge's engagement with the market,[60] therefore insisting that having the Indigenous communities embrace copyright could amount to forcing the community to adjust to something outside their belief system.[61] Furthermore, oral traditions themselves would have a difficult time dealing with the criteria of copyright law (as explained in later in this article).

The next section will address the treatment of oral traditions, together with the copyright implications, to show that copyright exists at every stage.

[55] Berry and Lawson 2018.

[56] Bannerman 2015, 95–104.

[57] Bammel and Borghino 2017, 239.

[58] As suggested by Michael Brown, this is a common approach for research on the relationship between law and intangible heritage. Brown 2005, 45.

[59] Foster and Others v. Mountford and Rigby Ltd, [1976] 14 ALR 71.

[60] Anderson 2005, 10.

[61] Lixinski 2013, 183.

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Stages in the treatment of oral traditions and copyright law

So far, several themes have emerged from the discussions of the existing legal protection available to oral traditions: the CSICH is focused mostly on inventory making and does not guarantee Indigenous participation. Indigenous rights are relevant, but the instruments are vague on how much control they yield when it comes to the documented versions of Indigenous heritage. WIPO *sui generis* protection will be useful in the long run, but the provisions are not finalized, and they also focus more on the oral traditions themselves and less on what happens in the later stages (where other "works" arise). These instruments do recognize each other, but they do not provide very much clarity, especially in the later stages. As suggested earlier, control could mean various things, ranging from knowing which copies exist and where and when they were created, to determining which ones will be accessed, shared, returned, or deleted. While not guaranteeing knowledge on where copies are, copyright subsistence and ownership will determine who controls the existing copies and if they can actually be accessed, shared, returned, or deleted.

This section of the article will identify a range of stages in the treatment of Indigenous oral traditions, ranging from less control to more control by Indigenous communities: (1) collection by outsiders; (2) treatment in heritage institutions; (3) institutions making and providing copies upon community request; and (4) Indigenous archives. By going through different stages, this section will examine not only the copyright implications for oral traditions themselves but also their documented versions (in text, sound recording, or film format), subsequent copies (analogue/digital), adaptations, and new works created by independent projects.

Collection by outsiders

The first stage is where Indigenous oral traditions are collected by outsiders without the informed consent of the communities. For tangible objects, treating them as "property" has meant being able to use, exploit, and prevent others from accessing them, which is not in line with the wishes of the community, which may need constant access or secrecy.[62] As for intangible heritage, it could be said that the interest in documenting it is relatively more recent and mostly comes after the "life style change after Industrial Revolution, causing the past to become something that needed to be preserved in a specific space."[63] Seeing oral traditions as something to be collected, like curiosities or specimens, is also not in line with how they are seen by the communities.[64]

Even at the collection stage of oral traditions, there is more room for different interpretations and bias compared to the collection of tangible objects. Since groups and even individuals within a single group can practice them differently, the choice of the version and the amount that will be documented could reflect the wishes and ideologies of the parties making the documentation. The documented version can also be heavily altered, shortened, or censored afterwards in order to have a "simplistic, sentimentalising and sanitized" version of the past.[65] When assessing the copyright implications for establishing control at this stage, there are two main aims: Indigenous parties not allowing the documentation of the oral tradition and, if it happens, then having control over what happens to the recording, either as the author or the performer. For this stage, we must look at two separate works for

[62] Brown 2005, 43; Stamatoudi 2011, 6; Lixinski 2013, 14.
[63] Alivizatou 2012, 18.
[64] Cruikshank 1992.
[65] Probst 2008, 99.

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which copyright protection should be considered: (1) the oral traditions themselves and (2) documented versions of the oral traditions.

For the oral traditions themselves, it would be difficult to rely on copyright to refuse their documentation by outsiders. By their nature, Indigenous oral traditions are not automatically fixed. While the Berne Convention does not require fixation for protection and leaves it to member states (Article 2.2), some jurisdictions do require the work to be recorded in material form. While facilitating the documentation of such oral traditions can have an impact on their preservation, the community cannot be forced to do so. Furthermore, there are some oral traditions that are sacred and not meant to be turned into written form,[66] and recording oral traditions could mean "freezing or stifling" the living culture[67] and only having a single version of it.

Another reason for not being able to rely on copyright for refusing documentation is the nature of the works. The Berne Convention allows contracting countries to determine their own originality threshold; however, judicial interpretations usually revolve around a form of "judgement, creativity or intellectual contribution."[68] Most of the oral traditions would not be original due to their cross-generational nature, as it is possible that the same stories are transferred each time with very minor original contribution. Embracing a low originality threshold would mean that future members of the same community could make minor changes and enjoy copyright protection each time, but it would also mean that non-Indigenous parties could enjoy copyright with very little input from themselves.[69]

Even if the oral traditions satisfied the requirements for copyright, it would be hard to determine who controls them. Most jurisdictions define the author as the individual who creates the work, and some jurisdictions even recognize legal entities as authors of some works. In rare cases, it is possible to find oral traditions where the creator's name is mentioned within the expression.[70] But, most of the time, it is impossible to determine who created the oral traditions, especially if the work is created a long time ago and it is part of a "collective pool of creative resources."[71] Even when the community accepts the necessity to identify a single, specific author (who can then exercise the rights and have control), this reduces the options available to the rest of the community. There is also a great risk of parties assuming that oral traditions themselves are in the public domain and therefore can be used by anyone.

As for the copyright of documented versions of oral traditions, this is where copyright could emerge but provide control to the outsiders instead of to the community. Regardless of the type (a text-based work, sound recording, or film), the resulting work would fit within the protected subject matter and be sufficiently fixed, therefore satisfying the protection criteria in many jurisdictions. When the documentation is made by outsiders to the community, they become the authors of that particular fixation of the Indigenous oral traditions. In terms of originality, different criteria would apply depending on the form of documentation. For text-based works, it would depend on how much the author contributes in terms of criteria such as "free and creative choices" or "minimum degree of creativity." For example, there is more room for originality for an anthropologist making notes on the Indigenous oral traditions witnessed that day, compared to an anthropologist noting it down verbatim. As for sound recordings and films, the law usually does not require any

[66] Janke 2009, 164.

[67] Paterson and Karjala 2003, 640.

[68] See Sterling 2018, ch 7 (for a detailed comparison of criteria for copyright protection in different jurisdictions).

[69] Torsen and Anderson 2010, 26.

[70] Hanna 2000, 29.

[71] Lixinski 2013,186.

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creative contribution. This would mean that the specific representation of the oral tradition recorded in the film or sound recording would be protected by copyright, but it would only benefit the control of outsiders to the community.

In this case, what gives slightly more control to the Indigenous peoples that are being recorded could be the performers' rights. Article 2 of the 1996 WIPO Performances and Phonograms Treaty (WPPT) defines performers as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."[72] Even when the oral traditions themselves are considered to be in the public domain, and their documented version belongs to an outsider, the performer could at least prevent the reproduction and communication of that particular performance.[73] But it is still not a perfect form of control since, first, the performers' names were usually not kept in the older collections.[74] Newer projects are more sensitive about identifying individuals, using methods such as release forms, permissions, and informant contact information sheets,[75] but the old ones lacked this approach. Second, it is also important to remember that the protection of performers' rights was provided later in the development of copyright law. Seeing that the Berne Convention did not include performers' rights and that it was not until the Rome Convention that the performers were recognized at an international level, it can be argued that performers were previously seen as merely interpreting works.[76] Third, and on a more ethical level, the definition of performers in Article 2 of the WPPT might not be in line with how the Indigenous community members see themselves, sharing their past to educate the other members, giving the gift of stories, and ensuring the continuity of the underlying sacred knowledge.

Similar to the oral traditions themselves, these documented versions also carry the risk of being assumed to be in the public domain. In addition to the difficulties in determining the age and copyright status of past collections, there could also be a middle party causing misleading assumptions regarding the ownership of the Indigenous recording. For example, Ami elders' traditional songs were recorded for archival purposes (the performers claiming that they did not consent, while the institution claims that they had consent forms) and were later made available on an album. Being assumed to be in the public domain, the sample of the chant was later used in the song "Return to Innocence" by Enigma.[77] In this example, the popularity of the song allowed the community to become aware of the situation. In other situations, the discovery might happen much later and indirectly. Such coincidental discoveries then further increase the distrust. For example, Henrietta Fourmile refers to the tapes of her grandfather speaking the language in 1959, coincidentally located in the Australian Institute of Aboriginal Studies after a staff member recognized her name.[78]

[72] WIPO Performances and Phonograms Treaty, 20 December 1996 (WPPT).

[73] It should be noted that the performers' rights are not uniform. The Rome Convention gives performers the possibility of preventing instead of an absolute right – meaning that member countries were left to decide on how to implement it. Arnold 2015, 23; International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 Ocober 1961 (Rome Convention).

[74] Lancefield 1998, 57.

[75] Torsen and Anderson 2010, 34; Van Zanten 2009. For collection methods, see Mahuika 2019.

[76] Bently and Sherman 2018, 357; Rome Convention.

[77] Riley 2000; Coombe 2003; Taylor 2003, 64–90; Vézina 2016.

[78] "Some of my people have been trying to encourage and revive our language for about the last 10 years yet the existence of valuable resources like these remained unknown to them. One might well ask: is it deliberate government policy to limit funds to institutions like the state museums and the Institute so that they are generally unable to compile comprehensive registers and send catalogues or inventories of their collections of our property of us, and thus maintaining our ignorance for political purposes?" Fourmile 1989, 3.

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Given the disappearing nature of oral traditions, these hard-to-find documented versions might be the most complete versions in existence.[79]

To sum up this stage of collection without informed consent, copyright alone is not going to be sufficient to stop collection by outsiders or the community controlling the traditions or their documentations. On top of that, if the conditions for copyright in that jurisdiction are met, the outsiders would enjoy the copyright and the control that comes with it. Thus, copyright is more likely to be used against the community and not by them at this stage. The main option available to the community in this case would be to rely on the protection for performers, which is not uniform and not useful for old recordings made without consent or recognition. The situation is less bleak for newer collections, considering that both sides are more sensitive and aware. Newer projects pay more attention to sharing copyright with the community as a form of benefit sharing.[80] In any case, parties should be careful about determining the copyright ownership before undertaking joint projects.

Treatment of the documented versions of oral traditions in heritage institutions

Once these documented versions are placed in cultural heritage institutions, the Indigenous community can continue to practice the same oral traditions without much difference. However, seeing these copies held in institutions is also a reminder of how this material was collected and of the past and current power differences.[81] For institutions holding such documented versions, there are some challenging decisions, such as classification, access levels, reaching out to the communities, following protocols, employing Indigenous curators, and meeting donor wishes. For Indigenous communities wanting to have control over the existing documented versions, the first challenge is their classification and treatment within heritage institutions. In the past, the institutions have had trouble in understanding that these oral traditions have different meanings compared to how they view other types of art forms.[82] As a reflection of this different understanding, the material held in the heritage institutions might be treated and shared in a manner that is incompatible with the wishes of the Indigenous community. Additionally, institutional decisions can lead to the loss of context: subject headings and cataloguing practices can be "biased toward Western classification of knowledge,"[83] and language obstacles could make it harder for the Indigenous community to locate them afterwards, so UNESCO is encouraging institutions to embrace multilingualism.[84] A successful example is the National Library of New Zealand using subject headings in the traditional Māori language.[85]

However, the main challenge is controlling who gets to access these works. Among the documented collections, there could be things that are not meant to be shared with certain people (outsiders and individuals with different standing in the group and a different gender). Examples like the college professor from New Mexico being banished from the

[79] Although not an Indigenous example, the interview with Clifford Murphy refers to the American folk recordings found in the archives and how recordings made in 1960s depict these artists at the height of their skills, while the same artists will not be equally healthy and not be able to convey the same information in the 2010s. Stefano and Davis 2016, 365–70.

[80] Australia Council for the Arts, Protocols for Using First Nations Cultural and Intellectual Property in the Arts, 2019. For an example of sharing copyright, see Hennessy 2012, 356.

[81] Anderson 2005, 3.

[82] Lucas-Schloetter 2008, 343.

[83] Whaanga et al. 2015, 527.

[84] Winn 2015, 9.

[85] "This not only improves access for Māori library users, but it shows respect; the library belongs to them too." Rinio 2016, 186.

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Taos Pueblo for writing a paper about their spiritual tribal dance[86] or the Smithsonian Global Sound accidentally making ceremonial material available to the public[87] show us that sharing sensitive content might cause irreparable harm to the group. The harm to sensitive content is worse when the collections are shared online.[88] Even if these recordings are used for educational purposes, the members of the community might find it offensive. For example, an Indigenous elder sharing a story as a gift in public does not mean that he or she is allowing its documentation and sharing.[89]

Consulting the community does not always guarantee that the relationship will run smoothly or that all of the parties will be equally satisfied, but it is a positive first step. Some institutions might not be very proactive about reaching out, keeping in mind that such institutions are mostly funded by the government. Due to different classifications, languages, or the lack of opportunity to visit, it is not guaranteed that the community will coincidentally discover these collections. Other institutions are more active about reaching out toward the Indigenous communities for their input. For example, the National Museum of the American Indian contacts the community through "proper protocols, whether this was through the chief or the council" and representatives then contact the larger communities for their opinions, including selecting the material and teaching the necessary concepts for the curation.[90]

In determining the treatment and intellectual property ownership of Indigenous heritage, creating protocols and guidelines can be more dynamic than the instruments introduced in the first section. Such instruments are a useful way of supplementing the gaps in the existing rules and creating a closer relationship with the Indigenous communities.[91] But they are also limited to the jurisdictions and parties that have accepted to be bound by them. Another way to be more sensitive about such material would be to hire Indigenous people as employees of the state institutions to ensure control at the internal decision-making stage. For example, Australian-based Pacific Islander curators who are employed by Australian museums can make more nuanced decisions about how these documented versions should be treated.[92]

As a more significant measure, the community might wish to establish control by removing the objects from circulation or reducing their visibility. In one example, after learning that the cassettes included religious songs that were not meant to be listened to by the outsiders, the visitors from the Confederated Tribes of the Warm Springs Reservation were provided with the digitized copies of the cassettes and the originals were removed from circulation by the Washington State University Libraries.[93] A similar outcome was achieved in another example of sensitive material, where documented versions containing the Red Ochre ceremony were "housed in a locked room at the Australian Institute of Aboriginal and Torres Strait Islander Studies, with the only persons with permission to enter including the Principal and the Director of the Library."[94]

It can be harder to delete the documented copies completely. The institutions might not be able to comply with the wishes of the community because of the people who donated

[86] Torsen and Anderson 2010, 43.

[87] Wendland 2009, 83.

[88] "Jane (pseudonym), who works with a Pacific collection in a state museum, is involved in a digitization project, and is herself of Pacific Islander descent, said that digitization without adequate consultation is "like colonising people all over again." Singh, Blake, and O'Donnell 2013, 85

[89] On Skagit elders, see, for example, Wendland 2009, 82.

[90] Alivizatou 2012, 131.

[91] Nakata et al. 2005; Torsen and Anderson 2010, 67; Protocols for Using First Nations Cultural and Intellectual Property in the Arts.

[92] Singh, Blake, and O'Donnell 2013, 89.

[93] Christen 2015, 2.

[94] Anderson 2005, 28.

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these works. Michael Brown gives the example of the sketches of Navajo dry paintings found in the Peabody Museum: being aware that the originals were destroyed after the ritual, the museum was concerned that keeping them was a form of disrespect and had to get the advice of Navajo consultants to decide if they should be preserved or allowed to decompose.[95] It is understandable that these institutions also have a responsibility toward the people who donated these field notes or recordings of oral traditions, who did not think that they would be destroyed in the future. Another important reason might be the limiting policies on how heritage institutions' collections, which are subject to different national standards, can be deaccessioned.

One could argue that restitution brings ultimate control, but it does not expand to the documented versions of oral traditions. Even if one was to argue that instruments focusing on the restitution of objects, such as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property or the 1995 International Institute for the Unification of Private Law's Convention on Stolen or Illegally Exported Cultural Objects, are useful for retrieving fixations of oral traditions (which will not happen if they are seen as someone's copyright protected works instead of an extension of the restituted object), the requests for tangible objects are more likely to be prioritized in the ongoing restitution debates.[96]

For the copyright implications at this stage, it should first be noted that copyright law determines how these documented versions will be treated. It was already mentioned above that documented versions might be protected by copyright if they meet the criteria. This means that there will be copyright implications for any subsequent use by the heritage institution. Depending on what kind of activities they want to perform with the protected work for their visitors (reproduction, communication to public, or distribution), the institution has to ensure that they can perform these actions without infringing the copyright in the documented versions. It becomes more complex if the person who documented the oral traditions is employed by an organization as some jurisdictions give the copyright to the employer. In that case, the employee would need their employer's permission to work on their documented material and authorize others (such as the Indigenous community) to do so.[97]

Some fixations could be clearly in the public domain by that point, while other works could have complete information on who created and donated them and what was authorized by them. However, there are also works that are neither of these things: the protection available for such works whose owners cannot be identified or located, which are also known as orphan works, is not uniform in all jurisdictions. Depending on the national rules, such works could be subject to a diligent search before the orphan status can be ascertained, which can be a long and costly process. This means that the uncertainty around the copyright status of such works can limit the institution from further exploiting them, so copyright might very indirectly benefit the Indigenous community in such scenarios. The treatment of documented versions, even before the institution starts actively making further copies, can lead to the creation of things that are protectable by copyright. For example, if the heritage institution has generated metadata about their collections, translated subject headings, or if their treatment amounts to the creation of a database,[98] then the institution would hold the copyright for these "works," provided that they meet the other criteria, such as originality.

[95] Brown 1998, 1.

[96] 1970 UNESCO Convention; Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

[97] Myers 2017.

[98] For example, there are rights under EU Database Directive, if they demonstrate original selection or arrangement or demonstrate substantial investment in obtaining, verification or presentation. Council (EC) Directive 96/9 on the Legal Protection of Databases, [1977] OJ L77, Arts. 3, 7.

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To sum up, copyright is still not beneficial for the Indigenous communities at this stage. There are examples of institutions adhering to the wishes of the communities and removing works embodying oral traditions from circulation and destroying or returning them. But these are not achieved through copyright but, rather, through other venues.[99] So far, copyright implications are only evaluated for controlling the first documentation of oral traditions. The next section will look at subsequent copies made by heritage institutions.

Providing copies upon request and digital repatriation

The institutions can choose to make analogue or digital copies for various reasons, such as preservation, education, or even repatriation. But, as mentioned in the introduction, digital copies can further amplify the lack of control over the dissemination and interpretation of heritage. In the increasingly digital world of heritage, the term "digital repatriation" is used to describe making photographs and sound recordings available to Indigenous communities, and it is becoming more common in institutions in Europe, the United States, and Australia.[100] However, there are also concerns about whether it is all right to use the term "repatriation," and such practices could actually be more useful to heritage institutions trying to avoid physical repatriation.[101] This also shows again that knowledge of where the oral traditions are kept does not automatically equate to being able to control them.

Before considering the copyright implications of making subsequent copies, it is important to emphasize that holding the physical object does not amount to copyright ownership. Thus, returning the documented versions or their copies does not amount to transferring copyright ownership to the Indigenous community. One bad example is the treatment of the Maliseet tapes from Canada. In this example, the stories of several Maliseet elders were collected by a university professor in the 1970s and 1980s. When the community later bought the tapes for the purposes of sharing, transcribing, and reviving the language, the copyright holder refused to transfer the copyright.[102] The control enjoyed by the copyright holder can limit how much the institution can digitize and "digitally repatriate" copies. For example, when a delegation of senior Pitjantjatjara men requested the copies of a secret and restricted ceremony (the Red Ochre Ceremony) from the museum, the inheritors of donors refused this request by relying on the copyright of the donor who made these recordings.[103]

But if it is allowed, can the institution control the new copies through a new copyright? The copyright in (1) the oral traditions themselves and (2) the documented versions were already discussed in the earlier sections of this article. This section considers a separate, third type of work: new copies of documented versions, such as the ones made in digitization projects. In terms of protected subject matter, further analogue and digital copies would still fall under the types of works protected by copyright: copies of films and sound recordings would also be films and sound recordings, and the digitized copies of text-based works would still be literary or artistic works (photographs). They would also be sufficiently fixed, which leaves the question of originality. The subsequent copies created by the institution are not very likely to be original, as the reproduction of literary and artistic works do not have much room for original contributions. As for copies of old sound recordings and films, exact copies would not be protected. However, if the institution made some changes, which would

[99] Hudson 2006; Janke and Sentina 2017.

[100] Alivizatou 2012, 101.

[101] Boast and Enote 2013; Singh, Blake, and O'Donnell 2013, 91.

[102] Andrea Bear Nicholas, ""Who Owns Indigenous Cultural and Intellectual Property?" 2017, https://policyoptions.irpp.org/magazines/june-2017/who-owns-indigenous-cultural-and-intellectual-property/ (accessed 12 March 2022).

[103] Anderson 2005, 28.

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amount to an original contribution such as completing missing parts or editing multiple works together, then there could be sufficient originality. But their new copyright would only extend to their contribution over the existing work. If the new (digital) copies are protected, then the institution would be controlling any further treatment of it. It can even be a copyright infringement if the institutions copied the first documented version without authorization, such as from the original anthropologist who donated his or her collection without authorizing reproduction.

Overall, making subsequent copies and engaging in digital restitution is an unusual stage for the purpose of control. Even if the Indigenous community receives these copies, it does not come with the right to control the initial documentation or the right to control further institutional copies. Furthermore, in the unlikely event that subsequent reproductions are original enough for copyright protection, the institution can license the work for commercial uses.

Independent Indigenous archives and projects

In this stage, Indigenous communities have more control than in the other stages. Since the community decides on which projects will be undertaken, independent archives and projects position the Indigenous communities not as the "objects of study" but, rather, as the owners of their own oral traditions. Such projects then allow the community to make accurate records and expand and share the existing knowledge so that they can encourage further use and the creation of new knowledge.[104] The community exercising control at the decision-making stage also means there will be more diverse representation, which includes previously ignored voices. These voices then bring more insight on which oral traditions are meant to be shared with the outsiders and how.[105]

It should also be added that Indigenous archives and projects are not automatically more secretive. The community can choose to share the information that is necessary for revitalizing their oral traditions.[106] Some projects include digitizing analogue material, such as OurVoices.ca and the Vanuatu Cultural Centre's digitization project, including Indigenous works, where existing analogue works are digitized by the community and shared online.[107] Other projects train community members to collect born-digital material. For example, the Sabah Oral Literature Project trains local people to record and maintain their own oral traditions. Their process includes "setting up a local team (with a younger member doing the recording and two older members with most knowledge), followed by recording (ensuring that there are no outsiders such as government representatives who might influence the recitation), transcribing by local team, archiving in a reliable place, cataloguing by local methods, translation and creation of an cultural dictionary for certain terms."[108] Each of these stages allows the community to shape what will be recorded and to organize how these will be accessed.

There are also practical challenges when documenting oral traditions in an independent archive. Previously mentioned problems about incorrect classification, access levels, and the risk of commercialization can be solved by prioritizing community input. It is also useful to receive regular input from other members in different locations. This could be achieved by moving devices from community to community, such as the Ara Irititja Archive where past documentations were collected and participants in distant locations were invited to add and

[104] Kreps 2009, 193; Wendland 2009, 85; Christen 2015, 4–5.
[105] Knopf 2008, 100; Flinn 2010, 39; Pickover 2014, 9.
[106] Hennessy 2012, 351.
[107] Pasaribu 2016.
[108] Appell 2014, 10–11.

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comment on what was collected,[109] or the Zanzibar project with participants filming themselves for oral traditions on sacred natural sites (a participatory video).[110]

But even with clear goals and support from the community, it is important to note that these projects are not cheap, due to costs such as "administration, salaries, contract fees, training, honorariums, travel, equipment (tape recorder, camcorder, tapes, camera, computer) and report printing."[111] If the communities need funding, this could impact the selection process. The funding might come from the government, which might be responsible for the community's disadvantage in the first place. Communities are even warned against such studies as they might be in the interests of the proponents of the study.[112] It is another challenge if the funding comes from the private sector, which might be biased in other ways or more focused on commercializing the oral traditions. It does not just affect the born-digital material created by the project, but the same concerns apply to the digitizing existing copies, where the private sponsors might ask for a biased, consumer-driven selection of what will be digitized and ask to charge people a small fee for access.[113] Such requests could even push the boundaries of censorship.[114]

At this stage, copyright can be used as a basis for strengthening the Indigenous community's claim over their own recorded oral traditions. So far, the copyright implications for (1) oral traditions themselves; (2) their documented versions; and (3) subsequent copies of documented versions were addressed. There are two types of works to be considered at this stage: (4) the works created by adding additional commentary on the existing works returned by the outsiders (original fixations or subsequent copies) and (5) new works created by the Indigenous archives. For works with additional contribution from the Indigenous archive, they can benefit from the control that comes with copyright. They would likely fulfill criteria such as subject matter and fixation, but it should be determined case by case if the contribution is sufficient for creating an original work. Furthermore, such project's work would require authorization of the first documentation, and the copyright holder may not authorize further reproductions and adaptations. One example would be the film footage of the Pintupi people from 1964. The community enjoyed viewing these images when the footage resurfaced in the 2000s, which gave the researchers the idea of turning the footage compilation into a film with narration from the Indigenous parties. However, the circulation of this film depended on the license from the National Film and Sound Archives, which was the employer when the original footage was made.[115]

In the scenario where the old footage is in the public domain, there is still the issue of determining the author of the added commentary. Depending on the rules of that jurisdiction, this contribution might not amount to joint authorship, as there is no collaboration between the Indigenous commentator and the maker of the old recordings.

As for the new works created by the community, such as a literary work, sound recording, or film, these are within the scope of copyright protection. It is important to recognize at this point that what is being controlled by the community is the new documentation made by the community and that this control does not extend to the oral tradition itself or the past documented versions. This new work can be sufficiently original depending on the type of

[109] Anderson 2005, 29; Ara Irititja, "Community-based Approach," https://www.irititja.com/archive/the-ara-irititja-approach/ (accessed 12 March 2022).

[110] Wild and Slade 2014, 36–41.

[111] Hanna 2000, 17.

[112] Hanna 2000, 17.

[113] Leopold 2013, 87.

[114] Although it is not an Indigenous example, an archive might choose not to maintain and digitize material that they find distasteful. See Brink, Ducey, and Lorang 2016.

[115] Myers 2017.

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input. The community can also choose to rely on copyright as the performers and producers of these works. Indigenous people as performers were already mentioned earlier in this article. Producers of phonograms, as "the person, or the legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds," also enjoy protection under Article 2 of the WPPT.

There are a couple of problems that are related to the copyright term. While copyright will give the community more control during the term, it is still a limited term. The duration might differ between jurisdictions, but it does expire at some point. Therefore, the control given by copyright is a temporary one, and, once it expires, the work will enter into the public domain.[116] It can be argued that this is still a better outcome, compared to being assumed in the public domain since the beginning. Conversely, the increased visibility in between might mean that it is more open to exploitation once it enters the public domain.

To sum up this stage, it can be said that setting up Indigenous archives has many benefits and challenges. Once the financial and organizational hurdles are overcome, such practices give more control to the community, and copyright can further enhance this control, if they choose to rely on it. Overall, from knowing which copies exist and where, to making requests for access, further sharing, and the return or removal of copies, copyright plays a significant role in control. Analysis of the stages in the treatment of oral traditions has shown that there are many different works that can arise throughout the lifecycle of oral traditions. Since copyright law gives the control over different works to different parties, subject to different conditions, it is important to recognize the implications for different stages.

Conclusion

The first section of this article has shown that the treatment of Indigenous oral traditions relies on multiple legal areas, but none of them are sufficient on their own. Cultural property law provides the basis for safeguarding and inventory making. Indigenous rights provide more control to Indigenous people, and this control then extends to their creations, such as oral traditions. Intellectual property rights, while useful for controlling the subject matter, does not have a single type of right that perfectly fits oral traditions. While not opposing other types of rights and a future *sui generis* system, the second part of this article has analyzed the copyright implications for different works in different stages, meaning that copyright will affect control at every stage. This does not have to automatically mean that copyright is always beneficial for the Indigenous community. In fact, especially in the earlier stages, copyright can benefit outsiders more. However, recognizing and avoiding copyright pitfalls in earlier stages and then having the option to rely on copyright at later stages is still relevant for Indigenous communities interested in this type of control. Therefore, this article has reached the conclusion that the impact of an existing, relatively harmonized, and strong system like copyright needs to be recognized and considered in parallel to other attempts for finding what is best for oral traditions.

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[116] Torsen and Anderson 2010, 37.

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