

Giving Diligence its Due: Accessing Digital Images in Repatriation Efforts¹

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Abstract. An increasing volume of images is becoming available online, but barriers such as digital locks, proprietary interests, monopoly of information, software design issues, and narrow scope of information uploaded to image databases maintain structures that have placed constraints on repatriation efforts in the real world.

Images of art in the digital environment support cultural heritage. Institutions are developing complex solutions relevant in the network environment to further repatriation initiatives. These solutions facilitate discovery, opening avenues for research into the ethics of ownership that cross the physical/digital divide. There have been calls for strengthening the potential for use of pertinent information in order to protect and recover cultural heritage through increased visibility. However, some museums still limit access to images.

We will examine these issues referencing museums of art and anthropology and case studies specific to the First Nations and Métis peoples of Canada with an emphasis on cases dating from 2000 to 2017. In 2002, Dr. Ruth Philips, then director of the Museum of Anthropology in Vancouver, British Columbia, Canada, called for a database that would “reach beyond the walls of the building into First Nations communities and link them with each other and with museum and academic research partners.”

In 2018, a combination of concerns over permissions and monopolization of information is limiting the potential of shared visual information about art. This maintains the status quo in repatriation of cultural material and limits further research into the Indigenous peoples and cultures of North, South and Central America.

Keywords: digital images, visual heritage, knowledge mobilization, data access, repatriation, indigenous arts and culture, provenance

1. The Case for Transparency

Introduction

This paper examines the barriers and concerns over permissions and the monopolization of information that limit the potential of shared visual information about art. Although the past decade has seen a change from the Eurocentric ways in which data is organized and interpreted, and culture is selectively defined, interpreted and catalogued, historical structures remain which perpetuate deficiencies in both representation

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and access, particularly in Canada. Here, inadequate funding, especially at the federal level, limits the ability to create, develop and maintain appropriate resource databases. National collections also have inherent systemic problems associated with museum culture dating back to the nineteenth century. For example, fixed practices of “collecting> owning> naming,” and by extension modes of knowledge production that mirror a colonial structure with far-reaching political and epistemological implications. In recent years, museums have developed innovative ways of making their collections accessible and interesting including the use of 3D visualization tools and providing access to resource databases. Studies highlight the importance of accessibility, often underlining a multicultural and expansive perspective. Museums are prepared to show thousands of objects of First Nations art and handicraft online, complete with records of ownership. However, even as the idea of the reinvented museum takes hold and rather than being collections driven, museums become more audience focused embracing values of compassion and social responsibility, a combination of concerns over permissions and monopolization of information is limiting the potential of shared visual information about art. In 2002, Dr. Ruth Phillips, then director of the Museum of Anthropology in Vancouver, British Columbia, Canada, called for a database that would “reach beyond the walls of the building into First Nations communities and link them with each other and with museum and academic research partners.” After providing a brief historical background, this paper will examine the issues in 2018 and explore appropriate solutions to the difficulties of access to cultural material related to repatriation initiatives. We will examine these issues referencing museums of art and anthropology and case studies specific to the First Nations, Métis and Inuit peoples of Canada with an emphasis on cases dating from 2000 to 2017.

1.1 The Context of Canadian Claims

Widespread protests by Indigenous⁴ communities and activists during the celebrations of the 150th anniversary of Canadian Confederation drew global attention to the fact that three years after the publication of the Truth and Reconciliation Commission, the Canadian Government has yet to deliver on its promise of a full partnership with “Aboriginal governments as part of the federation” and to “work with Indigenous Peoples to create fairness and equal opportunity in Canada.”⁵ The rising demands on the part of indigenous peoples to their rights and to the restitution of their lands, territories and resources is reaching new heights. This is evident in the increasing number of repatriation claims across Canada. In 2013, the largest repatriation of human remains from a Canadian university took place, when the University of Toronto repatriated 1760 indigenous human remains, as documented in a study by the Aboriginal Peoples Television Network (APTN). Cultural heritage institutions are currently encouraged to digitize their collections and to create online catalogues for research and educational use; for example, the Bibliographical Center for Research’s (BCR) Collaborative Digitization Program (CDP) Digital Imaging Best Practices is made available to practitioners in cultural heritage institutions through Canada’s Heritage Information Network (CHIN).⁶ The Canadian Heritage Information Network offers practical assistance to senior collections managers in the form of practical guides and support for planning and implementing digitization projects; the document titled DIG35 Metadata Specification (2000) for digital images provides an overview of intellectual property rights metadata.⁷ Challenges arise in following these ideals for

⁴ The term ‘Indigenous’ includes First Nations, Métis and Inuit. It therefore encompasses a vast range of cultures and traditions, as underscored by John Borrows, Osgoode Hall Law School ‘With or Without You: First Nations Law (in Canada)’ *McGill Law Journal* [McGill L.J.], 41 (1996), page 632, fn 6.

⁵ <https://www.theglobeandmail.com/opinion/three-years-later-is-canada-keeping-its-truth-and-reconciliation-commission-promises/article34790925/>. Accessed Sept 3, 2018.

⁶ <https://www.canada.ca/en/heritage-information-network/services/digitization.html>. Accessed Sept 15, 2018.

⁷ <http://xml.coverpages.org/FU-Berlin-DIG35-v10-Sept00.pdf>. Accessed Sept 15, 2018.

discovery or due diligence research. For example, the discovery of relevant information is integral to repatriation claims and the process must be set in motion in a timely fashion.⁸ Also, the foundation for repatriation claims is establishing good faith and this is difficult to establish and places a burden of proof on the party bringing forward a restitution claim. Additionally, it is extremely difficult to track internationally dispersed cultural property. Any indigenous group or researcher aiming to re-appropriate indigenous cultural resources and objects is faced with examining primary sources in libraries and archives and/or collections and searching through everything from scrapbooks to media releases, from the House of Commons Debates (Hansard) to the physical shelves of the Royal Ontario Museum. Combing every museum collection worldwide for material from Canada is at present the only way to identify items. Across Canada, online resources for some of the archives are available and have proven very helpful, but combing through them is very time consuming.⁹

Repatriation claims involving indigenous peoples and communities concern two related classes of objects:

- Ancestral human remains: Ancestral remains numbering in their thousands have been repatriated to the Haida community in Canada involving the Canadian Museum of History (formerly the Museum of Civilization), the museum at the University of British Columbia, the Royal British Columbia Museum and other institutions. Cases of human remains repatriated to the Haida community date back to the 1990s. There are more than 12,000 attributed Haida pieces in more than 130 museums around the world.
- Ceremonial objects: A well-known case of an informal repatriation is the long-term loan of the Kwakwaka'wakw transformation mask by the British Museum to a local First Nations' Cultural Center in 2005. The other well-known case is the 2003 repatriation of a Kwakwaka'wakw ceremonial headdress to the same institution by a private individual. Both pieces belonged to a collection of almost five hundred ceremonial objects confiscated from the Kwakwaka'wakw people by the Canadian government in 1922 following the illegal organisation of a potlatch, a ceremony banned since 1885. After the confiscation, the potlatch regalia were divided between the National Museum of Man (now Canadian Museum of History) and the Royal Ontario Museum. About thirty-two pieces were acquired by an important private collector, George Heye, the founder of the Museum of the American Indian in New York. In the late 1960s, the Kwakwaka'wakw began campaigning for the return of their ceremonial treasures. After many years of negotiations and in a rather favourable political context, in 1979 the National Museum of Man in Ottawa returned to the Kwakwaka'wakw the so-called "Potlatch Collection" (Mauzé 1999).

Successful repatriation cases also include the return of pictographic documents and other objects of material culture. In 2009, a G'psgolox mortuary totem pole created by the Xenaksiala people (Haisla) in the Kitlope Valley of British Columbia was returned to the Haisla. When the Xenaksiala people were away from their village in 1929, the visiting Swedish Consul took this totem pole and brought it to the Museum of Ethnography in Stockholm. In 1991 the location of this Haisla totem pole was discovered and proceedings for its repatriation began. A relationship was formed between the Haisla and Sweden and the Swedish government agreed to the pole's repatriation in 1994. The Haisla in return created a replica totem pole for the Swedish Museum of Ethnography. The pole was finally returned to Vancouver in 2006 and was housed for a portion of time at the UBC Museum of Anthropology before being returned to the Haisla

⁸ Timeliness in art claims may be related to the need for restitution efforts to fall within statutes of limitations for conversion cases, though this area may not necessarily be relevant for indigenous restitution claims. Timeliness is also relevant in terms of witnesses as well as evidence regarding claims.

⁹ The authors sincerely thank Dr. Sorouja Moll for this reference and C. Apostolatos for her research assistance.

people's territory and housed in an educational facility to educate future generations about Haisla culture. Not only artefacts but essential knowledge can be recovered, such as the knowledge of lost techniques and artistic processes required for museum restoration.¹⁰

With regard to the successful repatriation claims described here, the framework for exploring the question of provenance is the legal and policy environment that sets out the ethical codes and procedures that museums have a duty to abide by, and that apply to both tangible and intangible First Nations cultural property. The concerns of First Nations in relation to the thousands of ancestral remains in collections responds to the history of their unauthorized removal from traditional burial sites and originates from collecting activities deemed inappropriate and inconsistent with the spiritual beliefs and religious practices of the Aboriginal community resulting in feelings of violation and loss.¹¹

In 1992, the *Task Force on Museums and First Peoples* recommended that "museums return items that were illegally acquired or can be defined as 'sacred' or as objects of cultural patrimony (Phillips 2011, 135). Based upon this, some indigenous claims have been resolved, and discovered objects have successfully made their way back to their historical descendants and the communities where they belong. A well-known example is the Yuguot Whaler's Shrine, Ahousaht, British Columbia. This shrine with sixteen human skulls, separate carved human remains and four carved whales, considered a place of purification by the Muchalacht tribe was taken without consent in the 1930s by an agent for Franz Boaz who sold it to the American Museum of Natural History for \$500. Another well-known example involves the repatriation of 18 Anishinaabe community members remains from the University of Winnipeg that took place in 2017. Six more cases involving Canadian university collections are currently in progress.¹²

The Truth and Reconciliation Commission of Canada (TRC) held its closing events in 2015 and, along with its executive summary of the TRC's findings, released its Calls to Action.¹³ The executive summary calls for the federal government to take action in compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and it includes a set of recommendations expressly intended for museums and archives. It calls to the Canadian Museum Association (CMA) and Library and Archives Canada (LAC) to commit to the care of indigenous intellectual property rights, cultural traditions and sacred items. The TRC calls for the creation of best practices and standards developed at the national level. It also calls for museums to work collaboratively with the local indigenous community and to be respectful of Indigenous worldviews. The aforementioned Calls to Action recognize that "Indigenous people have a right to access material created by and written about them" and to ensure Indigenous voices are being preserved in a complete and respectful way" (McCracken 2015). Ultimately, this document has led to a national review of existing museum policies and procedures that will look into whether museums are in line with the Declaration. In May 2018, the CMA established a fifteen member-working group to work on this initiative over the next three years (CMA 2018). These actions come two years after Canada fully endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2016 without qualifications.¹⁴ Article 31 of the UNDRIP states:

¹⁰ See relatedly, Phillips on the Canadian Museum of History and the Gwich'in Cultural Centre joining forces with to recover the knowledge needed to recreate a historical example of the style of a man's summer outfit from the nineteenth century, but this did not result in a request for repatriation. Cited in Phillips 2011 p.137.

¹¹ For discussion see Robert E. Paterson 2009.

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¹³ Truth and Reconciliation Commission of Canada: Calls to Action (2015) sections 67-70.

¹⁴ Canada officially declared its endorsement of the Declaration in 2010, at the same time as the United States, Australia, and New Zealand. See Kuprecht 2014.

(1): Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and 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 flora and fauna, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

(2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Indigenous peoples therefore have the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions. These rights are not only signed off on by the Canadian government, but the government is also required to take measures to recognize and protect these rights. Though there are many areas of intellectual property that may be useful tools in asserting this right, for the purposes of this paper as we are focusing on databases and images we will stick to copyright concerns. Since Canada is a multi-juridical system, copyright law in Canada is regulated legislatively by the *Copyright Act* (RSC 1985, c. C-42), but case law that establishes the interpretation of the Act draws from Anglo-Canadian common law, French-Canadian civil law, and may also draw from Indigenous law.

Cultural material in museum collections, other institutions and/ or government agencies may include items that, from an indigenous perspective, have been acquired “under illegal, potentially illegal, or questionable ethical circumstances” (Bell 2008). These collections may however also include material “acquired legitimately under the laws of Canada and affected First Nations communities.” According to Catherine Bell, it is in this broader context that both domestic and international museums are mandated to “recognize a moral obligation to return to ‘originating culture(s) [collections] or individual objects ... judged by current legal standards to have been acquired illegally” (Bell 2009, 21). Databases dealing with First Nations cultural heritage represent a facet of the control over cultural property and changes in how information about Indigenous heritage is collected, maintained, and shared.

According to legal scholars like John Borrows, for Indigenous peoples to properly assert their rights and counter narratives of colonial control that often operated via legal mechanisms, there should be a marked return to Indigenous law (Borrows 2002). As copyright is the primary intellectual property tool used in the management of cultural information, it stands to reason that there should be discussion of Indigenous uses and theories on copyrights in terms of information sharing or safeguarding. Building on Borrows’ argument that sources of Canadian law be harmonized (Borrows 2002, 180), Brundson suggests that the Canadian conception of copyright laws, wherein a balance between creator and user rights has become essential, would be a useful area in which incorporate Indigenous Legal Theory (ILT) to support Indigenous initiatives, writing: “It seems intuitively wrong that the oppressor’s laws should be relied upon to protect the culture of the oppressed.” (Brundson 2016, 8, 13). In practice, database Terms of Use pages would be one area in which to share information regarding the wishes of Indigenous groups regarding the respect for and use of applicable cultural heritage information. However, while the databases examined here were often produced in conjunction with Indigenous groups they are remarkable in their consistency of legal language regarding use permissions or lack thereof. This will be discussed further in a later section.

1.2 Digital Inventories in Canada

It is important to note that The North American Graves Protection and Repatriation Act (NAGPRA), an American piece of legislation regarding restitution of Indigenous cultural property is used in Canadian cases as an example of some functional guidelines.¹⁵ Interestingly, NAGPRA has a database that includes entry, retrieval, and item tracking as well as records and files pertaining to grants for repatriation, and databases on unidentified remains across Turtle Island.¹⁶ (Bell and Paterson 2009) Until the 1990s, the Canadian government had no official policy on digital inventories. Canada was an early signatory to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and as a result in 1972 a pilot policy, the National Inventory Programme, was created. When this was dismantled it was replaced by the Canadian Heritage Information Network (CHIN), a component of a national strategy to create a digital repository containing a collection of all the records in Canadian museums. The main priority for CHIN was to provide seamless access to cultural content through publicly funded websites. This was part of a broader cultural policy to establish a uniquely Canadian presence on the Internet.¹⁷ With the possibility of adding images to the original records, CHIN became more proactive and attempted to create a more effective site. However, they ran out of funds and asked museums to both finance the initiative and contribute records. From the outset, the Royal Ontario Museum and the Canadian Museum of History prioritized digitizing their public collections contributing content and inviting stakeholders to participate in knowledge production through CHIN Data Dictionaries.¹⁸ Many cultural professionals in collections institutions across Canada looked to CHIN as a model form of knowledge representation, both educational and classificatory. It offered meaningful open, searchable and publicly accessible information and visual data. This was because CHIN, the museum's collections management database, enabled museum professionals and others to search across institutional platforms using PARIS (a version of BASIS software), to maximize accessibility and compatibility.

Established in 2001 to foster media literacy and digitization, the Canadian Culture Online Program (CCOP) designed a portal, Culture.ca, with an eye to the “needs of francophones, young people and Aboriginal people.” (Canadian Culture Online 2003 p.6) It promoted “the exploration, creation and sharing of interactive content,” including archival content, while simultaneously being an online space. In terms of standards, research and development, the CCOP was charged with developing a digital rights management policy to deal with copyright issues. (Canadian Culture Online 2003) Canadian museums were focusing on museum management software and CHIN's responsibility was not only helping museums find software that was appropriate to their needs but publishing digitization guidelines and standards. With regard to the access and sharing of digital Canadian content online, including digital objects, it was the vision of the public servants who devised CHIN that “Instead of privatizing public space, [the CCOP] wants to de-emphasize commerce on Canada's corner of the Web.” (Canadian Culture Online 2003, 16.) Economic issues and proprietary software proved a challenge and consequently CHIN was superseded. As the database grew, the notion of creating a virtual museum took hold. The virtual museum was handed over to the museum of history c. 2010 and is no longer managed by CHIN.

Ruth Phillips' notion of promoting intercultural understanding and facilitating new knowledge through “radical ways of sharing power and developing multivocal understandings of collections,” began to be explored in the early 1990s. (Phillips 2011, 285) With a focus on Pacific Northwest Artefacts, and

¹⁵ NAGPRA was referenced in the case of _____, according to Bell 2009b

¹⁶ In the traditional teachings of First Nations peoples the name Turtle Island designates to North American hemisphere. For more, see Newcombe 2011, Christmas 2016.

¹⁷ For related discussion see Canadian Culture Online, 2003; and Final Report of the Canadian Culture Online National Advisory Board, 2004.

¹⁸ The CHIN Data Dictionaries are a set of vocabularies produced by the Canadian Heritage Information Network (http://www.chin.gc.ca/English/Collections_Management/index.html. Accessed Sept 15, 2018.

housed in University of British Columbia's Museum of Anthropology, a digital repository known as the Reciprocal Research Network (RRN), soon confounded traditional museological approaches to document preservation and conservation through its facilitation of interdisciplinary and collaborative research. Few museums have overcome the challenge of recovering the original integrity of historical collections in a way that is meaningful to Canada's diverse Indigenous communities or creating access to museum holdings originating from particular community groups or regions.¹⁹ The RRN is also important in fostering First Nations involvement in provenance research and links to a network of museums around the world. (Phillips 2011, Rowley 2013, Rossi 2017)

The RRN is "an open-source, Web-based, federated museum information system intended to provide First Nations, researchers and museum professionals with interactive access to worldwide collections of Northwest Coast and British Columbia First Nations' cultural heritage." (<http://www.rrn-pilot.org/>) Constructed within a social networking environment it will enable users to undertake individual or multiuser projects. The overall goal of the project is "to re-connect objects, people, land, languages, and traditions culturally and historically significant to First Nations community researchers, and to create a collaborative, reciprocal, and inclusive environment in which to explore museum collections of First Nations' cultural heritage." (*ibid.*) The collaborators are the Musqueam Indian Band, the Stó:lō Nation/Tribal Council, the U'mista Cultural Society, and the Museum of Anthropology at the University of British Columbia. A number of national and international cultural institutions are also involved including the Royal British Columbia Museum, Burke Museum, Glenbow Museum, Royal Ontario Museum, Canadian Museum of History, McCord Museum, American Museum of Natural History, National Museum of the American Indian, National Museum of Natural History, Cambridge University Museum of Archaeology and Ethnology, and the Pitt Rivers Museum.²⁰ Although it is not intended for casual users, the RRN may be considered an 'open' database, especially because it was created with the collaboration of Indigenous peoples. On the other end of the spectrum is the GRASAC Knowledge Sharing (GKS) database, a portal developed to facilitate the exchange of research with over 4,000 digital surrogates of images, which is 'closed.'²¹

In general, online archive systems such as online public access catalogs (OPAC), content management systems and portals such as RRN are forms of knowledge representation. As Srinivasan et al point out: "The object, as a piece of tangible cultural heritage, is a gateway to a number of intangible, yet critically connected, practices: the telling of a story, a prayer, the process of research, the history of the exhibition...." (Srinivasan 2009) This is the time when provenance matters most: when, increasingly, metadata on a wide range of art, architecture and cultural objects and their characteristics are becoming available in the form of Linked Open Data (LOD). Such LOD data has a defined structure that allows integration from different sources and is readily shareable on the web although standards and licencing options for this activity are still evolving.

There is concern that classic existing intellectual property forms are unable to meet the current needs of Indigenous communities in protecting their cultural property, and this concern is more pressing in an age of easy digital sharing of information (Lai 2016, 172). As a whole, intellectual property protections may be adapted for use by indigenous groups.²² Creation of special or *sui generis* intellectual property laws for the management of Indigenous heritage and information have been suggested to account for the

¹⁹ URL. <http://www.rrncommunity.org/>

²⁰ URL. <https://www.museumsandtheweb.com/mw2008/papers/iverson/iverson.html>.

²¹ URL. <http://grasac.org/gks4/>. A select international research group is permitted access to the database.

²² For examples, refer to Lai 2016, WIPO

diversity of world views, types of articles and information, as well as conceptions of property and knowledge sharing that are not necessarily consistent across tribes whose geographic presence varies within the regions such as colonial nations which typically govern intellectual property.²³ Eleni Polymenopoulou argues that steps to empower Indigenous claims on a more focused and local level should be of paramount concern in protecting rights to control over cultural information (Polymenopoulou 2017).

A sense of active ownership together with shared resources and tools would also expedite repatriation activities. In recent years, Inuit communities have revealed interest in the market for intellectual products and copyright and in the politics of cultural property. Focussed on artefacts of Yukon First Nations origin, the Searching for our Heritage database provides researchers and other interested groups with access to resources and information from museums all around the world. These objects of Yukon significance and associated archival records appear constrained by predetermined program architecture making the site difficult to navigate for end-users. Not all the objects have digital images, and records from outside institutions bear watermarks and or carry copyright notices and are therefore anchored in concepts of property far stronger than copyright laws. This database includes provenance information and bibliographic references where appropriate. The *Inuvialuit Pitqusiit Inuuniarutait* (Inuvialuit Living History) platform was designed to create access for Inuvialuit people and general public to the Smithsonian's MacFarlane Collection.²⁴ The website uses descriptions and images from the Smithsonian. It provides information about the history of the collection, about the Smithsonian Institution, and about repatriation, ownership, and intellectual property rights to the collection. In addition to artefact records as well as video and photographs the website includes other resources such as an interactive map related to people and places in the Anderson River area.

Another example is the Inuvialuit Smithsonian Project, an initiative housed at Simon Fraser University in British Columbia, Canada. Its original funding came from the Intellectual Property Issues in Cultural Heritage (IPinCH) project led by George Nicholas. Using a problem-based research paradigm, this seven-year project worked to explore IP and ethical concerns relating to "the rights, values, and responsibilities of material culture, cultural knowledge and the practice of heritage research." It posed questions and sought the responses needed for culturally valuable activities in the area of cultural heritage.²⁵ The Inuvialuit Living History website enables users to access the RRN and other institutional collections on the RRN. Since the RRN also facilitates the exchange knowledge about collections and artefacts by allowing users to communicate with one another, indigenous peoples' cultural perspectives and historical experience help to fill out the picture of nineteenth century life in the Yukon.

2. The Case for Interoperability

2.1 Adequate Documentation Formats

Our experience of the above-mentioned catalogues and object representation is that although each makes efforts to present numerous objects in digital form there are some structural issues. As mentioned earlier,

²³ For discussion, see Gervais 2013; Lai 2016. Ghana adapted intellectual property protections to incorporate folklore and Kente cloths. For discussion see Boateng, Boatema, "Adinkra and Kente Cloth in History, Law, and Life" (2014). Textile Society of America Symposium Proceedings. 932. <http://digitalcommons.unl.edu/tsaconf/932>. Accessed Sept 15, 2018.

²⁴ URL. <http://www.inuvialuitlivinghistory.ca>.

²⁵ URL. <http://www.sfu.ca/ipinch/about/project-description/>.

the sites are not for casual users. One of the distinctive features of Searching for our Heritage is that it comes with a Manual. Our research suggests that their internal interface has been directly translated into a Web environment and so it lacks functionality. In the Searching our Heritage database, each object has been set up as in a physical archival record and the images are not high resolution. While more user friendly, the Inuvialuit Living History is more like a knowledge archive: some of the information cards have been copied directly from the Smithsonian and carry watermarks or copyright notices accordingly. Images with a Smithsonian watermark are used with permission of the Smithsonian. For commercial use, permission from the Inuvialuit Cultural Resource Centre or other copyright and /or intellectual property rights holders is required.

As part of the collections record archival file, the Searching for our Heritage database includes metadata and other details in each object record. The RRN similarly includes many images organized comparatively and it also includes accessible metadata but there are no copyright notices on the images and their terms of use are extremely limited. All images and catalogue data posted on the RRN website are protected by copyright. Reproduction is prohibited without the express permission of the copyright owner. Requests for information for use of the images are the responsibility of the object's holding institution. Commercial or publication use is prohibited. These databases show a number of images but restrict what content can be accessed and a dominant copyright regime seems to prevail. The rights afforded to Indigenous peoples in the UNDRIP 2007, as well as the WIPO framework for protection of indigenous heritage information are means of thinking about who the information in these databases is intended for and which value systems are at play in restricting access and reuse of the information within. "Copyright is the most pervasive cultural regulatory system in the world" (Vaidhyanathan 2017, 6). Limitations to copyrights (what Vaidhyanathan refers to as "breathing holes" in copyright law to prevent misuse or overuse of exclusivity (2017)), for example fair use/fair dealing or expiration, vary in strength and relevance around the world. Copyright protections and exceptions remain a patchwork that can be manipulated to reflect localized values and power (Vaidhyanathan 2017).²⁶

2.2 Access Provision and Information Linking

Digital image repositories often conceal the broader context in which barriers such as digital locks, proprietary interests, monopoly of information, software design issues, and the narrow scope of information uploaded to images databases maintain structures that have placed constraints on repatriation efforts in the real world. One of the issues we have been struggling with is that types of indigenous property appearing in cultural collections and databases do not easily fit into definitions of things that are protected by intellectual property rights (IPR). Generally, intellectual property law is designed to protect new, original creations and innovations, and thus intellectual property protections have to be changed or adapted to fit with traditional practices. The WIPO breaks these traditional elements into categories:

- Traditional knowledge (TK), which encompasses traditional know-how, skills, innovations, and practices (e.g. medicinal use of plants); and
- Traditional cultural expressions (TCEs) (WIPO 2017, 9).

For the most part, experts in the field would agree that, by virtue of representing the narratives of Indigenous people, images collected and managed online are likely to be defined as both incorporating traditional knowledge and the expression of individual creators using this framework.²⁷ Accordingly, within

²⁶ note

the Canadian intellectual property system, as with IP protections in much of the world, the focus is on innovation and originality seemingly runs counter to practices that are traditional in nature. This is because, in an indigenous context, traditional cultural expressions are not static, rather they are key components of community practices and development (Bell and Shier 2011, 37) though this understanding of tradition and authorship does not necessarily run counter to existing and mainstream conceptions of intellectual property. Legal scholar Daniel Gervais points out that at least some Indigenous groups conceive of property in ways that are adaptable to Eurocentric legal systems, even where conceptions of stewardship and collective rather than individual rights are paramount (Gervais 2003, 475). What remains paramount are the rights outlined in the UNDRIP 2007 and the remaining problems of power differentials regarding Indigenous communities and peoples that have historically had the support of the Canadian legal system.

Case law on Aboriginal rights, for example the pivotal restitution case *Mohawk Bands of Kahnawake, Akwesasne and Kanasatake v Glenbow-Alberta Institute*, [1988] 3 CNLR 70 (*Alta QB*), demonstrates that Canadian courts already recognize First Nations principles illustrating how they can be articulated to help communities achieve their heritage preservation goals. We argue (along the same lines as Bell 2009) that allowing museums to establish parameters for control and access of indigenous information may not be the most appropriate solution if that does not comply with Aboriginal groups' rights as stakeholders. The *UN Declaration on the Rights of Indigenous Peoples* (2007) Article 31 outlines Indigenous rights regarding control of information as follows:

- (1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and 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 flora and fauna, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional culture expressions.
- (2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Copyright is the primary means of controlling information that is of a cultural nature. Intellectual property measures such as copyright protections are just one intellectual property right suggested by the World Intellectual Property Organization (WIPO) to use in the protection of Indigenous rights. While intellectual property protections may not meet all community needs, they can be used as tools to prevent exploitation and misappropriation or to “maximize economic value” since the primary focus of WIPO recommendations is to empower communities to tailor intellectual property protections to their specific needs. (WIPO Protect and Promote Your Culture 2017 pp.8-9)

WIPO appears to be the predominant model that Canadian websites are referring to. It is a full protection model concerned with exploitation and misappropriation. The World Intellectual Property Organization defines intellectual property rights broadly:

“Intellectual Property Rights (IPR) is a general concept addressing the ownership and usage conditions of image content. Because the content of a file can be either created from scratch (original works) or built upon existing material (derivative works), the IPR may be different for each scenario. There are two basic categories of IPR, which are as follows: (1) Moral Rights (attached to the creator and non-transferable); and (2) Copyrights (conditional rights to copying, using, and exploiting content). WIPO has

²⁷ There is no international agreement for these definitions. For discussion see WIPO (2015) Intellectual Property and Genetic Resources, Traditional Knowledge, and Traditional Cultural Expressions, pp.13-17 at http://www.wipo.int.edocs/pubdocs/en/tk/933/wipo_pub_933.pdf. Accessed Sept 15, 2018.

stated [25][26] that, once IPR information is included in a file, then the information becomes an integral part of the file and must be conveyed without modification along with the file by all intermediate actors between creator and end user. This concept of conveying the IPR information is called ‘persistence.’ However, access to original IPR data may be classified as ‘confidential’ and therefore access would be restricted in certain conditions. Naturally, in such circumstances, updating IPR information could also be restricted by conditional access.”²⁸

The problem is that the means of maintaining control over heritage information is copyright. Therefore, at a time when there is no integrated ontology of provenance data and knowledge mobilization is being reassessed by Canadian, Quebec, and Indigenous law, digital initiatives are beginning to capture complex indigenous epistemologies yet surprisingly convey a rigid framework of information protection.

Broadly speaking, digital protection measures have the potential to tilt copyright further in favour of exclusivity and exclusive rights holders. This movement of power leads to the question of what rights holders intend to accomplish by asserting protection of their property (Vaidhyanathan 2017 p.38). The WIPO recognizes that the objectives of documenting traditional knowledge and traditional cultural expressions are valuable for multiple reasons including the safeguarding, preservation, and the passing along of culture for the present as well as future generations (Following the 2003 UNESCO Convention Safeguarding Intangible Cultural Heritage). Documentation of images and information additionally fixes these as creations and thus positions them to be under the purview of intellectual property protections. Issues with invoking Intellectual property in such contexts include an understandable concern that documentation and sharing of information can lead to misuse or unwanted disclosure of traditional knowledge and traditional cultural expressions; that intellectual property rights in cultural heritage databases end up being claimed as the sole intellectual property of the host institution that place the information online; and that protection granted to documented content under protection such as copyright has a limited scope (minimum the life of the author plus 50 years). Hence, while the opening up of records such as the Smithsonian’s online collections database and the creation of shared museum strategies to provide information pertaining to works whose provenance is in dispute have led to gains in this area (Bell and Paterson 2009, 23) repatriation research remains problematic.

Using databases, many practical challenges may arise for end-users: search fields or browsability may be limited, gaps may exist in technical literacy, servers may crash or browsers prove incompatible. These technical issues must be continually assessed and managed. Hence to fully explore issues regarding responsible digital collaboration, scholars must address digital design. This may mean recognizing the First Nations call to “decolonize heritage preservation and management practices” (Gish Hill and Csoba DeHass 2018, 44). It may also mean addressing “the reification of fluid cultural knowledge” which has been raised as a concern in Indigenous communities. The aspect of mobilizing the museum community to adopt best practices is also vitally important. More than ten years after the release of the UN Declaration on the Rights of Indigenous Peoples (2007), we have more collaboration and control over indigenous cultural property manifesting via the law and/or showing up in practice in cultural heritage databases (Bell and Shier 2011, 36). Yet there is still no particular set of policy or legislation governing control over indigenous cultural property. It is a “legal and extralegal” combination of policy, trade agreements, parks, cultural heritage, environmental law, access to information/privacy law, contract and administrative law, international laws and agreements, land claim/treaty/self-governance agreement.²⁹ This is a blend affecting what governs the

²⁸ note

²⁹ Following recommendations of the 2003 UNESCO Convention Safeguarding Intangible Cultural Heritage. Some examples include: The Nisga’a Final Agreement; the Yukon Land Claim Agreement, YESEAA; and the Nunavut Land Claims Agreement.

items/material being digitized as well as the digital object.

Conclusion

A simplified digital environment has potential in preventing the export of Canadian First Nations cultural property through the Cultural Property Export and Import Act (CPEI). Cultural objects of national importance over fifty years old and made by individuals no longer living may be included on the Canadian Cultural Property Export Control List and may be denied export permits. (Bell and Paterson 2009 p.80) The case study of the Echo Mask illustrates a successful attempt to prevent a mask belonging to the Nuxalk Nation being sold outside of Canada for US\$250,000 in the late 1980s. Another well-known example involves Chief Charles Nowell's bead and button blanket which was eventually repatriated back to the U'mista Cultural Centre in Alert Bay, British Columbia. The blanket, which was exported for sale in Sotheby's New York, and was sold to a private gallery in Ontario for US\$24,500 has since been put on display, and following Kwakwaka'wakw law, with other items belonging to the community it serves. (Bell and Paterson 2009 pp.81-82) Through these two final examples our aim is to suggest that collaborative development of international standards for museum documentation should be ethical and carefully formulated if museums are to bridge the gap between mainstream knowledge and indigenous perspectives. Linking relevant information requires access to information as well as visual and technological literacy to connect the local and the global. In the repatriation context, this means more than educating professionals in the heritage sector and providing guidelines. The challenge is to develop uniform standards for visual materials and image quality as well as for intellectual access and information exchange. In summary, the key factors to be addressed are intellectual property obligations and clarifying copyright. A well-defined model that promotes the interoperability of metadata will also facilitate the articulation of property rights.

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Legislation/Treaties/Agreements/Regulations

Canadian Federal

Canadian Charter of Rights and Freedoms, s 35, Part II of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c. 11

Copyright Act of Canada, RSC 1985, c. C-42

Cultural Property Export and Import Act (CPEI), RSC 1985, c. C-51

Canadian Provincial/Territorial

Blackfoot First Nations Sacred Ceremonial Objects Repatriation Regulation, Alta Reg 96/2004

First Nations Sacred Ceremonial Repatriation Act, RSA 2000 ch F-14 §2

BC Heritage Conservation Act, RSBC 1985,, ch H-4 - allows formal agreements w/First Nations re conserving/protecting heritage sites and objects

Tlicho Agreement, signed 25 August 2003 [<http://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544>]

International/Other

Native American Graves Protection and Repatriation Act 25 USC §§ 3001-3013 (West Supp 2001) (NAGPRA)

United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295 (enacted 2007)

UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage* (adopted 17 October 2003, entered into force 20 April 2006)

UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (adopted 20 October 2005, entered into force 18 March 2007)

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Delgamuukw v British Columbia, [1998] 1 CNLR 14 (SCC)

R v Marshall; R v Bernard, [2005] 2 SCR 220, 2005 SCC 43

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