

Transnational Culture in the Internet Age

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14. Balancing act: the creation and circulation of indigenous knowledge and culture inside and outside the legal frame

Kimberly Christen

14.1 INTRODUCTION

The recent development of Web 2.0 technologies grounded in user-generated content and bottom-up exhibition and display modes has produced a dynamic platform for, among other uses, sharing and creating cultural materials. This newly animated digital terrain is not however, without its uneven landscapes and microclimates of management. Indeed, neither a “flat earth” nor a “global village” model work for understanding the diverse circulation routes for, or control over, the flow of information, ideas, and materials as bits and bytes of a new digital landscape that includes overlapping and oftentimes contentious intellectual property rights regimes. This new technological terrain holds significant potential for knowledge production and dissemination, but at the same time there are distinct challenges and pitfalls for indigenous peoples attempting to integrate, adapt, and make anew technological-cultural systems that fit their diverse needs, complex political situations and histories of exclusion, dispossession, and legal disenfranchisement.

Existing legal norms are inadequate to address the range of needs and divergent local and national situations of indigenous peoples as they forge new technological relationships that alter the contours of entrenched legal concepts such as property and ownership. Critics and skeptics who point to the essentializing and/or romanticizing nature of some indigenous claims to cultural property, cultural heritage, traditional knowledge (TK), and traditional cultural expressions (TCEs), miss and downplay the differences between Western legal frameworks and indigenous understandings of, relationships with, and obligations to both material objects and their associated knowledge. At the same time, allegations of essentialism discount the strategic and tactical uses of indigenous frameworks as a way to ensure cultural

sovereignty in a politically charged and uneven legal field.¹ The recent World Intellectual Property Organization (WIPO) initiatives to produce an international policy integrating indigenous concerns surrounding the use, reuse, and protection of their cultural resources and knowledge offer a welcome antidote to both colonial imperialist constructions of folklore and cyberlibertarian fetishizing of the public domain.² However, a top-down legal solution is itself inadequate and insufficient to either understand or analyze the newly emerging techno-cultural-legal landscape as indigenous interests often “sit awkwardly outside the legal framework.”³ Rather, focusing on community-driven projects that both create new digital platforms and sidestep legal dead-ends, offers examples of practical solutions whose lessons may also have broader resonance for digital policy *vis-à-vis* both indigenous and mainstream communities.

Through active engagement with new technologies and the legal frameworks that define the boundaries of cultural movement and production, indigenous communities have put technology and law to use for their own political, social, cultural, and economic ends. Discussing the role of new technologies in indigenous cultural production, anthropologist Faye Ginsburg argues that, “Rather than destroying Inuit cultures as some predicted would happen, these technologies of representation – beginning with the satellite television transmission to Inuit communities of their own small-scale video production – have played a dynamic and even revitalizing role for Inuit and other First Nations people, as a self-conscious means of cultural preservation and production and a form of political mobilization.”⁴ Similarly, through their Creative Heritage Project WIPO suggests that, “New technologies provide communities with fresh opportunities to document and digitize expressions of their traditional cultures, meeting the

¹ Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 *YALE L. J.* 1022, (2009); Sean A. Pager, *Folklore 2.0: Why Remixing Tradition is the Best Way to Preserve It*, 2011 *STAN/YALE JR. FAC. F.* (June 25, 2011), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Folklore_2_Why_Remixing_Tradition_is_the_Best_Way_%20to_Preserve_It.pdf.

² MOLLY TORSÉN & JANE ANDERSON, WIPO, *INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES: LEGAL ISSUES AND PRACTICAL OPTIONS FOR MUSEUMS, LIBRARIES AND ARCHIVES* (2010), available at <http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf>; Andrew Ross, *Technology and Below-the-Line Labor in the Copyfight over Intellectual Property*, 58 *AM. Q.* 743, (2006); PROJECT MUSE, <http://muse.jhu.edu>, last accessed 8.25.2011.

³ *Supra* note 2, Torsén and Anderson, at 10.

⁴ Faye D. Ginsburg, *Screen Memories: Re-signifying the Traditional in Indigenous Media*, in *MEDIA WORLDS: ANTHROPOLOGY ON NEW TERRAIN* 39 (Faye D. Ginsburg, Lila Abu-Lughod and Brian Larkin, eds, 2002).

strong desire of communities to preserve, promote and pass on their cultural heritage to succeeding generations.”⁵ The need to simultaneously “preserve, promote and pass on” cultural heritage materials and knowledge often presents a challenge for indigenous communities who seek to strike this balance using a mixture of traditional, legal, and extralegal models. At the same time, this complex situation prompts a disconnect for normally progressive pundits who mishear protection as locking down or enclosing culture where “culture” is assumed to best function if “open.”

In order to undo this stranglehold and offer both extralegal examples and normative solutions, the remainder of this chapter unpacks the central debates energizing the field and offers concrete examples to help imagine an alternative set of possibilities that mix and match legal, social, political, and cultural practices as an end in themselves. In section 14.2 the chapter begins by examining the dominant discourses that have animated the terrain of the digital–legal landscape, specifically focusing on the intersections of legal debates over indigenous cultural materials, the public domain and/or the commons. Section 14.3 offers three case studies of indigenous projects that highlight the practical ways in which technology and indigenous knowledge can be merged and created anew without deferring completely to either Western legal models or technologically deterministic ones. This section underscores the erasure of indigenous knowledge systems from both the dominant legal and cultural debates about the digital landscape, and in particular the failings of archival and curatorial paradigms and products to date to deal with and integrate alternative models for the preservation, protection, and promotion of indigenous knowledges. Finally, section 14.4 offers a brief suggestion bringing together and highlighting the possibility for changes to and social pay-offs from integrating the lessons learned from emergent digital indigenous knowledge productions into mainstream understandings of the techno–digital landscape.

14.2 CENTER AND MARGINS: CONNECTING INTERESTS

14.2.1 Partial Legal Solutions: Preservation, Protection, and Promotion

The dominant discourses animating the debates surrounding the intersection of indigenous cultural materials, digital technologies, and intellectual

⁵ *Community Cultural Documentation*, WIPO, <http://www.wipo.int/tk/en/culturalheritage/community-cult.html> (last visited August 1, 2011).

property laws have focused on protection and preservation – two terms that maintain the residue of colonial impulses and paternal lawmaking and seem to reject the notion that indigenous peoples are creators of cultural materials, products, and knowledge. Part of this skewed debate is based in an ongoing collective historical amnesia over how the public domain of ideas and materials came into existence, and part is based on lingering stereotypes and racist frameworks that hold indigeneity and modernity at opposing ends of a progressive spectrum.⁶ While vast amounts of indigenous peoples' intangible cultural heritage populates the public domain, much of it was procured through dubious colonial and post-colonial nation-making practices and supported by legal structures that upheld the legality of colonial "collection."⁷ Adding to the presumed colonial discovery and salvage of indigenous materials was the until recent classification of indigenous knowledge and traditional cultural expressions as "folklore," which provided the needed basis for non-protection under international intellectual property rights laws that saw folklore as part of the "universal heritage of humanity" and thus not the property of one group.

Tracing the history of the folklore classification in relation to international intellectual property rights, Monika Dommann finds that, "These legal categories had strong economic effects. Developed countries exported goods protected by intellectual property law, while developing countries exported folklore, falling into the public domain. Whereas developed countries could benefit commercially from their works, the cultural products of developing countries remained objects of commercial exploitation by others."⁸ Similarly, within settler nations such as Canada, the United States, Australia, and New Zealand, indigenous peoples' materials have been open for use, abuse, reuse, and

⁶ Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 DUKE L. J. 104, 138–41 (2006). Samuelson lists 13 conceptions of the public domain, the thirteenth is the "Romantic or Imperialist Public Domain" that does not take into account indigenous traditional knowledge practices and alternative conceptions of property and access. See also Brad Sherman and Leanne Wiseman, *Toward an Indigenous Public Domain?*, in *THE FUTURE OF THE PUBLIC DOMAIN*, 259 (Luice Guibault and Bernt Hugenholtz, eds, 2006); and Anupam Chander and Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004).

⁷ Repatriation movements are a direct result of this acknowledgement of colonial collection histories.

⁸ Monika Dommann, *Lost in Tradition? Reconsidering the History of Folklore and its Legal Protection Since 1800*, in *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT*, 3, 12 (Christoph Beat Graber and Mira Burri Nenova, eds, 2008).

appropriation by individuals, corporations, and collecting institutions which rely on legal definitions to exclude indigenous materials from the already limited protections of intellectual property rights. Since the late 1970s, indigenous peoples and activists have used both national agendas and international forums intentionally to undo the historical legacy of the folklore designation, and have achieved modest advances with the recent shift to “traditional cultural expressions” (TCEs) and “traditional knowledge” (TK) as categories of inclusion and acceptance internationally. These classifications direct attention to the distinctiveness and heterogeneity of these categories without implying that they somehow belong to or should be vested in humanity.⁹ WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO), along with other institutions, have pushed these designations along with a renewed understanding of the dynamism of indigenous traditions and knowledge that provide the necessary focus on the production of indigenous materials and IPR as one part of a multipart solution to deal with the concerns of indigenous peoples regarding the use and reuse of their cultural knowledge and materials. WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources has made significant advances towards an international policy in relation to indigenous TCEs and TK. It is worth quoting at length WIPO’s rationale and explanation of these concepts and the underlying notions of preservation, protection, promotion, and safeguarding in order to get a sense of the animating principles of these policy suggestions. In the summary document, “Protection of Traditional Cultural Expressions/Expressions of Folklore,” WIPO posits that:¹⁰

⁹ See *Traditional Cultural Expressions (Folklore)*, WIPO, <http://www.wipo.int/tk/en/folklore/> last accessed 8.25.2011. Janice T. Pilch, *Traditional Cultural Expression*, LIBRARY COPYRIGHT ALLIANCE ISSUE BRIEF (Sept. 1, 2009), <http://www.librarycopyrightalliance.org/bm~doc/issuebrieftce.pdf>; American Library Association, “Librarianship and Traditional Cultural Expressions: Nurturing Understanding and Respect” <http://wo.ala.org/tce/2009/11/13/sixth-draft-librarianship-and-traditional-cultural-expressions-nurturing-understanding-and-respect/> last accessed 9.01.11, and Michael Blakeney, *Protecting Traditional Cultural Expressions: The International Dimension*, in 3 NEW DIRECTIONS IN COPYRIGHT LAW 3, (F. Macmillan and K. Bowrey eds, 2006); Rosemary Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANN. REV. L. & SOC. SCI. 393 (2009).

¹⁰ THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE: AN OVERVIEW OF THE WIPO IGC DRAFT PROVISIONS, http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce_provisions_summary.pdf (last visited 8.25.11).

7. Traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community's beliefs and values, embody skills and know-how, reflect a community's history, and define its cultural identity. Traditional cultural expressions (TCEs) are therefore valuable cultural assets of the communities who maintain, practice and develop them. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and economic development. They may also serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations.
8. This dual nature of these elements of a community's cultural heritage – cultural and economic – raises a number of policy issues related to the protection, promotion and preservation of cultural heritage.
9. From an IP [intellectual property] point of view, the protection or otherwise of expressions of traditional cultures forms an integral part of policies concerning the promotion and protection of creativity and innovation, community development and the stimulation and promotion of the creative industries as part of sustainable economic development.
10. However, the protection of expressions of traditional cultures touches also upon other important policy areas. These include the safeguarding and preservation of cultural heritage; freedom of expression; respect for the rights, interests and claims of indigenous and other traditional communities; recognition of customary laws, protocols and practices; access to knowledge and the scope of the “public domain”; addressing the challenges of multiculturalism; and, promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions.

The meaning of “protection” within a holistic policy context

11. TCEs can be “protected” in several complementary ways. A range of international policy processes and several international legal instruments address various aspects of protection, amidst calls for an holistic approach to protection of TCEs. Protection may include safeguarding against loss through, archiving, documenting and recording, building capacity to support traditional creativity and the bearers and social structures that sustain and express them, acknowledging the broader range of collective and individual rights that are linked to TCEs and their cultural and legal environment, and protecting TCEs against unauthorised or illegitimate use by third parties, including commercial misappropriation and misuse that is derogatory or offensive.
12. The draft provisions in WIPO document WIPO/GRTKF/IC/10/4 concern most directly the protection of TCEs in a legal sense, that is, protection of the creativity and distinctiveness inherent in TCEs against illicit uses and misappropriations, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many have expressed to avoid distinct new property rights. This has been the approach of the IGC, in keeping with the mandate of WIPO, since the inception of its work.

“Protection” in this sense is, distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, but complements them. Indeed, an holistic approach to protection of TCEs within this broader international context entails recognising and complementing legal instruments and policy approaches in cognate policy areas, such as the UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, and work in other forums such the United Nations Permanent Forum on Indigenous Issues and the Working Group on Indigenous Populations of the Human Rights Council. Any new forms of protection for TCEs should also take into account existing IP treaties. For example, the WIPO Performances and Pronograms Treaty, 1996 (the WPPT) provides protection to performers of TCEs.

13. Only through such complementarity with instruments in other policy areas can truly comprehensive and holistic protection, preservation and promotion of TCEs be achieved. For example, the draft provisions are expressly intended to complement and work together with laws and measures for the preservation and safeguarding of cultural heritage, and practical suggestions in this regard are made throughout the provisions and the commentary.

This section of the summary document clarifies the movement between preservation, protection, and promotion within the legal and extra-legal policy solutions that range in detail from broad economic goals to local (or semi-local) social needs. While these goals may appear to be in tension from the outside, what is apparent is that indigenous representatives are seeking complementary approaches. In this regard, then, “holistic” should not be confused with a one-size-fits all approach. Instead, emphasizing the diverse needs and suggestions of the various representatives, the call for “protection” and “preservation” of TCEs casts a wide net. While some may see this big-tent approach as a drawback, for the purposes of maintaining diversity, respecting sovereignty, and understanding the range of political situations in which indigenous peoples find themselves, the summary document highlights the simultaneous need to create legal structures and at the same time make those flexible enough to apply to the global indigenous situations.¹¹ Innovation is as significant and necessary as preservation. Without invoking the clumsy notion of “hybridity” – which itself relies on colonial frameworks and discounts indigenous assertions of autonomy – one can argue for a social–legal framework that acknowledges the dynamism of all cultural production, without denying

¹¹ POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES (DUNCAN IIVISON, PAUL PATTON, AND WILL SANDERS, eds, 2000). INDIGENOUS EXPERIENCE TODAY (Marisol de la Cadena and Orin Starn, eds, 2007); Pager, *supra* note 1.

the uneven historical terrain and present post-colonial moment in which indigenous peoples are marginalized.

Contrary to the sometimes knee-jerk reaction of critics, this language does not freeze, stagnate, or reify indigenous practices, knowledge, or culture. It does not call for or claim that indigenous traditional practices or knowledge should be set apart from the local, national, or global circulation routes in which information travels, gets adapted, and is remade. What it calls for, instead, is a careful appraisal of and respect for the diverse needs, agendas, and patterns of cultural production and reproduction that happen within indigenous communities, between them, and as they interact with the global flow and exchange of ideas. Preservation, protection, and promotion work in concert – there is no one set of principles that dictate how this might happen, although as an intellectual property organization WIPO is advocating, at least in part, IP solutions. However, they are quick to recognize the limits of relying on legal measures alone, calling for “complimentary” approaches within policy and legal reforms. In fact, Wend Wendland, Deputy Director of the Global Issues (Traditional Knowledge) Division of WIPO, argues that at the international policy level heterogeneous indigenous needs and local demands for “cultural sovereignty” often result in a strained quest for homogeneous policy.¹² What Wendland makes clear is what he has no doubt heard over the course of several years working with indigenous representatives worldwide: while legal frameworks are necessary, they are not the endgame. Maintaining cultural sovereignty, in the face of the homogenizing tendencies of legal and social state apparatuses, creates the tensions that are rightly highlighted by critics. And yet, these are not failings. Instead, these differences emphasize the need to work in unison with other-than-legal frameworks. While WIPO’s policy work and their local efforts within communities highlight one – and oftentimes the most visible – account of indigenous concerns over TCEs and TK, WIPO will have a limited ability to shape how policies play out within national contexts and are filtered down at local levels. International policy and legal solutions are, and will continue to be, only one part of the solution for protecting, preserving, and promoting indigenous cultural materials, traditional knowledge, and traditional cultural expressions. Balancing the needs of diverse indigenous communities – from nations within nations, to small tribal groups, to

¹² Wend B. Wendland, *It's a Small World (After All): Some Reflections on Intellectual Property and Traditional Cultural Expressions*, in *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT* 150 (Christoph Beat Graber and Mira Burri-Nenova, eds, 2008).

urban-living indigenous peoples – scholars, legal pundits, and activists alike must recognize the lingering effects of colonial histories, policies, and the current erasure of indigenous lives from the global discourse of digital technologies and intellectual property rights as they work with indigenous peoples to craft mutually beneficial and adaptable solutions.

14.2.2 Digital Commons

The emergence of the Internet as a powerful global tool for connection coupled with low-cost digital technologies has brought intellectual property debates to the forefront of public discussions about information circulation, consumer versus creator rights, and the role of the government in regulating and sustaining the public domain of ideas – which some label the “commons.”¹³ Critics of indigenous claims to cultural heritage often use the commons as the counterpoint to what they assume is a fencing off or shutting down of the public domain inherent in indigenous calls for other types of control mechanisms for their cultural materials. In fact, as Carpenter et al. argue, “Legal scholars in particular – including those who typically align themselves with progressive causes – strongly criticize indigenous peoples’ efforts to assert ownership and autonomy over their tangible and intangible traditional resources arguing that culture is and must remain part of an entitlement-free commons.”¹⁴ Failing to recognize the historic erasure and legal ostracizing of indigenous peoples and their cultural materials and knowledge from both legal protection and social inclusion, these critics promote a value-free commons and thus reproduce the same sorts of unequal scale for the circulation of information that they purport the commons solves.¹⁵

Framing the contours of this understanding of the commons, James Boyle argues that, “the freest possible circulation of ideas and facts is important to anyone whose well-being significantly depends on intellectual innovation and productivity – that is to say, every citizen of the world.”¹⁶ While Boyle certainly does recognize the complexities of IP-related issues in relation to indigenous peoples and their distinct claims,

¹³ JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

¹⁴ Carpenter, *supra* note 1.

¹⁵ Anupam Chander and Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, (2004).

¹⁶ James Boyle, *Fencing Off Ideas: Enclosure & the Disappearance of the Public Domain*, DAEDALUS, Mar. 22, 2002.

these types of appeals to cosmopolitanism – whether manifest as a flat world or commons metaphor – nevertheless wedge divergent systems of knowledge management into one field of cultural circulation. The call to unite “every citizen of the world” under the same umbrella of creativity and knowledge circulation undoes the specific historic situations and contemporary cultural and political realities that make it impossible for some citizens of the world to take advantage of or act in relation to their own cultural materials in ways they find most compelling and appropriate. At the same time, these appeals to the commons or global agendas also dovetail with claims that the current intellectual property rights framework is “out of balance” and needs to be recalibrated back to what it once was: in balance. Unfortunately, most of the terrain connecting digital technologies, legal frameworks, policy and social systems has been mapped by dominant legal advocates and corporate interests, leaving out more marginalized voices and concerns that might tip the scales of balance to consider divergent social and historical systems. For example, oftentimes indigenous peoples choose extralegal solutions or para-corporate strategies as they define their own techno-cultural agendas due to their:

- skepticism of legal remedies, given colonial histories and ongoing struggle for sovereignty and self-determination;
- marginalization within nation-states given their colonial and assimilationist histories;
- cultural heterogeneity between indigenous groups making top-down international agreements/agendas/policies and legal frameworks difficult to agree on and even harder to implement; and
- favoring of community-led solutions and practices based on their appeals for “cultural sovereignty.”

Promoting a balanced approach here must include recognizing historical disenfranchisement and its lingering effects, and the practical solutions offered by indigenous communities.

These factors have provided fertile ground for collaborations with a range of partners, including universities, corporations, and industries without specific allegiances to any particular institution. These unions signal a desire by indigenous people to use technology to further their own agendas and chart a course within, as well as apart from, standard technical practices or legal constraints.¹⁷ By encoding culture in the overlapping

¹⁷ Mira Burri-Nenova, *Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship*, 17 INT'L J. CULTURAL

aspects of digital content and software creation, development, production, and management these diverse projects are linked by a common thread of a commitment to diverse forms of access and nuanced notions of acknowledgment. That is, not simply a focus on crossing or bridging a divide, but rather, and more significantly, providing the tools, infrastructure, and support necessary to open the back door in order to design, create, and collaborate based on a serious recognition of indigenous systems of information management, circulation, and distribution within already functioning ethical and obligation-based property systems. This type of recognition (highlighted in the case studies that follow) depends on taking pre-existing indigenous systems of information management and sociality and integrating them into and building from them to create digital systems. It also opens the possibility of shifting away from a dominant property and ownership legal model to make sense of indigenous relations with the cultural materials and knowledge to a model of stewardship.¹⁸ This shift does not cut out the possibility of circulation or sharing. In fact, evidence from over 20 years of working within the legal framework of the Native American Graves Protection and Repatriation Act (NAGPRA) in the United States shows that joint management, shared custodianship, and negotiated stewardship of indigenous cultural materials held in national museums has resulted in a wider array of materials in the public domain and on display.¹⁹ At the same time, “in pursuing claims to traditional medicinal knowledge, for instance, indigenous groups do not commonly seek the power to prevent access by the rest of the world, but rather a role in the dynamic processes of developing and disseminating and seeking compensation for the good.”²⁰ These cases show that what is happening in the legal realm is based on indigenous peoples advancing an agenda, with the foundation being regaining a role in determining a shared, but not a

PROP, 33 (2010); Kimberly Christen, *Changing the Default: Taking Aboriginal Systems of Accountability Seriously*, 2 *WORLD ANTHROPOLOGIES NETWORK* 115, (2006); Jane Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, Presentation at the ALA and The MacArthur Foundation Conference: Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena (May 5–7, 2005).

¹⁸ Carpenter, *supra* note 1.

¹⁹ Martha Graham and Nell Murphy, *NAGPRA AT 20: Museum Collections and Reconnections*, 33 *MUSEUM ANTHROPOLOGY*, 105, (2010); Aaron Glass, *Return to Sender: On the Politics of Cultural Property and the Proper Address of Art*, 9 *J. MATERIAL CULTURE* 115 (2004); Stephen E. Nash and Chip Colwell-Chanthaphonh, *Nagpra After Two Decades*, 33 *MUSEUM ANTHROPOLOGY* 99 (2010).

²⁰ Carpenter, *supra* note 1, at 1102.

single, route for cultural creation. Recognizing this pushes aside the normative assumptions of monetary incentives and individual frameworks as the primary models for relations to and productions of cultural materials and knowledge. Indigenous peoples, similar to corporations and nations, seek an equitable bargaining position and a voice that cannot be drowned out or downplayed.

14.3 THE MARGINS: INDIGENOUS DIGITAL PRODUCTIONS AND THE MAKING OF CULTURE

Debates focused too squarely on legal solutions miss the strategic side-stepping of entrenched legal frameworks and the creative and adaptive measures by those on the margins of the mainstream digital discourse. Indigenous digital productions, software, archives, websites, and Web portals are conscious applications of traditional (though adaptable) cultural protocols to bend technology and redefine legal frameworks to meet specific cultural and social ends. As such, they give scholars a chance to critique normative legal and social frameworks for cultural production and circulation, as well as provide models for new ways of defining digital technologies and the policies that frame their creation and use. For example, scholars and policymakers may ask to what extent the individual versus community binary is useful in distinguishing ownership rights and protections.²¹ How might understanding a continuum of social responsibility and obligations within overlapping social networks help frame our notions of circulation through which objects get created, are transported, reused, and mobilized in service of both commercial and non-commercial activities? Placing these concerns at the center of these debates allows one to tackle head on the challenges and the benefits of examining indigenous cultural knowledge systems in relation to both legal and extralegal

²¹ Many scholars have pointed to the difficulty of accounting for indigenous communal (i.e. not individual) ownership when dealing with IPR. This debate often falls into an individual = Western, communal = indigenous trap which misses the nuances of indigenous social systems that rely on more granular levels of stewardship and care for both tangible and intangible cultural materials. Carpenter, *supra* note 1; MOLLY TORSÉN AND JANE ANDERSON, WIPO, INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES: LEGAL ISSUES AND PRACTICAL OPTIONS FOR MUSEUMS, LIBRARIES AND ARCHIVES (2010), available at <http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf>; Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, 12 INT'L J. CULTURAL PROP. 315 (2005).

frameworks. Indigenous community-driven projects aimed at both the protection and the production of cultural knowledge define an emergent digital field of sociality that has the potential to inform dominant debates about the role of digital technologies in modern society, including such divisive debates over privacy, remix, and ownership or stewardship of intangible materials.

In what follows, I examine in more detail three indigenous projects as case studies that provide perspective from the margins of the digital landscape. These cases help to frame the larger socio–techno–legal debates with an eye toward redefining the claims of, and grounds for, legal, social, and political interventions into indigenous cultural production and the circulation of cultural heritage materials and traditional knowledge in its many forms and formats.

14.3.1 IsumaTV: Framing the Present

In Canada, First Nations groups have banded together to produce IsumaTV, a free online platform for creating and distributing videos on multiple indigenous community and individual channels (<http://www.isuma.tv/>). Reaching out to indigenous nations, communities, and individuals worldwide, IsumaTV allows for a range of production capabilities and circulation routes. Launched by Igloolik Isuma Productions in 2008, IsumaTV's goal is to "enable Indigenous people to express reality in their own voices: views of the past, anxieties about the present and hopes for a more decent and honorable future."²² It is crucial for understanding their goals and work to foreground that IsumaTV recognizes that indigenous anxieties stem from colonial pasts and post-colonial presents where their voices, lives, and values are regularly erased, romanticized, and/or marginalized. Taking this marginalization seriously by emphasizing a shift in authorial voice and expert opinion, IsumaTV works at one and the same time to alter the field of online video and television, while also empowering indigenous peoples with the technologies and tools to drive their own specific and diverse agendas. Their technological platform also recognizes the need to allow communities or individuals to control the flow of their productions based on their own cultural, commercial, social, or political needs.

Instead of an open by default setting, IsumaTV allows individual channels to be partially open to the general public while at the same time allowing members full access. Much as Flickr or Facebook allow individuals

²² ISUMATV, <http://www.isuma.tv/hi/en/about-us> (last time visited 8.25.11).

to tailor their own privacy settings, IsumaTV recognizes that knowledge circulation is a political, ethical, and cultural choice that needs to be determined by the communities and individuals themselves who maintain their channels. IsumaTV allows users to determine settings that provide a range of viewership options, not just open or shut. Although openness is the norm and goal for some progressive technologists, IsumaTV highlights the need to question the underlying assumptions about openness and its presumed benefits to everyone. Much like the calls to embrace a single vision of the cosmopolitan citizen, appeals to the universal benefits of moving images or tangible materials belonging to everyone bespeaks an arrogance about and a misunderstanding of the actual diversity concerning notions of “privacy,” “property,” “community,” “knowledge” and the like globally. Instead of pandering to a global village view where everyone shares the same sets of ideas (and their corresponding ideologies) IsumaTV makes no claims to universals, while at the same time emphasizing dialogue between people about such pressing legal and social issues as policy reform, media rights, and so on.²³

With indigenous concerns central to their mission and mandate, IsumaTV also makes the exchange and preservation of knowledge and materials key to its work, providing services to restore and maintain indigenous collections and thus merging indigenous concerns with production and preservation in one platform. As Teague Schneiter remarks:

It [IsumaTV] seeks to use “the power and immediacy of the Web” to improve communication and exchange within and between Indigenous and non-Indigenous peoples by encouraging the creation of content that features native voices. It creates opportunities not only to record, store and present content, but to share and create an active community around Indigenous knowledge, languages, experiences, opinions, and ways of life. Not only is a site devoted to Indigenous media with sharing capabilities, but increasingly they are becoming actively involved in campaigns, projects and initiatives to open peoples’ eyes to Indigenous realities.²⁴

Schneiter rightly recognizes that the site’s multifunctionality produces a dynamic platform not just or even mainly for video-sharing, but also for dialogue and outreach to and between people, communities, and

²³ See Teague Schneiter, *Ethical Presentation of Indigenous Media in the Age of Open Video: Cultivating Collaboration, Sovereignty and Sustainability*, in VIDEO VORTEX READER II: MOVING IMAGES BEYOND YOUTUBE 147 (Geert Lovink and Rachel Somers Miles, eds, 2011).

²⁴ Teague Schneiter, *Isumatv: Indigenous Community Media and Online Activism*, THE HUB (OCT. 5, 2009), <http://hub.witness.org/en/blog/isumatv>.

collectives. While it may be convenient to see IsumaTV as just another niche market – as YouTube for a specific subculture – this view erases the intentionality of its creators to leverage a specific set of technologies to create a political and action-oriented community of users focused on the specific (and changing) needs of indigenous peoples globally. IsumaTV takes an idea like YouTube and particularizes and historicizes its technological reach, understanding that YouTube does not meet the particular circulation or exchange needs of many indigenous peoples or communities in an ethical, private, or public sense.

In their schema, IsumaTV has several focus areas based on cross-cutting indigenous topics: language revitalization, cultural revitalization, climate change, mining, and reconciliation. They are also a self-proclaimed “action-oriented” platform, with an eye toward empowering people and influencing debate around significant global issues. In their attempt to make indigenous knowledge a viable part of the global discussion on climate change, for example, producers have worked together across communities to design a film and multimedia campaign, *Inuit Knowledge and Climate Change*, which includes its own dedicated IKCC channel. The project aims to:

Promote the importance of Inuit knowledge and human rights in the global discussion of climate change. Using a collaborative approach to video creation, Inuit filmmaker Zacharias Kunuk and his team from Igloolik Isuma Productions (the media production company that started IsumaTV) have teamed up with researcher Ian Mauro, as well as a community advisory board, to document Inuit knowledge in several communities in Nunavut. Filming elders and other locals in their native language of Inuktitut speaking about impacts and associated adaptation strategies, this project makes an important contribution to the knowledge pool on climate change.²⁵

The project has sparked much interest by outsiders and has also been used to strengthen policy discussions at the international level. Starting at the local level and engaging with knowledgeable community members, the project emphasizes the necessity of linking indigenous knowledge to the dominant debates that normally fuel decision-making. Watching the trailers, following the blog, and keeping up with their latest movements on Facebook, one comes away with a diverse set of ideas and instances of contemporary indigenous people, culture, activities, and goals for their futures.

Scanning the over 400 channels in operation currently (as of June 2011) one can see the unique range of indigenous voices in video that make IsumaTV a truly revolutionary portal. A random sampling shows a range

²⁵ *Id.*

of programming: (1) “‘First Talk with Tamara Bull,’ the first Indigenous talk show. With 35 half-hour, episodes airing nationally on OMNI & APTN;” (2) ANT: “Indigenous solidarity activism focusing mostly on the struggle of the Six Nations of the Grand River;” (3) the Ironwood Log Project: “Films on Native wisdom, first results of the Ironwood Log Project, a non-commercial educational initiative dedicated to the wide spreading of Native teachings;” and (4) Yindjibarndi Creation, “Yindjibarndi people are from the Fortescue River valley and Hamersley Ranges region of the Pilbara, Western Australia.” From the specific to the general, the local to the pan-indigenous, these channels showcase the variability as well as the unity of indigenous programming, issues, and agendas. What makes IsumaTV so compelling in the context of digital technology and its reach across legal and social frames is its focused, dedicated, and conscious application of multiple indigenous needs and agendas when working with the technological tools to facilitate social, legal, and cultural empowerment that both understands current legal frameworks, and works around them using technological platforms that provide the contours of social control versus a legal straightjacket.

14.3.2 Mukurtu: The Logic of Cultural Protocols

While IsumaTV implicitly grapples with questions of access in relation to both intellectual property rights and indigenous systems of information management and control, the Mukurtu project I have directed takes these tensions as its core focus. Mukurtu began production in 2005 as a dedicated, stand-alone digital archive project with the Warumungu community of Central Australia. Mukurtu began as a community-driven project aimed at addressing the particular needs of the Warumungu community relating to the preservation, access, and distribution of their newly digitized cultural and familial materials within the community. After years of collaboration between Warumungu community members, employees of the Nyinkka Nyunyu Art and Culture Centre in Tennant Creek, software designers and engineers, and myself, in August 2007 we launched the Mukurtu Wumpurrarni-kari archive – a custom-built, browser-based digital archive system that uses Warumungu cultural protocols to define the circulation and distribution of their digital materials and knowledge.²⁶

²⁶ For more details: Kimberly Christen, *Archival Challenges and Digital Solutions in Aboriginal Australia*, 8 SAA ARCHAEOLOGICAL REC. 21 (2008). The idea for and creation of the archive was driven by community members especially those involved in the production of the Nyinkka Nyunyu Art and Culture Centre. See also: MUKURTU, <http://www.mukurtu.org>.

In the infrastructure and interface of the archive two components work together to provide granular and dynamic access to content filtered through a predetermined set of cultural protocols:

1. An extensive user profile for every member of the community that acts as a social filter providing graduated access based on ritual status, community status, family relationships, gender, age and country relations. These parameters were defined by the community of users and are changeable and updateable.
2. An easy-to-use upload and tagging system that directly links content to a network of pre-existing social and ethical obligations between community members.²⁷

This technological frame provides a unique archive experience for each user. In practice what that means is that as soon as someone logs on to the system with their individual identification (ID) and password, the system reads their profile (male, flying fox, Patta country, elder, and so on) and matches the user profile to all the content with these particular constraints. In essence, then, each member views only those materials to which they are related and for which they share a responsibility to maintain.²⁸ These protocols, as well as the individual's user profile, were and continue to be defined and updated by the community. For example, the community wanted the ability to tag materials with categories of gender in order to define men's and women's business. These categories of inclusion already exist within the community and mirror social, cultural, and political relations users have to physical places on the landscape, relatives, and traditional knowledge. Some "business" (ritual practices and associated knowledge) is only open to some men and/or women. In practice men and women often know about each other's business, but they do not divulge the knowledge, nor do they or can they act alone to maintain these practices. This is a complimentary system in which men and women and

²⁷ See: <http://www.youtube.com/watch?v=jpIZjIO1rkU> for a video describing the archive's functionality (last accessed 9.06.11)

²⁸ In this example one's user profile is generated by fields corresponding to one's gender, ritual status, country relationships, and family's country and community status. For the Warumungu, as with most Aboriginal communities throughout Australia, people are related to specific areas of land through their mother and father and their corresponding kin groups, they are also related to specific "other-than-human" relatives and ancestors that place them in very specific types of reciprocal and obligation-bound relationships. *See more generally* KIMBERLY CHRISTEN, *ABORIGINAL BUSINESS: ALLIANCES IN A REMOTE AUSTRALIAN TOWN* (2009).

related community members must act and perform knowledge together in order to maintain it, pass it on and continue to build on, it for new generations.²⁹

Archive administrators can change the protocols at any time, mirroring the cultural dynamism of the community itself, and individual users can suggest changes, edits, modifications on restrictions, and make changes to their profile all from within the user interface. In fact, we initially created the interface so that it would automatically cover all images of people marked as deceased within the archive's metadata fields. Following local protocols around viewing images of the deceased, we built in this function to allow family members to conceal these images for any amount of time. However, upon testing the interface in the community, we found that some individuals did want to view images of deceased relatives. One of the community members proposed a solution to have thumbnail views on the main page and then a pop-up warning after clicking the image. This partial covering was acceptable to the entire team. Now, in the archive, all images are first viewed in a thumbnail size and if one clicks on an image of a deceased person they will be warned and then prompted by a pop-up window with a message asking if they want to continue through to see the full-size image.³⁰ Much as digital photography has begun to alter protocols around the display of images, so this digital platform is part of another set of cultural negotiations. Like all peoples everywhere, the Warumungu continually alter and adapt their cultural norms in conversation with and in relation to sets of varied technological and social influences. This is neither the death of tradition, nor the unwieldy march of Western cultural homogenization. Instead, it is the thoughtful and sometimes controversial process of cultural change at a micro-scale.

As a tool, the Mukurtu Wumpurrarni-kari archive provides a set of social speed bumps to slow people down as they upload, decide on circulation and distribution routes, and create new content. It reflects one community of users' needs, desires, and ongoing offline commitment to a shared stewardship for their cultural heritage materials. Many indigenous communities globally share this basic framework of cultural protocols and tradition-based circulation parameters, but need a tool to adapt to their specific context. My collaborators and I are now in the process of creating

²⁹ Kimberly Christen, *Tracking Properness: Repackaging Culture in a Remote Australian Town*, 21 *CULTURAL ANTHROPOLOGY* 416 (2006).

³⁰ The Digital Dynamics Across Cultures website provides an example of these cultural protocols for viewing materials; <http://www.vectorsjournal.org/issues/3/digitaldynamics/> (accessed 9.06.11).

a free, open-source, content management tool and digital archive platform that provides indigenous communities with a one-stop software package to manage their cultural materials and knowledge, using their own cultural protocols and intellectual property systems that already provide mechanisms for the creation and circulation of cultural materials. Mukurtu, still in its beta format, aims to empower indigenous and underserved communities to manage, preserve, protect, and share their cultural heritage and traditional knowledge using their own protocols and social models. The software allows users to customize their archive based on their own sets of cultural protocols, granular access levels for content, and specific licensing needs.³¹

Colonial histories of collection, contemporary intellectual property rights laws, and current standardized content management systems all combine to make it difficult for indigenous groups to: (1) share and exchange information, traditional knowledge, and digital collections in culturally appropriate and socially responsible ways; and (2) manage and preserve their communities' cultural heritage and knowledge. What became apparent to me as I consulted with indigenous groups interested in a digital archive platform like Mukurtu was that indigenous libraries, museums, cultural centers, and archives are underserved by both off-the-shelf proprietary and open-source content management systems and digital archive and Web production tools that do not account for indigenous communities in terms of their:

- cultural protocols surrounding access and distribution of digital materials;
- diverse and multiple non-Western intellectual property systems;
- histories of exclusion from content preservation and metadata generation sources;
- traditional knowledge relating to collections and specific items;
- need to exchange metadata with national collecting institutions that may hold collections relating to their communities; and
- remote locations and lack of technological infrastructure.

Mukurtu seeks to address these intertwined needs by providing not just a content management tool, but also a platform that is flexible enough to meet both the technical and cultural needs of diverse populations. In order

³¹ Funded by a National Endowment for the Humanities Digital Start-Up Grant. See MUKURTU, <http://www.mukurtu.org> 9.01.11 and see the Mukurtu documentation wiki: http://www.mukurtu.org/wiki/main_page.

to meet this goal, we have: consulted widely with indigenous communities and representatives from Kenya to Oklahoma to define a base set of needs and templates for the system that can cater to a variety of needs; created an advisory board that includes members from the Library of Congress as well as indigenous communities in order to ensure that institutional standards are balanced with cultural heterogeneity; collaborated with SmallBean Inc.,³² to ensure that the least connected among us will be served by both mobile services and offline products; upgraded to using Drupal 7 to ensure sustainability and stability over time by tapping into a network of worldwide developers; and partnered with the Traditional Knowledge Division of the World Intellectual Property Organization (WIPO) to produce a set of licenses that reflect the needs of indigenous communities in relation to their cultural heritage materials.³³

One of the most exciting aspects of Mukurtu's development is the creation of a traditional knowledge license option for content. This work grew out of our team's conversations with individual nations, tribes, and communities as well as our consultations with WIPO. As it turns out, WIPO representatives were hearing a similar set of concerns from communities as we were: the need to expand the range of choices for protecting their cultural heritage and intellectual property once it was within the public domain or already in a commercial setting. To this end, we have been working with IP lawyers and WIPO's legal team to draft a set of licenses that give communities flexibility in their licensing and agreement choices. In the beta version of Mukurtu we have options for both item-level and collection-level licenses that reflect standard copyright, creative commons choices, and "traditional knowledge licenses" that provide a range of choices unique to indigenous concerns:

1. Standard copyright:
 - a. "You can protect your original creative works with standard copyright, which applies the moment you record the work. Others will need a license to make more than minimal (or 'fair use') copies. Copyright also protects against performance and modification."

³² SmallBean's "Citizen Archivist Project" to train and empower local communities to document and archive their oral histories. We are working with SmallBean Inc. to integrate their Smallbean Android application with the Mukurtu platform. The Google Android mobile application extends the ability of indigenous populations to collect, organize and upload this data from remote locations lacking traditional technological infrastructure. *Citizen Archivist Project*, SMALLBEAN, <http://www.smallbean.org/cap> (last accessed 8.25.2011).

³³ See Mukurtu, *supra* note 21 for more information.

2. Creative commons:
 - a. attribution, non-commercial, no-derivatives, <http://creativecommons.org/licenses/by-nc-nd/3.0/>;
 - b. attribution, share-alike, http://creativecommons.org/licenses/by-sa/3.0/deed.en_GB.
3. Traditional knowledge license and label options (in development):
 - a. Traditional knowledge licenses recognize that Indigenous communities have different access and use expectations in regards to their cultural material and traditional cultural expressions. These different expectations of access and use depend heavily on the material itself and these licenses help identify this material. In particular they are designed to identify and clarify which material has community-specific, gendered and high-level restrictions. This is especially with regards to the circulation of sacred and/or ceremonial material. Additionally, these licenses recognize that use of specific material might require special permission and appropriate acknowledgement of the source community. These licenses are not copyright licenses and therefore do not change already existing rights and responsibilities of copyright owners and copyright users. These licenses are additional agreements that acknowledge that with some material, special rules governing access and use of that material also exist. It asks all parties to be sensitive to the Indigenous customs and laws that govern this material, and that some material in the archive is sensitive, has restrictions and is not free to be used by anyone at any time.
 - b. TK options under development:³⁴
 - i. community use only;
 - ii. circulation limited to traditional practitioners;
 - iii. gendered materials;
 - iv. sacred materials: permission required from community leaders to use, circulate;
 - v. attribution – defined granularly by a list or set of group of people;
 - vi. community-owned commercial;
 - vii. non-community-owned commercial;

³⁴ These licenses are under development. We are drafting “human readable” and legal text for each license. See the Mukurtu documentation wiki for full versions of the licenses and labels: http://www.mukurtu.org/wiki/Manual:Traditional_Knowledge_Licenses.

- viii. public domain commercial;
 - ix. TK labels (social and educative for external use).
- Within each type, users can make specific designations locally or choose from pre-determined templates with jargon-free terminology.

The “traditional knowledge license” option, or what in development we also called the do-it-yourself (DIY) license option, gives Mukurtu adopters the option to control the circulation, distribution, and access of their materials externally in a recognized legal format. And because they may not own or have copyright to much of what they may want to include in their archive, we have also provided TK labels as a social tool to educate archive users to the cultural and ethical systems in which materials circulate, even as they fall outside legal frames. As part of Mukurtu’s education and training components, then, we are committed to providing communities with resources to make the best decisions they can for what they wish to accomplish. Along with the software tool, we will provide training and educational materials that will be bundled with the software and videos online that will provide tutorials. In relation to licensing options, we suggest that communities, institutions, or whomsoever uses the tool follow a few steps to define their needs:

1. Identify the nature of the material in the archive (text, photos, audio-visual, sound etc.), because different IP rules and considerations apply to each.
2. Determine what rights exist in those specific materials? There are two main options: conventional IP rights (such as copyright) and rights under customary law.
3. Define who owns those rights. Conventional IP rights may or may not vest in the communities themselves. They will often vest in the party who made the recordings that are in the archive, and these rights should be assigned to the communities so they can manage them. Rights under customary law belong to the communities, but they do not bind third parties. In short, IP rights management software for use by communities only makes sense if there are: (a) enforceable rights; that are (b) held by the communities. Without prior intervention, such as assignments, this may not be the case very often.

It is essential for each community or institution to decide on what it wants to allow others to do with their materials: there is no single approach, and of course there may not be agreement internally with what to do with any or all materials. Like state or local museums or archives,

indigenous-run repositories or small collectives wishing to control their resources will have to negotiate with one another face-to-face and determine the contours of their needs. Mukurtu allows for constant updating; cultural protocols, access permissions, and licenses are always updateable. Simply stating that IP rights and indigenous knowledge systems are at odds, as many commentators have done, does not provide solutions for the tensions, fraud, and abuse of materials that are taking place. What Mukurtu offers is a set of tools designed to work in conversation with other social and political models and discussions. These are not an endpoint, but a beginning.

The licensing options provided work in tandem with the social speed bumps in place in the archive's architecture and the cultural protocols that are neither strictly legal nor wholly social. Mukurtu's interest in creating these flexible licenses was to align the already-existing international legal structure with the needs of these communities. Much like Creative Commons saw a gap in existing copyright law and sought to fill it with a more flexible and user-driven system, Mukurtu aims to cater to the needs of indigenous communities who have been left out of progressive legal frameworks (like Creative Commons) because their specific needs do not fall neatly into either individual or communal, commercial or private, public domain or share-alike frameworks.³⁵ Providing licenses in addition to the cultural and social frame of Mukurtu's protocol-based architecture balances the desire by some indigenous communities to implement a range of strategies to preserve, protect, and continue to produce cultural materials and knowledge.

14.3.3 FirstVoices: Speaking Back, Moving Forward

Much like IsumaTV and Mukurtu, FirstVoices emphasizes community-driven solutions and technological assistance with the challenges indigenous peoples face. FirstVoices is a language archive initiative launched by the First Peoples' Cultural Foundation in 2003 and managed by the First Peoples' Heritage, Language and Culture Council. FirstVoices provides support for language revitalization for Aboriginal and First Nations groups in Canada, with a growing interest among some indigenous groups in the United States and Australia. The FirstVoices program is an:

³⁵ Kimberly Christen, *Openness and Ownership*, DIGITAL PLANET - OPENNESS IN A DIGITAL AGE (Feb. 22, 2011), http://www.bbc.co.uk/iplayer/episode/p00dt2rc/Click_22_02_2011/. Jane Anderson, *Indigenous Knowledge/Traditional Knowledge and Intellectual Property Issues*, Centre for the Public Domain, Duke University (2010).

Innovative and dynamic linking of Aboriginal heritage and 21st century information technology. Through the development and application of internet-based language archiving and education products and services, FirstVoices provides the means for grassroots community-based Aboriginal language authorities to document and share their rich linguistic heritage with community members anywhere in the world.³⁶

FirstVoices is not alone in their quest to aid indigenous communities with language preservation and revitalization. Working against language endangerment and determining the pathways to linguistic revitalization is one of the main, cross-cutting issues facing indigenous communities globally. Linguists estimate that a language “dies” every week.³⁷ What indigenous peoples know well is that with the erosion of their languages comes the slow loss of cultural traditions and knowledge. Indigenous language loss is bound to histories of missionization, colonization, and assimilation in oftentimes cruel forms.³⁸ Therefore, bringing back or revitalizing endangered languages is an emotional and sometimes painful experience for individuals and communities. Digital technologies have recently become an ally in this process. The FirstVoices initiative harnesses both the strength of community members and the power of digital technology to create sets of individual learning and archiving tools aiming to aid in fostering and promoting grassroots revitalization work.

When I visited the FirstVoices offices in Victoria in 2007, Peter Brand, the FirstVoices Coordinator, took me through the extensive toolkit and educational resources available to communities wishing to embark on language preservation and revitalization. I met Brand about four years prior when he visited Tennant Creek. A schoolteacher in the area in the 1970s, Brand was keen to reunite with the now adult Warumungu people who he once taught as feisty primary school students. I was already working with community members at the not-yet-opened Nyinkka Nyunyu Art

³⁶ Personal communication: Peter Brand, the FirstVoices Coordinator, dated June 16, 2011.

³⁷ NICHOLAS EVANS, DYING WORDS: ENDANGERED LANGUAGES AND WHAT THEY HAVE TO TELL US (2010); Lenore Grenoble, *Endangered Languages*, in 1000 LANGUAGES: THE WORLDWIDE HISTORY OF LIVING AND LOST TONGUES (Peter K. Austin, ed., 2008).

³⁸ Teresa Evans-Campbell, *Historical Trauma in American Indian/Native Alaska Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families, and Communities*, 23 J. INTERPERSONAL VIOLENCE 316 (2008); HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS (Wilcomb E. Washburn, ed., 1988); Leanne Hinton, *Languages and Language Programs*, in HANDBOOK OF NORTH AMERICAN INDIANS: INDIANS IN CONTEMPORARY SOCIETY 351 (Garrick A. Bailey, ed., 2008).

and Culture Centre in the town. Our idea for a “photo archive” was just blooming.³⁹ Brand was looking to add Warumungu as the first Australian Aboriginal language in the FirstVoices suite; however, there were not enough resources at the time to commit fully to the project. But Brand’s ideas, and the FirstVoices program, made an impact on the community and on our collective thinking about what would eventually become the Mukurtu Wumpurrarni-kari archive.

At the FirstVoices offices it was clear that community empowerment was the main focus of its strategy (online or off). Brand and his team have worked over the years directly with First Nations communities to produce online language tools that engage with specific community needs including K-12 (Kindergarten to 12th grade) education and curriculum development. One of the most innovative aspects of their process is their own toolkit for language recording. Brand showed me the kit, custom-made, with a case, microphone, recorder, and all the necessary pieces to record high-quality audio to be uploaded to the site.⁴⁰ This step is crucial in providing communities with their own sense of “buy-in.” For too long, linguists, anthropologists, or other interested outsiders documented languages with little in the way of community return. While most certainly the days of colonial anthropology are behind us, the memories linger in many collaborative efforts. Like Mukurtu, FirstVoices puts the controls of the technology in the hands of the communities. They drive the process. Education and training are essential and ongoing components and commitments. The result is that no two FirstVoices sites are the same, since each community defines their language needs and the best fit of tools to reach their goals. Archiving their languages is just one piece of the puzzle. As any linguist will tell you, if children are not speaking the language on the playground it is not going to be passed on. Therefore, like IsumaTV and Mukurtu, FirstVoices emphasizes a living archive approach where community members contribute and document their languages as they are used and for continued use.

In 2010 FirstVoices created an iPhone application to further the goals of language empowerment. The mobile application has most recently been used for the Halq’emeylem language of the Sto:lo nation and the SENĆOŦEN language of the Saanich nation. In describing the new tool

³⁹ Kimberly Christen, *Following the Nyinkka: Relations of Respect and Obligations to Act in the Collaborative Work of Aboriginal Cultural Centers*, 30 MUSEUM ANTHROPOLOGY 101 (2007).

⁴⁰ The basic kit is outlined here: FIRST VOICES AUDIO RECORDING BUYERS GUIDE, http://www.firstvoices.com/Audio_Recording_Buyers_Guide.htm (last accessed June 29, 2011).

that is linked in with the online FirstVoices archive, Brand describes the process: “You can search the content in English or scroll through the SENĆOŦEN archive to find the word – *seplil* (bread) – as well as hear how it’s pronounced and see a picture. You can also take your own picture of bread and include that as the image in your personal dictionary.”⁴¹ The Halq’emeylem words had previously been recorded and archived on the FirstVoices site. Merging that active archive with the iPhone application provides one more avenue for language use and education. Pauline Terbasket, Chair of the First Peoples’ Cultural Foundation, summed up the connections this way: “Using popular technology to make these languages more accessible is another wonderful step towards our goal of hearing our people speak their languages in their everyday lives. We have to do this now, before it’s too late and we lose that chance forever.”⁴²

Balancing the need to entice children whose lives are framed by technology and tradition, language initiatives must work with the platforms in everyday use. To that end, FirstVoices is currently developing a Mobile Language Lab to include sets of Apple iPads bundled with their own mini server and Wi-Fi antenna to deliver highly interactive language lessons in a self-contained local area network (LAN). When the LAN server is connected to the Internet, student progress tracking results are relayed to the main FirstVoices Language Tutor server. These tools are intended to provide high-speed state-of-the-art language teaching resources to remote First Nations communities whether or not they have access to broadband. Often relegated to using dated computer equipment, the iPad Language Labs will provide indigenous language students with the latest technology tools to continue their language learning.

Similar to other indigenous organizations, FirstVoices has leveraged corporate-based technologies and platforms to further their own work. In the Canadian territory of Nunavut, for example, indigenous leaders partnered with Microsoft to create a localized version of Microsoft Office using the Inuktitut language and “culturally appropriate terms” for the circulation of information to the community.⁴³ Indigenous owned and run technology firm Thornton Media Inc. similarly uses the Nintendo

⁴¹ Paul J. Henderson, *Endangered Tongue: “Neat little tool” helps save Sto:lo language*, THE TIMES, Jan. 4, 2011, <http://www.chilliwacktimes.com/life/Endangered+tongue/4056610/story.html> (last visited June 16, 2011).

⁴² *Id.*

⁴³ *Microsoft in Inuktitut-Project History*, PIRURVIK CENTRE FOR INUIT LANG., CULTURE AND WELL-BEING, <http://www.pirurvik.ca/en/productions/microsoft/history> (last visited June 16, 2011).

DSi gaming platform to create mobile language tools for native children, and their “RezWorld” production is a full immersion gaming world that teaches native languages.⁴⁴ Partnering with or using corporate-driven platforms or systems is one way that indigenous communities and businesses engage in practical partnerships that build from, but do not necessarily reproduce the same capitalist or corporate agendas.

14.4 THE PAY-OFF: EXTRA-LEGAL SOLUTIONS AND INTERVENTIONS

In a recent overview of the legal, social, and political dilemmas faced by indigenous peoples in relation to changing conceptions of cultural property, Rosemary Coombe suggests that: “Digital communications have amplified concerns in this area, increasing the risks of misappropriation and decontextualization while also offering new opportunities for communities to benefit from promoting new uses for traditional cultural expressions that promote sustainable development.”⁴⁵ Coombe stresses the shift since the mid-1990s seen both (and simultaneously) in the growth of digital technologies and in the move of “culture” to center stage in debates about the ethical and legal circulation of certain forms of property – whether it is labeled “heritage” or “traditional cultural expressions.” At one and the same time, indigenous peoples have used technologies and the law to reframe debates about a host of political, social, and cultural issues that may only tangentially have to do with property (tangible or not). In fact, what is clear from the above case studies, as well as in the work of Coombe and others, is that legal solutions remain only one – often sidelined – form of negotiation between indigenous communities, nations, or collectives and corporations, nation-states, and/or international legal bodies.⁴⁶ Indigenous communities have engaged in grassroots activities

⁴⁴ *Language tools for Indian Country*, THORNTON MEDIA INC., http://www.ndnlanguage.com/nintendo_dsi.html (last visited June 16, 2011).

⁴⁵ Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANN. REV. L. & SOC. SCI. 393 (2009).

⁴⁶ Mira Burri-Nenova, *Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship*, 17 INT’L J. CULTURAL PROP. 33 (2010); Coombe, *supra* note 42; Elizabeth Burns Coleman and Rosemary J. Coombe, *A Broken Record: Subjecting Music To Cultural Rights*, in ETHICS OF CULTURAL APPROPRIATION 173 (James O. Young and Conrad G. Brunck, eds, 2009); Shane Greene, *Indigenous People Incorporated? Culture As Politics, Culture As Property In Pharmaceutical Bioprospecting*, 45 Current Anthropology 211 (2004); Christina F. Kreps, *Indigenous Curation, Museums, And Intangible Cultural*

that merge their own interests and agendas with those of other interested parties to create local, adaptable, and scalable models for divergent forms of information preservation, circulation, and distribution. These projects map indigenous uses of digital technologies onto and within existing legal and social discourse, providing an alternative view of the landscape of digital production and circulation.

What is missing in this landscape is not the creativity or openness of indigenous peoples to engage with technologies, legal systems, social models, or institutional regimes. But, instead, what is missing is the same amount of openness and creativity from non-indigenous players to recognize, respect, and integrate indigenous models of information management into the mainstream. Debates about digital technology and openness tend toward legal frameworks that emphasize individual or corporate ownership and the creation of a robust public domain by the addition of more information. But these legal systems cannot or will not deal with more robust social systems in which access and stewardship revolve around ethical obligations between subgroups within a population (so they are neither communal nor individual).⁴⁷

It is the paradigm of “liberal individualism” that derails many efforts to understand indigenous social sensibilities and varied notions of and relations to material culture, land, and traditional knowledge.⁴⁸ Indigenous peoples’ obligations to and social relations with not always predictable subgroups pushes against an individual versus community model of rights and/or ownership. Instead, these systems of accountability rely on a type of dynamism that, to date, cannot be accounted for in Western legal systems. Some digital platforms allow indigenous peoples to mirror these interlocking systems of obligations without at the same time freezing them into place. Digital platforms like Mukurtu or IsumaTV provide elastic systems that acknowledge these granular and obligation-based relations. These systems are not replacements for or the usurpation of on-the-ground negotiations and cultural change, but they do provide one part in a multipart strategy for indigenous communities to define the contours of how cultural change happens and on whose terms. Like all representative communities there will never be total agreement, and yet consensus will and does happen. Indigenous peoples should not be penalized or demonized for wanting to balance tradition and modernity on their own

Heritage, in INTANGIBLE HERITAGE 193 (Laurajane Smith and Natsuko Akagawa, eds, 2008).

⁴⁷ Carpenter, *supra* note 1.

⁴⁸ *Id.* at 1028.

terms, for this is the type of cultural work in which we are all involved. The difference is this: indigenous peoples continue to be dehumanized when dominant discourses and political frameworks demand that they speak with one voice, march to the drum of liberalism, and bend to dominant legal and technical perspectives. If critics of indigenous claims to, and desires for, both stronger IP frameworks and negotiated extralegal solutions look past their own sensibilities and histories of privilege, then they may start to see that these are not all-or-nothing games. This is the messy, uneven, and sometimes impractical work of cultural production writ large. As Anne Balsamo reminds us, "In the active engagement between human beings and technological elements, culture too is reworked through the development of new narratives, new myths, new rituals, new modes of expression and new knowledges that make the innovations meaningful."⁴⁹

The digital landscape might provide the illusion of an even playing field, but the zeros and ones are never without their cultural constraints and human-added narratives. As Pamela Samuelson rightly notes, indigenous peoples and their advocates often have "fears that unreflective public domain advocacy may undermine the distributive justice claims of indigenous peoples arising from Western exploitations of their cultural resources."⁵⁰ Those who point to the public domain as the answer to restrictive IP regimes underestimate the limits and ambiguity of the public domain as a model for ethical information distribution. The current legal system and social narratives we have about digital technologies continue to devalue indigenous knowledge systems by emphasizing openness and freedom, without considering the value of graduated systems of access that are not oppressive, but that allow communities and collectives to engage in ethical negotiations over the flow of all types of information. These debates happen with or without the language of intellectual property rights, as communities continue to debate and change within and outside the confines of legal frameworks.

Indigenous systems of knowledge management and circulation provide a new way to think about our digital ecosystem. Examining the margins helps us see that the center has produced a set of polarized narratives that often obscure the types of dynamism the digital landscape can actually afford. Highlighting indigenous systems provides a roadmap for accepting other ways of seeing and not seeing, without falling into entrenched

⁴⁹ ANNE BALSAMO: *DESIGNING CULTURE: THE TECHNOLOGICAL IMAGINATION AT WORK* (2011).

⁵⁰ Pamela Samuelson, *Enriching Discourse on Public Domains*, 55 *DUKE L. J.* 104, 142–43 (2006).

notions of privacy, the public domain, or creativity that demand staunchly Western frameworks. Beyond just acceptance, though, I am suggesting that recognizing indigenous knowledge systems allows us to expand the dominant digital narrative and thus produce a digital culture that can instigate change in our intellectual property laws, alter display practices, and extend our notions of privacy all with an eye toward a historically attuned and politically focused system of knowledge circulation. Striking a balance for everyone means jettisoning all-or-nothing models that continue to masquerade as fair and balanced.