

Intellectual Property Issues in Archaeological Publication: Some Questions to Consider

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ABSTRACT

For the past 4 years, in concert with a growing number of colleagues, we have been examining intellectual property issues within archaeology and the larger realm of cultural heritage. This topic is garnering increased attention as archaeologists, descendent communities, and other stakeholders grapple with difficult questions about the uses and abuses of cultural knowledge and research data. Our work seeks to identify the issues, examine the circumstances under which they arise, and disseminate policies and practices that lead to a better understanding of what is at stake and how to approach a resolution. Here we are commenting on what questions might be considered in a situation in which photographs portraying tribal members or cultural sites taken during the course of a project conducted on tribal land in the United States are to be printed as part of a public site report or other publication. Thinking through these issues beforehand can result in positive resolution and also promote increased awareness of and sensitivity to actual or potential intellectual property issues related to archaeological practice.

Résumé: Ces quatre dernières années, de concert avec un nombre toujours plus important de collègues, nous avons examiné les problèmes liés à la propriété intellectuelle dans le cadre de l'archéologie et du domaine de l'héritage culturel. Ce sujet recueille une attention soutenue, car les archéologues, et d'autres parties prenantes, luttent contre les difficiles questions relatives à l'utilisation et l'abus de la connaissance culturelle et des données de recherche. Notre travail consiste à identifier les problèmes, examiner les circonstances dans lesquelles elles se posent et disséminer les politiques et les pratiques qui amènent une meilleure compréhension de ce qui est en jeu, et en dernier lieu comment élaborer une résolution. Nous

commentons ici les questions qui doivent être considérées au sujet des photographies de membres tribaux ou de sites culturels prises à l'occasion d'un projet archéologique; si elles doivent ou non être imprimées en tant que rapport public ou dans le cadre d'autres publications. Réfléchir à ces problèmes à l'avance peut résulter en une résolution positive et également promouvoir une prise de conscience plus aiguë d'un domaine important des problèmes de propriété intellectuelle liés à la pratique archéologique.

Resúmen: En los últimos cuatro años, hemos estudiado, en colaboración con un grupo de colegas cada vez más nutrido, algunas cuestiones relacionadas con la propiedad intelectual de la arqueología y con el campo más amplio del patrimonio cultural. Este tema está recibiendo cada vez más atención ahora que los arqueólogos, comunidades descendientes y otros interesados se enfrentan a cuestiones de difícil respuesta sobre los usos y los abusos de los conocimientos culturales y los datos de investigación. Con este trabajo pretendemos identificar los problemas, examinar las circunstancias que los han originado y difundir las políticas y las prácticas que han propiciado un mejor entendimiento de lo que está en juego y cómo adoptar una resolución. En él hablamos sobre las cuestiones que podrían considerarse si se dieran determinadas situaciones, como por ejemplo, en caso de imprimirse fotos de miembros tribales o lugares culturales durante el curso de un proyecto arqueológico para incluirlas en un informe público sobre el sitio o en otra publicación. Recapacitar sobre estas situaciones antes de que ocurran puede ayudar a alcanzar una resolución positiva y fomentar también la concienciación y la sensibilidad en el importante asunto de los derechos de propiedad intelectual relacionados con la arqueología.

KEY WORDS

Intellectual Property, Cultural Heritage, Photographs, Ethics, Publication

Concerns about intellectual property have become rampant in the arts and sciences, with discussions about on-line music sharing or protection of new discoveries through copyright and patents. Intellectual property issues also pertain to archaeology in a host of ways, and especially in the ethics of research and publication of research results.¹ While archaeology has in recent decades emphasized cultural property issues, new questions relating to the less tangible dimensions of the archaeological record extend are emerging. Who owns the data produced during research? Who has the right to use them in various forms or media? How should archaeologists (or other researchers) proceed when data collected during research are

found to contain information or images and designs that are culturally sensitive? What rights do descendant communities have to information extracted through archaeology? What rights do archaeologists or others have to knowledge produced from that data?

Often these questions are discussed in the somewhat esoteric atmosphere of academic discourse or legal analysis. What is most illuminating, however, for policymakers, practitioners, and even legal theorists are on-the-ground cases that show where points of friction exist. These real situations encourage stakeholders to think in advance about what decisions may need to be made, and to consider the unique context and constraints of each case, as well as the consequences of various ways of acting—in particular what happens when concerns about intellectual and cultural property are not voiced or heard, or are misunderstood.

Here we discuss issues of intellectual property and publication, with a focus on the publication of photographs, by identifying general problem areas that apply to most instances.² Although our comments arose around questions that emerged from a particular case in North America (see *The Midden* 39[4]:10–15), we have generalized several points of consideration to make them of interest to a broader audience: (1) Who owns the copyright to the images that were published?; (2) Does the tribe or group have a policy in place covering these issues that archaeologists should be aware of and follow?; (3) What policies on permissions and attributions do publications typically adhere to?; (4) What is the ethical course of action?; and (5) What was the nature of the relationship between the archaeologist and the tribe or persons referenced in the published images?

Two other sets of questions, which have to do with the nature of the collaboration and shared governance, are also important to understanding the context of such cases:

- Whose traditional lands is the site on and who should be consulted in regard to its management?
- What was the relationship between the archaeological team, the tribe, and other parties involved with the project (e.g. a development corporation, a government agency, a university, a museum)? Who has jurisdiction, and who is employed by whom?

Who Owns the Copyright to Images That Are to Be Published?

Who actually holds the copyright to the photographs that appear in an article: the photographer?; an employer?; a tribal authority?; the museum that “owns” or holds the artifacts? Legally, the copyright of photographs

taken of a site or of artifacts is generally owned or held by the photographer. This is because ownership is vested in the individual who physically exerted the labor to take the photograph. However, if the photographs were taken by an employee while on the job, unless previously negotiated in the terms of employment, the copyright will usually belong to the employer. If this is the case, the use of the photographs in a publication would require the employer's permission.

As legal scholar Cindy Carson notes, "[t]he greatest concerns may be loss of control over how the images will be used and any profits the use may create. Governments or individuals may try to prevent the use of the archaeologist's own images by restricting access to the site, by making non-publication a condition of access, or by declaring that all images become the property of the landowner" (1997:291). This is especially true of location information for archaeological sites, which many people consider to be put at risk if revealed to the public.³

First Nations or tribes may have additional concerns about photographs of sites or objects, or about other uses of knowledge that may have special significance or embody cultural meanings that people feel are endangered when they are made public.⁴ In most cases, people want to have a voice in how sites and information pertaining to *their* pasts⁵ are presented to the public, or, at the least, want to be apprised of how the information will be used.⁶ Part of the problem is that their concerns or rights to intellectual property are often not recognized by the legal system, which leaves them to be expressed in policies and agreements promulgated by a governing body or other tribal entity.

Does the Tribe Have a Policy in Place That Archaeologists Should Follow?

A second question is whether the tribe (or similar entity that has oversight in such situations) has a policy in place that requires some form of permission or permitting process for either taking photographs of tribal cultural materials (including sites on tribally ceded lands), or regarding the use of such photographs or information about a site in a publication. If so, was this policy clearly and plainly communicated to the researcher or photographer? If one were in place, were the tribal members photographed aware of such a policy?

Many First Nations and other Indigenous communities have policies or protocols that convey local values and tribal policies to archaeologists and others and serve as memoranda of agreement (see Watkins and Ferguson 2005). This way research becomes a negotiated process, a sign of true collaboration, accountability, and ethical practice. In our experience and that of our colleagues, fears about censorship of reports or articles are almost

always unfounded when parameters are worked out ahead of time in the spirit of collaboration.

What Policies on Permissions and Attributions do Publications Typically Adhere to?

Most publishers' guidelines require that the author gather and submit evidence that specific permission has been granted before a photo or image can appear in published form. Attributions of copyright are expected to accompany the captions of published photographs (e.g., "used with permission of..."). Sometimes the institution or individual that lends permission for a photo will specify exactly how the attribution should be stated.

Even if a photographer holds unrestricted copyright to a photo that he or she took, if it contains an image of a person who can be identified, right to privacy laws come into play. These require that permission must be sought from person(s) portrayed before the photo can be used in a marketed work, with the exception of public figures (e.g., politicians or celebrities). For example, the manuscript preparation guidelines of University Press of Florida (2003:26 [§4.7]) state: "*If a picture includes people who are not public figures, you will need to have signed release forms from the participants*" (emphasis in original).

It is generally the responsibility of the author to obtain all the needed permissions and legal rights for publication, and the publisher typically disclaims any responsibility for inaccuracies or incorrect attributions. The publisher, however, is responsible for ascertaining that the author has indeed acquired the permissions needed for publishing. This is standard editorial policy.

Authors also need to be aware that giving a publisher permission for use of an image, unless explicitly negotiated in the license agreement, typically also gives them the right to use the image or an altered version of it on the cover of a book or journal or in other ways to promote the book.

What is the Ethical Course of Action?

Above and beyond the legal implications regarding the publication of copyrighted material, there are ethical issues that underlie the situation. One place to look for guidance is in the ethics codes and guidelines of professional archaeological organizations. The eight principles of World Archaeological Congress' *First Code of Ethics* focus on acknowledging the special relationship between Indigenous peoples and the sites, objects, and data related to their cultural heritage and on establishing equitable relationships with those whose

heritage is being investigated (see Principle 7, in particular). The WAC Code also includes a set of “Rules to Adhere To.” The first four (see Table 1) are applicable here, and, of these, three (all but #3) are aspects that a publisher might want to take into account in accepting manuscripts.

General Considerations

We can outline five general suggestions, based on several similar cases, which may help archaeologists and the communities with whom they work avoid problems:

- Tribes (or other such entities) should seek to provide clear guidelines for researchers and should make sure these are communicated early in the process, when research is designed, and revisited as a project proceeds;
- Researchers need to seek appropriate permissions prior to publication of images or sensitive data (see Bendremer and Richman 2006);
- Researchers should recognize, acknowledge and be accountable to the special nature of the relationships that First Nations have to the past;
- Journals need to make sure that authors have acquired the permissions needed, even though the responsibility to do so falls upon the researcher; and
- Some degree of transparency about the nature of the relationship between archaeologists and First Nations (or lack of one) seems called for in articles that include information or images about sites or projects located on traditional lands. If the project is truly collaborative in nature, representatives from the tribe can be asked to review the article(s) prior to publication, or to act as co-authors.

In the end, conflicts over images can be helped or avoided (a) if there have been clear guidelines for researchers, including statements about who owns the copyright to images or data; (b) if archaeologists take a broad view of accountability, thinking through the consequences of their publication of articles and images; (c) if a tribal or community representative has been directly involved in the publication, and (d) if a publication recognizes from the outset the potentially sensitive nature of a manuscript or the photographs it contains and requires the author to seek permissions and to include proper attributions for any images it publishes. Again, we reiterate that these considerations are based on consideration of a particular case, so that our comments are not merely speculative, but they are also not meant to be exactly applicable to other contexts. In any case, we feel it is important to promote open discussion of how to think through these

Table 1. The First Code of Ethics of the World Archaeological Congress (see http://www.worldarchaeologicalcongress.org/site/about_ethi.php?code1 for this and other codes and accords developed and endorsed by WAC)

Adopted by WAC Council in 1990 at WAC-2, Barquisimeto, Venezuela

Principles to Abide By:

Members agree that they have obligations to indigenous peoples and that they shall abide by the following principles:

1. To acknowledge the importance of indigenous cultural heritage, including sites, places, objects, artefacts, human remains, to the survival of indigenous cultures.
2. To acknowledge the importance of protecting indigenous cultural heritage to the well-being of indigenous peoples.
3. To acknowledge the special importance of indigenous ancestral human remains, and sites containing and/or associated with such remains, to indigenous peoples.
4. To acknowledge that the important relationship between indigenous peoples and their cultural heritage exists irrespective of legal ownership.
5. To acknowledge that the indigenous cultural heritage rightfully belongs to the indigenous descendants of that heritage.
6. To acknowledge and recognise indigenous methodologies for interpreting, curating, managing and protecting indigenous cultural heritage.
7. To establish equitable partnerships and relationships between Members and indigenous peoples whose cultural heritage is being investigated.
8. To seek, whenever possible, representation of indigenous peoples in agencies funding or authorising research to be certain their view is considered as critically important in setting research standards, questions, priorities and goals.

Rules to Adhere To:

Members agree that they will adhere to the following rules prior to, during and after their investigations:

1. Prior to conducting any investigation and/or examination, Members shall with rigorous endeavour seek to define the indigenous peoples whose cultural heritage is the subject of investigation.
2. Members shall negotiate with and obtain the informed consent of representatives authorized by the indigenous peoples whose cultural heritage is the subject of investigation.
3. Members shall ensure that the authorised representatives of the indigenous peoples whose culture is being investigated are kept informed during all stages of the investigation.
4. Members shall ensure that the results of their work are presented with deference and respect to the identified indigenous peoples.
5. Members shall not interfere with and/or remove human remains of indigenous peoples without the express consent of those concerned.
6. Members shall not interfere with and/or remove artefacts or objects of special cultural significance, as defined by associated indigenous peoples, without their express consent.
7. Members shall recognise their obligation to employ and/or train indigenous peoples in proper techniques as part of their projects, and utilise indigenous peoples to monitor the projects.

The new Code should not be taken in isolation; it was seen by Council as following on from WAC's adoption of the Vermillion Accord passed in 1989 at the South Dakota Inter-Congress.

Additional ethical guidelines are currently under discussion; WAC members are encouraged to address comments to the Committee on Ethics, Julie Hollowell and Alexander Herrera, co-chairs)

issues, especially since concerns about the appropriate use of photographs and images as forms of intellectual property are likely to continue to increase in archaeology and related sectors.

Concluding Comments

Today intellectual property issues are increasingly on the agenda, whether in terms of restrictions on access to information or the exploitation of cultural knowledge for the benefit of public or commercial interests. Within archaeology, these concerns emerge not only in the obvious areas of cultural tourism or the appropriation and commodification of rock art images on t-shirts, but also in the areas of research permissions and protocols, dissemination of research data, and censorship (Brown 2003, Nicholas and Bannister 2004; Nicholas and Hollowell 2006). Sometimes these issues are posed in the somewhat heady dialogue of culture-based rights and the A2K (access to knowledge) movement, but most often they transpire at the local level, such as when tribal representatives believe that their intellectual property, however defined, has been co-opted. It is here that we each must ask how do we conduct archaeology (or any form of research) in the spirit of true accountability and an understanding of the potential for both good and harm that our work has for others. It is not just a question of “who owns the past,” but how specific material and intellectual aspects of the past are used or abused for various purposes. Who actually benefits from archaeology and how are these benefits distributed?

Archaeologists, authors, and publishers might want to take note of the following two comprehensive resources that contain well thought-out guidelines for use of cultural knowledge

- The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) *Guidelines for Ethical Research in Indigenous Studies* (http://www.aiatsis.gov.au/__data/assets/pdf_file/2290/ethics_guidelines.pdf). These guidelines, from the Institute charged with archiving all research related to Aboriginal peoples of Australia, ask that researchers negotiate an agreement about the allocation of intellectual property rights, gain informed consent for any publications that result, identify individuals contributing to the research and how they should be involved or acknowledged in any publications or other outcomes. It also asks researchers to consult with affected individuals and groups concerning the details of reports or publications, consider whether joint authorship is appropriate, and to report results to source communities before publication.

- *Guidelines for Respecting Cultural Knowledge*, compiled by the Alaska Native Knowledge Network (<http://www.ankn.uaf.edu/publications/knowledge.html>). See in particular the sections on “Guidelines for Authors and Illustrators” and “Guidelines for Editors and Publishers.” They suggest, among other things, “submitting all manuscripts with cultural content to locally-knowledgeable personnel for review, making effective use of local and regional entities set up for this purpose.”

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Notes

1. Much of our work in this area is associated with the development of a major international research collaboration, “Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics.” Information on the project can be found at <http://www.sfu.ca/IPinCulturalHeritage>.
2. We are not considering here the special concerns that arise with publication of photographs of human remains, leaving that for a future discussion.
3. Limits on the publication of site locations in newspapers and other publications are, of course, something that archaeologists themselves have long promoted.
4. The customary laws of Indigenous peoples can revolve around heritage values that outsiders may not recognize but which nonetheless carry a great deal of significance for them (see McLay et al. 2008; also Noble 2007). Also, there is often no real or clear separation between cultural and intellectual property.
5. This also holds for pertaining to their present. One of many examples is the prohibition on photography in many pueblos in the southwestern United States.
6. Some individuals (Aboriginal or not) may not want to be photographed or to have photographs of themselves published or made public. In addition, some in this position may have objections but may not be willing to voice them.

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