

## **From Creative Commons to Local Contexts and the Traditional Knowledge Labels**

**Jane E Anderson**

A hundred years ago, not only was our language declining, but our ways had to go underground. I was interviewing this elder one time and she told me, she said when the lights went out at the convent, they'd go to the tribal hall and start to play the drum, and [they] would sing the old songs. And then, they'd do that about once a week. It was safety for them to do that. And it just showed me how strong our culture is and how, you know, *we have to keep pushing forward* to save the culture. Because they had to do it because they'd be punished. They'd be punished for singing the old songs. They'd be punished by not getting food ... As I was growing up in the 1960s, there were still traditional families in our community that practiced their own way.... *But they continued to push forward and here we are, you know, those people are leaders in our culture, because they kept that cultural way.* Donald Soctomah 2018.

### **I INTRODUCTION**

Creative Commons began as a grass-roots movement of US based academics, creators, activists and copyright owners that were concerned about the consequences for creativity, the public domain and the future of the 'commons' in extending copyright protection term limits. Inspired by the Free Software movement<sup>1</sup> and the Open Content Project<sup>2</sup>, the founders of Creative Commons initiated an intervention that could expand the range of creative works that could be available for others to legally build upon. While unsuccessful in stopping the extension of the US copyright term limit from 50 years to 70 years by the US Congress in 2002, Creative Commons has gone on to make a significant intervention within the framework of copyright law itself.<sup>3</sup> This has been by developing a series of specific licenses that allow for a tailoring of standard copyright rights by

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<sup>1</sup> Initiated by Richard Stallman in 1983 and also the GNU Project.

<sup>2</sup> Open Content project was initiated by David A. Wiley. Developed in 1998 and subsumed by Creative Commons in 2001, Open Content Project developed the first licenses to bring the ideals of open source software to the world of content.

<sup>3</sup> The founders of Creative Commons are generally considered to be Lawrence Lessig, Hal Abelson and Eric Eldred. Current CEO of Creative Commons is Ryan Merkley.

copyright holders.<sup>4</sup> In 2019, Creative Commons estimates that there are over 1.5 billion works circulating with a Creative Commons license.<sup>5</sup> The premise behind this form of licensing is that in creating an opportunity for the ‘freeing’ of rights that creators don’t need, greater access to knowledge and culture can occur for everyone.<sup>6</sup>

Creative Commons (CC) as copyright intervention and free culture social movement has opened up new possibilities for understanding how copyright rights themselves can be differentiated from each other, and greatly increased the capacity for non-copyright experts, for instance artists and other producers of cultural content to make different decisions around how they engage and use this area of law. In particular, CC also leverages two key principles of attribution and integrity.<sup>7</sup> All six of the available CC licenses for instance, excluding the new CCO public domain license, have attribution as a key component of the license. That is the author and legal copyright holder retains the right to be attributed in any other future life that the CC licensed work might have. Several of the CC licenses are also specifically concerned with the integrity of the work by preventing adaptation, for instance, the CC-no derivatives licenses (CC BY-NC-ND and CC BY-ND) allow for works to circulate with attribution with no change to the work. Thus one powerful dimension of the CC movement has been its capacity to integrate key components from international moral rights doctrines as direct elements of this copyright licensing system.<sup>8</sup> This has been especially interesting in a US context where moral rights are exceptionally limited, but it has not been uniformly supported across the free culture spectrum of activism.<sup>9</sup>

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<sup>4</sup> See <https://creativecommons.org/>

<sup>5</sup> *Id.*

<sup>6</sup> See Lawrence Lessig, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>7</sup> See US Copyright Office, *STUDY ON THE MORAL RIGHTS OF ATTRIBUTION AND INTEGRITY*. Initiated in 2017 with subsequent public reports and symposium.

<sup>8</sup> Moral rights were first recognized in France and Germany – as constituting the whole complex of an author’s rights. This included the economic property rights *and* the personal rights of the author caught up in the work itself. These can be understood as the personality of the author embedded in the work, or the way in which a work conveys a spirit of an author. As personal rights, in many countries these rights cannot be waived or transferred. The protection of moral rights within the *Berne Convention for the Protection of Literary and Artistic Works* led to their narrow adoption by the US Congress in 1990 within the *Visual Artists Rights Act*.

<sup>9</sup> In the US moral rights are narrowly articulated through the *Visual Artists Rights Act* of 1990, 17 U.S.C. § 106A and in an even more modified form as an adaption right 17 U.S.C. § 106. Criticism of Creative Commons comes through attribution and that Creative Commons does not really disrupt copyright law in

As a movement developed out of legal critique, CC offers itself as a unique instance of counter-legal activism. It takes a problem with law as its point of departure and then moves beyond it in creating a means (through licenses) for the production of a new social consciousness around ideas of creativity. But there are also elements in the CC movement that remain normative and bound to the logics of copyright law, and indeed other forms of settler-colonial law themselves. For instance, the creative commons interpretation of the ‘commons’ remains conditioned by presumptions about the individual genius and the capacity for individuals to uniquely exploit the commons as a specific kind of resource.<sup>10</sup> In addition, the author as a socially and legally produced subject remains central to the logics of CC – you can only be an author to use a CC license.<sup>11</sup> These two elements in particular – the valorization of the commons as a non-political, abstracted space (wherein cultural and natural resources are accessible to all members of the society) and the centrality of the author as the legal and thus socially entitled actor – both continue to marginalize Indigenous peoples in culturally and socially detrimental ways.<sup>12</sup>

For Indigenous peoples in settler colonial contexts like Australia, USA, Canada and New Zealand there is no fuzzy warm glow that necessarily accompanies ideals of open-ness and access to the knowledge commons. Like the treatment and taking of Indigenous lands, these concepts retain core colonial logics which preclude questions about access for whom, open-ness to whose cultural content and for the benefit for whose society. Within the commons movement, as well as within traditional intellectual property scholarship generally, the concept of Indigenous rights and traditional knowledge has been extremely problematic to address and incorporate.<sup>13</sup> This is because

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any substantive way, it just reinforces it. *See* Nina Paley, ‘The Limits of Attribution’  
<http://blog.ninapaley.com/2010/03/04/the-limits-of-attribution/>

<sup>10</sup> This is very much based on Garrett Hardin’s ‘Tragedy of the Commons’ (1968). Recent work following Elinor Ostrom is more nuanced in thinking through and working to redefine the commons with regard to the various and multiple conditions of resource use.

<sup>11</sup> Peter Jaszi, and Martha Woodmansee ed., *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (1994).

<sup>12</sup> Eve Tuck and Wayne K. Yang, ‘Decolonization is not a metaphor’ *DECOLONIZATION* 1, no. 1 (2012): 1-40.

<sup>13</sup> Jane Anderson, *INTELLECTUAL PROPERTY AND INDIGENOUS/TRADITIONAL KNOWLEDGE: ISSUES PAPER* (2010) (contains an extensive bibliography including every findable article and published book on IP and TK up to 2010). *See* Rosemary Coombe, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTY LAW: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998); Jane Anderson,

there is no necessary alignment with the left leaning liberal paradigm of open-ness and less copyright restrictions. For Indigenous activists and advocates, copyright itself is understood as a colonial tool of dispossession, much like real property law which functioned alongside it.<sup>14</sup> The dispossession of Indigenous lands in settler-colonial contexts informs later tactics in the dispossession of Indigenous knowledge. For scholars like Eve Tuck and Wayne K. Yang for instance, the problem of property remains and persists. “In the process of settler colonialism, land is remade into property and human relationships to land are restricted to the relationship of the owner to his property. Epistemological, ontological and cosmological relationships to land are interred, indeed made pre-modern and backward. Made savage.”<sup>15</sup> Similarly, Cheryl Harris argues that property is a foundational mechanism in establishing racial and gendered hierarchies and identities.<sup>16</sup> Brenda Bhandar extends this by explaining how property establishes sophisticated racialized techniques of possession that remain operationalized within the present. It not only matters that “property law is the primary means of appropriating land and resources”, but that property ownership is central to the formation of the “proper legal subject in the political sphere”.<sup>17</sup>

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‘Intellectual Property and Indigenous Knowledge’. In, INTERNATIONAL ENCYCLOPEDIA FOR SOCIAL AND BEHAVIOURAL SCIENCES (2015); Trevor Reed, “Reclaiming Ownership of the Indigenous Voice: The Hopi Music Repatriation Project.” In THE OXFORD HANDBOOK OF MUSICAL REPATRIATION (2018); Rebecca Tsosie, “Indigenous Peoples and “Cultural Sustainability”: The Role of Law and Traditional Knowledge’, In TRADITIONAL ECOLOGICAL KNOWLEDGE: LEARNING FROM INDIGENOUS PRACTICES FOR ENVIRONMENTAL SUSTAINABILITY (2018) Chidi Oguamanam INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY AND TRADITIONAL MEDICINE (2006); Dalindyabo Shabalala, ‘Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Courts’ AKRON LAW REVIEW (2017) 51:1082; Laura Foster, REINVENTING HOODIA: PEOPLES, PLANTS AND PATENTS IN SOUTH AFRICA (2017).

<sup>14</sup> Angela Riley and Kristin A. Carpenter. “Owning Red: A Theory of Indian (Cultural) Appropriation.” TEXAS LAW REVIEW (2016) 94: 859-931; Rebecca Tsosie, “Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights” ARIZONA STATE LAW (2002) 34: 299-359; Cheryl Harris, Cheryl (1993). “Whiteness as Property.” HARVARD LAW REVIEW 106, no. 8: 1701-1791; Brenda Bhandar, THE COLONIAL LIVES OF PROPERTY LAW: LAND AND THE RACIAL REGIMES OF OWNERSHIP (2018); Eileen Moreton-Robinson, THE WHITE POSSESSIVE: PROPERTY, POWER AND INDIGENOUS SOVEREIGNTY (2015); Jane Anderson “Anxieties of Authorship in the Colonial Archive.” In MEDIA AUTHORSHIP (2013); Jane Anderson (2018), ‘Negotiating Who Owns Penobscot Culture’ ANTHROPOLOGY QUARTERLY(2018), 91(1); 267-306; Jane Anderson and Kimberly Christen, ‘Decolonizing Attribution: Traditions of Exclusion’ JOURNAL OF RADICAL LIBRARIANSHIP (forthcoming).

<sup>15</sup> Tuck and Yang, *supra* n12 at 5.

<sup>16</sup> Harris, *supra* n14.

<sup>17</sup> Bhandar *supra* n14 at 4.

The claims for return and control of Indigenous cultural heritage content that populates the great archives, libraries, museums and universities of the world make for one clear example of the potential friction between the commons movement, the colonial project of property making and Indigenous advocacy.<sup>18</sup> Indigenous peoples' concerns in settler-colonial contexts point precisely to the unequal, inequitable and culturally incommensurable conditions of collecting and amassing specific kinds of cultural objects and knowledge, making these into forms of property, classifying and rendering it into Euro-American logics and accessible forms, and of managing the collections and their subsequent circulation according to the legal rights of the non-Indigenous 'owner', the legally recognized 'author' of the collection.<sup>19</sup> Alongside this property-making project, it is the accompanying *structural and physical exclusion* of Indigenous peoples from institutions that hold their cultural material that has affected how knowledge about this material has been made and through whose cultural frame of reference.

This paper is designed to explore the new legal, educational and sociological project Local Contexts as, in part, another counter copyright movement.<sup>20</sup> This project's point of departure however is not with authors and author's rights, but with those who have been disproportionately excluded from this area of law – Indigenous peoples and communities. It is also embedded and responds to the larger conditions of dispossession within settler-colonial contexts. Local Contexts was developed out of frustration, out of failure and out of a need for adequate recognition of the inequities that Indigenous communities experience in relation to IP law. It was also necessarily developed as a response to the social and cultural entitlements that law produces and that continue to make the reconnection of Indigenous peoples back to their culture incredibly difficult. A primary site for these challenges is within museums, libraries and archives, and this is

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<sup>18</sup> [news articles]

<sup>19</sup> Anderson, *supra* n14.

<sup>20</sup> See [www.localcontexts.org](http://www.localcontexts.org). See also Jane Anderson and Kim Christen, "Chuck a Copyright on it": Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels." MUSEUM ANTHROPOLOGY REVIEW, SPECIAL ISSUE: AFTER THE RETURN: DIGITAL REPATRIATION AND THE CIRCULATION OF INDIGENOUS KNOWLEDGE (2013), 7 (1-2): 106-126; Kimberly Christen, "Tribal Archives, Traditional Knowledge, and Local Contexts: Why the 's' Matters" JOURNAL OF WESTERN ARCHIVES: NATIVE AMERICAN ARCHIVES (2015), 6 (1); Jane Anderson, 'Options for the Future Protection of GRTKTCES: The Traditional Knowledge License and Labels Initiative', JOURNAL OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (2012), 4(1).

why Local Contexts is a direct initiative targeting these sites of authority and knowledge production.<sup>21</sup>

## **2. THE BEGINNING OF LOCAL CONTEXTS**

For hundreds of years, the US legal system has sanctioned the taking and destruction of Indian lands, artifacts, bodies, religions, identities and beliefs all towards the project of conquest and colonization. . . . When it comes to intangible property, however the situation is more complicated. It is difficult for legal decision makers and scholars alike to understand why Indian tribes should be able to regulate the use of Indian names, symbols and expressions. Angela R. Riley and Kristen A. Carpenter.<sup>22</sup>

The intersection of intellectual property law and Indigenous knowledge is a complex comprised of history, politics and power. The problems that Indigenous peoples experience in relation to protecting their knowledge systems are not easily remedied within a legal system that has actively worked at reducing and dispossessing Indigenous peoples of lands, languages, children, material culture, sacred materials from graves, buried ancestors and knowledge. Indigenous scholars and activists continue to insist that Indigenous knowledge systems do not map easily onto or into intellectual property frameworks.<sup>23</sup> In certain instances, accommodation and compromise can be found. This is especially the case now that there is recognition of Indigenous artists as authors of their works. But Indigenous artists were not always considered authors, and their works were not always understood as protectable copyright subject matter.<sup>24</sup> The consequences of this emergent legal subjectivity continues to affect what Indigenous works can be protected

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<sup>21</sup> Local Contexts and the TK Labels was founded by Jane Anderson and Kim Christen in 2010. We initially received start-up funding from the World Intellectual Property Organization and the Canadian Social Science Humanities and Research Council funded project, Intellectual Property Issues in Cultural Heritage. We have continued the work with funding from the National Endowment for the Humanities, New York University Graduate School of Social Science, Washington State University and the Arcadia Foundation.

<sup>22</sup> Riley and Carpenter, *supra* n14 at 859.

<sup>23</sup> Angela Riley, Sonya Katyal and Kristen Carpenter, "In Defense of Property" *YALE LAW JOURNAL* (2009), 118(6). This was in part written in response to Michael Brown *WHO OWNS NATIVE CULTURE* (2001).

<sup>24</sup> Jane Anderson, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* (2009).

and what can't.<sup>25</sup> Indigenous peoples have had to be flexible with the law, not the other way around.

Despite enormous international debate with very few practical outcomes and too many to count law journal articles, there have been very few suggestions, interventions or imagination about how to alleviate some of the problems that Indigenous peoples experience with IP law in the everyday. Very few people actually work at the interface with Indigenous communities who are experiencing IP problems, and thus the problems, when they are re-counted are often abstracted, fictionalized or inadequately described. Their complexity and their inter-relationship to other kinds of issues and history tends to get minimized, reduced or is just absent. For Indigenous peoples, intellectual property issues are not outside history, they are not outside of colonialism but a product of it. As colonialism is a structure not an event, it maintains itself and distributive effects on Indigenous peoples daily.<sup>26</sup>

One key piece of the Local Contexts project is as an intervention in the field of copyright and Indigenous knowledge and/or traditional knowledge. Local Contexts was developed as an initiative to support Indigenous people and communities in the management of their intellectual property and cultural heritage specifically within the digital environment. Importantly, one of its key points of departure was in addressing the limits of the commons movement for including Indigenous interests. This paper tells the story of the Local Contexts project and thus also offers a unique reading of where different sites of contest over copyright, authorship and collections of Native American culture and their potential digital circulation reside. More than mere rumination on the problems, Local Contexts functions as a tool and vehicle to support Indigenous peoples in establishing alternative paradigms of recognition, acknowledgement and cultural rights – illuminating legal mistakes that law cannot resolve, but that education and policy might help alleviate into the future.

In drawing together both theoretical and practical threads, the Local Contexts project is situated within a field of legal, decolonial, applied anthropological and critical

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<sup>25</sup> See Adrienne Keene (Cherokee) *NATIVE APPROPRIATIONS* <http://nativeappropriations.com/>

<sup>26</sup> Patrick Wolf, "Settler Colonialism and the Elimination of the Native." *JOURNAL OF GENOCIDE RESEARCH* (2006), 8, (4): 387-409; Kauanui, J. Kēhaulani. "A Structure, Not an Event: Settler Colonialism and Enduring Indigeneity" *LATERAL* (2016) 5.1 (Spring).

museological scholarship that highlights the capacity for innovation and action. At the same time we are invested in un-raveling the complicated social entanglements of intellectual property law in our contemporary present. At one meta level, Local Contexts is focused on developing greater understanding of how new knowledge-sharing paradigms, ones that are inclusive of various histories and cultural perspectives, are currently being developed out of Indigenous-specific contexts.

Whilst being directly practically orientated in scope, Local Contexts is firmly constituted as a legal project for social change that prioritizes Indigenous standpoints and forms of Indigenous activism.<sup>27</sup> Developed directly out of requests from Indigenous peoples for more information and clearer options to protect their cultural heritage, Native American and First Nations communities directly shape and modify this project for their specific needs. Thus what underpins this project is a community-based approach, which signals the new kinds of ways in which projects that engage with Indigenous communities must have flexibility built in them from the beginning.<sup>28</sup> They must be able to transform with each community's unique needs and expectations over time. Local Contexts also offers a critical methodological contribution to the future of research with Indigenous peoples and their collections of cultural heritage.

Local Contexts can offer a close study of how collaborative, international and multi-tribal contextual work is also answering questions about what control over Native American collections could look like from a tribal perspective. It also provides a lens for how individuals and communities feel about the opening of collections to incorporate their perspectives; how intellectual property law is affecting and shaping a range of tribal decision-making and governance structures; and how collaborations and partnerships between tribes and academic or archival institutions are changing attitudes of mistrust and historical misunderstanding. Through its practical approach, this project is getting at some of the difficult questions about the legacies of colonialism and the study of Indigenous peoples within Indigenous contexts, as well as what a third space for considering the benefits and affects of circulating Indigenous cultural material might be

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<sup>27</sup> Linda Tuhawai Smith, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (1999); Australian Institute for Aboriginal and Torres Strait Islander Peoples, *GUIDELINES FOR RESEARCH IN ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES* (2007).

<sup>28</sup> Sonya Atalay, *COMMUNITY BASED ARCHAEOLOGY: RESEARCH WITH, FOR AND BY INDIGENOUS AND LOCAL COMMUNITIES* (2012).



when Indigenous peoples are positioned as primary decision makers over the terms and conditions of that circulation and access.

## **2.1 The Problem of Collecting Native America**

Indigenous claims regarding the ‘return’ of their collections within libraries, museums and archives (both the tangible and the intangible) speaks a specific truth to power.<sup>29</sup> How these collections came to be made is a difficult question that many institutions are grappling to answer.<sup>30</sup> In some instances, certain cultural knowledge and cultural material was shared through the entanglements of the colonial encounter.<sup>31</sup> In the majority of instances however, material was stolen, taken without consent or taken under extremely compromised circumstances. Federal Indian law and policy in both Canada and the US, for instance, had a significant effect on the capacity for communities to maintain themselves and their cultural traditions. For instance ceremonial material, including masks, regalia and copper necessary for the potlatch ceremonies in the Pacific Northwest Coast were confiscated and sold by government officials following the ban on potlatch ceremonies which was legislated through Canadian Indian Act from 1885-1951. In other instances, collectors employed by the Field Museum and the American Museum of Natural History actively stole from Indigenous graves and burial mounds, knowing they were doing so and documenting the process in diary entries, letters and other exchanges.<sup>32</sup> Many of these same researchers were also encouraged to go ‘visit’ communities in the winter months, when communities were at their most desperate, and could be guaranteed to get cultural heritage items ‘for a bargain’.<sup>33</sup>

For other kinds of intangible heritage, the story is a little more complicated, yet it is still caught up in the destructive laws and policies imposed on Native American

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<sup>29</sup> Michel Foucault, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON KNOWLEDGE* (1972) and *POWER, TRUTH, STRATEGY* (1979)

<sup>30</sup> The recent exhibition ‘The Art of Native America: the Charles and Valerie Diker Collection’ at the Metropolitan Museum of Art in New York sharpens these kinds of questions. Unfortunately for the MET, the Diker collection does not have clear provenance for the majority of the collection.

<sup>31</sup> Nicholas Thomas, *ENTANGLED OBJECTS: EXCHANGE, MATERIAL CULTURE AND COLONIALISM IN THE PACIFIC* (1991). Margaret Bruchac, *SAVAGE KIN: INDIGENOUS INFORMANTS AND AMERICAN ANTHROPOLOGISTS* (2018).

<sup>32</sup> Douglas Cole, *CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS* (1985),

<sup>33</sup> *Id.*

peoples.<sup>34</sup> For example, the documentation of Indigenous languages was initiated at the behest of Thomas Jefferson.<sup>35</sup> Alongside a genuine interest in language as an indicator of ‘civility’ Jefferson’s project was also one that was more self-serving: knowing the names of key tracts of land gave certain military strategic advantage. Thus Jefferson sent many field-workers out with a key list of English vocabulary for which he sought Indian language translations. Jefferson’s project to document and study Indigenous languages however, cannot be understood outside of the larger social and political efforts to eradicate those same languages and the people who spoke them. The subsequent US residential school system, founded upon the genocidal refrain ‘Kill the Indian, Save the Man’ from Capt Richard Pratt at Carlisle, Pennsylvania and the significant role of the church in violently banning Native languages from being spoken, has profoundly affected Native American language transmission.<sup>36</sup> This history has ironically made Indigenous peoples reliant and dependent upon the archives established by these initial field workers, researchers and missionaries who continued to study, document and preserve Indigenous languages. These logics of preservation supported future non-Indigenous researcher inquiry.

Through the colonial collecting endeavor in the United States, Native American lives and cultural practices were collected, documented and recorded at unprecedented levels.<sup>37</sup> The development of new technology, first the camera and then the phonograph allowed for an exponential increase in the documentation of Indigenous cultures which

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<sup>34</sup> See, *The Indian Removal Act* (1830), the *Dawes Act (General Allotment Act)* 1887. These are only two examples of extensive legislative and policy interventions designed to target and radically shift Indigenous peoples physically and ontologically from the land.

<sup>35</sup> See Thomas Jefferson *NOTES OF THE STATE OF VIRGINIA* (1782). Also see The American Philosophical Society in Philadelphia as a specific archive built for this Jeffersonian project.

<sup>36</sup> 2019 is the United Nations *INTERNATIONAL YEAR OF INDIGENOUS LANGUAGES* which “aims to raise awareness of the consequences of the endangerment of Indigenous languages across the world, with an aim to establish a link between language, development, peace, and reconciliation.” It is perhaps too hopeful that within this year there is an adequate visibility and recognition of the social and cultural conditions of violence wherein Indigenous languages became endangered or lost for communities.

<sup>37</sup> Vine Deloria Jr. “The Right to Know: A Paper Prepared for the White House Pre-Conference on Indian Library and Information Services on or Near Reservations.” (1978); Allison Boucher Krebs, “Native America’s Twenty-First-Century Right to Know” *ARCHIVAL SCIENCE* (2012), 12(2):173-90; Jennifer O’Neal, “‘The Right to Know’: Decolonizing Native American Archives” *JOURNAL OF WESTERN ARCHIVES* (2015); Kimberly Christen, ‘Tribal Archives, Traditional Knowledge and Local Contexts: Why the ‘s’ Matters’, *JOURNAL OF WESTERN ARCHIVES* (2015) 6(1) 2015; 1-19.

were understood to be “rapidly becoming extinct”.<sup>38</sup> During this period, cultural heritage in material and immaterial forms was removed from communities and detached from local knowledge systems.<sup>39</sup>

In the projects of documentation, there was an inherent presumption that Indigenous people, because they were ‘dying out’ would not ever need access to this material. As a result there was a failure to get consents or permissions, or to even document the material properly including individual and community names. Through these projects, Indigenous peoples, and their cultural expressions and material culture forms became objects – for study and examination by non-Indigenous peoples. There is a reason why ‘research’ is one of the dirtiest words in an Indigenous vocabulary.<sup>40</sup> As James Francis (Penobscot) explained in a recent symposium at the Library of Congress, information colonialism is an ongoing issue within the Penobscot Nation:

“[I]n our communities we're often guarded about, you know, archives and sharing. Because so much take, take, take, take, take, take, take, take, take, take, take has been happening in our communities and it's time for us to protect ourselves and protect our stories, you know, on our terms.”<sup>41</sup>

Indigenous peoples never ceded ownership or authority over this knowledge, the documentation of songs, ceremonies, languages, or cultural narratives that now populate the archives and museums around the world. Alongside requests for the return of material, Indigenous peoples have been asking for decades that the material that remains

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<sup>38</sup> Jesse Walter Fewkes, ‘On the Phonograph’ *SCIENCE* (1890)

<sup>39</sup> William Hagan, 1978. ‘Archival Captive – The American Indian’ *THE AMERICAN ARCHIVIST* (1978), 41(2); Vine Deloria, *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1988); Jennifer Kramer, *SWITCHBACKS: ART, OWNERSHIP AND NUXALK NATIONAL IDENTITY* (2006); Cara Krmpotich, *THE FORCE OF FAMILY: REPATRIATION, KINSHIP AND MEMORY ON HAIDA GWAI* (2014); Cara Krmpotich, and Laura L. Peers, *THIS IS OUR LIFE: HAIDA MATERIAL CULTURE AND CHANGING MUSEUM PRACTICE* (2013); Hennessy, Kate, Natasha Lyons, Stephen Loring, Charles Arnold, Mervin Joe, Albert Elias, and James Pokiak, “The Inuvialuit Living History Project: Digital Return as the Forging of Relationships Between Institutions, People, and Data.” *MUSEUM ANTHROPOLOGY REVIEW* (2013), 7(1-2):44-73. Kimberly Christen, “Opening Archives: Respectful Repatriation.” *AMERICAN ARCHIVIST* (2013), 74:185-210.

<sup>40</sup> Linda Tuhiwai Smith *supra* n27.

<sup>41</sup> James Francis, Collaborations, Collections, and Connections Symposium (2016). *See*: <https://stream-media.loc.gov/webcasts/captions/2016/160913afc0900.txt>. Accessed on 23 Aug 2018. *See also* Jane Anderson and James Francis, ‘Decolonial Futures of Sharing: ‘Protecting Our Voice’, Intellectual Property and Penobscot Language Materials.’ In *TRANSLATING ACROSS TIME AND SPACE: ENDANGERED LANGUAGES, CULTURAL REVITALIZATION AND THE WORK OF HISTORY*. (in press).

in institutions *at least* be protected and cared for according to local rules governing access and circulation.<sup>42</sup> This highlights a key difference in the Creative Commons and free culture movement – namely that meaning for Indigenous materials largely continues to derive from the local contexts where this material originated and that there is a complex ecosystem of responsibility and care that remains necessary for the life and circulation of this material. The difficult legacy for copyright and open-access advocates to acknowledge and address here is the extent that copyright, much like real property law, operated and continues to maintain hierarchies and power relationships developed through expropriation of Indigenous lands and knowledges as part of the settler-colonial project.<sup>43</sup> It assumes that Indigenous culture was already part of a commons, and that now as a common and free resource within archives and libraries, it should be continued to be treated as available for everyone. But for Indigenous peoples, this is a manifest injustice that is barely visible, acknowledged or open to legal remedy.

The dispersal of Native American collections is a significant impediment for access by communities seeking to find and reconnect with cultural heritage, cultural practices, and related traditional knowledge. Importantly, it is also a problem for researchers and institutions who are only able to access and offer partial and incomplete accounts of these colonial encounters. Projects like the NEH funded Plateau Peoples' Web Portal<sup>44</sup> at Washington State University and the Reciprocal Research Network<sup>45</sup> at the University of British Columbia's Museum of Anthropology directly address this complexity and serve to connect communities back to their cultural heritage through advancing diverse workflows and digital heritage management models that include scholars, Native/First Nations communities, and collecting institutions. These projects

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<sup>42</sup> Vine Deloria Jr. *supra* n37.

<sup>43</sup> Patrick Wolf, *supra* n26.

<sup>44</sup> Directed by co-Director of *Local Contexts*, Dr. Kim Christen the Plateau Peoples' Web Portal [<https://plateauportal.libraries.wsu.edu/>] is a collaboratively curated online site for Plateau cultural materials. The Portal is a collaborative project between the Yakama Indian Nation, the Confederate Tribes of the Umatilla Reservation, the Confederated Tribes of the Colville Reservation, The Spokane Tribe of Indians, the Confederated Tribes of the Warm Springs Reservation and the Coeur d'Alene Tribe; the Washington State University Libraries; Manuscripts, Archives, and Special Collections (MASC), the Northwest Museum of Art and Culture, the Smithsonian Institution's National Anthropological Archives and National Museum of the American Indian.

<sup>45</sup> Reciprocal Research Network [<https://www.rncommunity.org/>] connects National collections with First Nations communities inviting a reciprocal model of narrating museum collections.

illustrate just how valuable it is to extend the curatorial model to local communities who have been systematically and structurally separated from it.

These projects also highlight the range of issues that follow from re-connection and collaboration. For it is in the moment that communities are reconnected back to their collections, that they face the major questions of its legal, social and ethical ownership. The legal, social and ethical questions of access and use arise because Native American cultural heritage material is not actually owned by Native American peoples, but rather by the anthropologists, the hobbyists, the folklorists who ‘made’ the film, sound recording, photographs and manuscripts. Indigenous peoples are seldom the legal copyright owners of the cultural heritage materials that document their lives, their family’s lives, their languages, their ancestors and their cultural practices. This means that they have very little, if any say in how these valuable materials are used and accessed by others. For collecting institutions like libraries, museums and archives then, tensions being experienced through the reconnection of material back to communities do not just revolve around providing access, but also inevitably engage with the legal and social rights and entitlements that were arbitrarily made in the moment of the materials’ production (the colonial project of documentation). As Haidy Geismar notes, we need to pay attention to the implicit power relations that permit digital returns and to the hierarchies that ‘keeping-while-giving’ establishes, in which [digital] objects may circulate but title or ownership remains centralized.”<sup>46</sup>

For Native American cultural heritage material in the public domain, there is a different but related problem that unfolds: how to insert and inscribe the appropriate cultural protocols and social responsibility back into material that can now be legally used by anyone at anytime in any way imagined? How can community-specific guidelines for respectful and responsible use of these valuable materials be integrated into material that now has no controls on circulation and use? What, if any, data ethics apply? According to the logics of the public domain, a sacred song that is now in the public domain can be used in any number of culturally disrespectful ways. It can cause harm at a cultural and spiritual level for many people. A sacred song has ongoing restrictions on

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<sup>46</sup> Haidy Geismar, *TREASURED POSSESSIONS: INDIGENOUS INTERVENTIONS INTO CULTURAL AND INTELLECTUAL PROPERTY* (2013).

use and obligations for its care that are specific and community based. It is not free. It never was free, but was carefully cared for and maintained. Not considered important or relevant in the moment of documentation, once interred in the archive or library this material becomes subject to a culturally different set of laws (copyright) – where the content itself doesn't matter. Understanding the current legal framework that governs all material within these contexts, as well as finding solutions that can transcend the failures, neglect and mistakes of not caring about the content itself and the meanings and relationships that are maintained through that content, there is a deliberate and collaborative crafting of workflow alternatives needed that acknowledge that with Native collections, different kinds of considerations and management are required.

Native American cultural heritage collections are unique in composition, content, and in their social and cultural value to the communities from where they derive and also to non-Native publics seeking to better understand the complexity of Native cultures and cultural practices. Due to the history of collecting, for archives, libraries, and museums these collections are inherently political and therefore present a range of unusual and difficult management issues. These issues range on a spectrum from: adequately and appropriately identifying and uniting collections; including historically specific and culturally relevant information within catalogue entries; and, providing new standards for access within digital platforms. But the most consistently problematic area for collecting institutions is in the negotiation with communities over the legal, ethical, and cultural rights to these collections: who owns them, who controls them and who should access them now and into the future? Unlike other collections, Indigenous cultural heritage is caught-up in various legal regimes of protection that are difficult to understand and untangle, even for the most seasoned legal counsel. For example, the intersection of the *Native American Graves Protection and Repatriation Act* (1990) and copyright law, which can effect a significant amount of photographs and field notes taken of graves, human remains and grave goods during these material extractions and taking have never been fully explored. Moreover, in the increasing movement of the photographs, sound recordings, audio-visual and manuscripts documenting Native America into digital formats, the new rights that are generated only compound the problems of responding to Indigenous concerns about ownership and the circulation of these materials. These are

colonial and legal entanglements that impede access and use and make already difficult negotiations that Indigenous peoples are having with institutions and other rights holders even harder.

Local Contexts emerged as a response to a range of these interconnected issues. Specifically, this included that there was no platform where communities and institutions alike could go to find information about legal and extra-legal solutions as they apply to these kinds of collections. There were no services available for helping Indigenous communities navigate the terrain of copyright ownership as they pertain to their unique cultural heritage materials. There was no tool that actively works to correct or augment the public historical record according to cultural sensitivities and responsibilities in practice. There was no national initiative in place that offered a different kind of workflow that acknowledges the difficulties and dilemmas for multiple stakeholders in managing collections and providing access to such valuable materials. There was no practical standard-setting vehicle dedicated to bridging past practices and finding ways for new kinds of reciprocal and collaborative relationships that addresses a collection in its totality, including its past, present and future legal and cultural status. With Local Contexts, now some of these needs are being met.

As a direct engagement, the Local Contexts project acts as functional tool to support multi-community and multi-institutional needs for collaborative models, development of a new digital heritage stewardship workflow and tools that are able to add missing or alter incorrect information into the catalogue or public record, and to find new mechanisms for incorporating ethical and culturally responsible norms for the future use of this material. In understanding our current unique legal and cultural environment, Local Contexts offers itself as a vehicle for increasing community capacity about the range of possibilities for diversifying collections management and curation practices, as well as offering labeling options for access and sharing that convey local community perspectives, concerns and responsibilities. The innovation here is the development of a new model for Native American cultural heritage collections management and curation that acknowledges the legitimacy of Indigenous protocols of use, access and sharing of traditional knowledge, and new means for their incorporation into practice.

### **3. THE TRADITIONAL KNOWLEDGE (TK) LABELS**

The Local Contexts initiative has two objectives. Firstly, to enhance and legitimize locally based decision-making and Indigenous governance frameworks for determining ownership, access and culturally appropriate conditions for sharing historical and contemporary collections of cultural heritage. Secondly, to promote a new classificatory, curatorial and display paradigm and workflow for museums, libraries and archives that hold extensive Native American collections. By elevating the visibility of erased or marginalized voices from collection and exhibition practice, the Local Contexts initiative works to significantly impact how Indigenous perspectives about the management of Native American collections are recognized, legitimized and incorporated into contemporary practice. By adding critical and missing information, and facilitating new collaborative and reciprocal relationships between Indigenous communities and cultural institutions, Local Contexts is a digital tool for increasing knowledge about how Native American collections should be accessed, shared, governed, circulated, used and curated within institutions and by other non-Indigenous users of this cultural content.<sup>47</sup>

Inspired by Creative Commons, the project began by thinking through what a unique set of Traditional Knowledge licenses would do within this field of increasing digital content. However with the bulk of Indigenous cultural heritage material either owned by non-Indigenous people, institutions or in the public domain, the Local Contexts project team made an early decision to focus on the development of a set of TK Labels as a way to provide an educational and social “mark” on this large body of cultural material. For labeling options, we were initially inspired by the combined idea of community-based locality marks, such as geographical indications, alongside the innovation and success of fair-trade labeling. This latter form of labeling in particular has been used to render visible more ethical relationships of production in areas that have historically suffered from exploitation. These include, for instance, coffee, tea and clothing markets. Fair-trade labels encourage a form of social responsibility by making past exploitative practices visible in non-confrontational but socially effective ways. In these contexts, when given more information via a label, responsibility falls to the user to make a

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<sup>47</sup> See Marissa Duarte, NETWORK SOVEREIGNTY: BUILDING THE INTERNET ACROSS INDIAN COUNTRY (2017).



different decision about a purchase.

In the case of Indigenous digital heritage materials, because we were also largely seeking a strategy to target non-Indigenous *users* of this unique cultural heritage we asked the question: how could we give users additional information directly from Indigenous contexts, to help them make more ethically sound and responsible decisions about use of these unique cultural heritage collections? How could we incorporate care responsibility and ethics into use of specific content, elevating the significance of that content in moments of decision-making? Conceptually we decided to extend this idea of fair-*trade* labels in production into fair-*use* labels for collecting institutions. Consciously using this specific naming convention, we directly reference the concept of ‘fair-use’ as it exists within a US copyright context. As a copyright exception, Patricia Aufderheide and Peter Jaszi argue that fair-use offers itself as an important component for ameliorating the harsh exclusions of copyright. It is precisely because of the flexibility within the concept that allows for multiple interpretations of what constitutes ‘fair-use’ to be developed. They suggest that fair-use must, by definition, retain flexibility as social and cultural norms for what constitutes ‘fair’ changes over time and are often made in response to differently situated parties.<sup>48</sup> The TK Labels are a practical articulation of the possibilities that Aufderheide and Jaszi note within their analysis of fair-use. The TK Labels situate community-determined interpretations of what constitutes fair and equitable use at their center, and this helps a range of other parties, including users, understand more about what fair and responsible use looks like from another cultural perspective.

The TK Labels provide a conceptual extension of fair-use by also providing a flexible option for conveying important information about cultural heritage materials – their proper use, guidelines for action, or responsible stewardship and re-use. The TK Labels can be used in libraries, museums, and archives and within tribal institutions and online projects to extend already existing catalog records, provide additional context, and define responsible re-use of the materials.<sup>49</sup> The TK Labels can be used to include information that might be considered ‘missing’ (for instance the name of community

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<sup>48</sup> Patricia Aufderheide, and Peter Jaszi, RECLAIMING FAIR-USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).


<sup>49</sup> See Safiya Noble, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018)


from where it derives), what conditions of use are deemed appropriate (for instance if the material has gendered or initiate restrictions associated with it), whether correct protocols for vetting materials have been followed (for instance many tribes now have tribal policies and agreements for conducting research on tribal lands), and importantly, how to contact the relevant family, clan or community to arrange appropriate permissions. Importantly, the TK Labels are informational and educational – they ask users to make a choice, a conscious decision to follow the protocols of the source communities.

Many of the initial TK Labels were produced through already existing knowledge, relationships and work on Indigenous cultural protocols in the US, Australian, and Canadian contexts. Several recent labels were developed through specific workshops and focused testing with tribal partners. For instance, the Family Label grew directly from working with the Musqueam First Nation in Canada to highlight the importance of family knowledge and responsibility from a Musqueam First Nations perspective.

TK Family (TK F)




Listen 


Example 


### TK Family (TK F)

**Why Use This TK Label?** This label should be used when you would like external users to know that this material is subject to certain conditions for circulation. This material is usually only shared between family members. Because these conditions have not historically been recognized, this label helps make these conditions clearer for future users. Specifically it asks them to respect culturally specific rules of use and to make different and fair decisions about using this type of material.

Each label is meant to be customized by a community. Click below for a label template text.

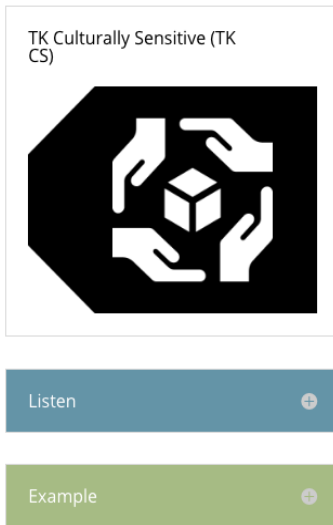
TK Label Template Text 

Español / Spanish 

Français / French 

In this instance, the Musqueam community determined that the community label we already had developed was not specific enough to get at the nuanced and complex responsibilities within families that function for sharing cultural materials and practices. For instance, certain designs, songs and dances have family responsibilities in relation to who can sing and perform these, as well as who these can be transmitted to. The content itself establishes the relationships and the responsibilities in caring for that material.

In another example, the Penobscot Nation in Maine created two labels – the Community Voice Label and the Culturally Sensitive Label. This latter one in particular was one that the community identified as necessary for content like language materials, which, from a community standpoint are extremely culturally valuable and need to be treated with care and respect.



### TK Culturally Sensitive (TK CS)

**Why Use This TK Label?** This Label should be used when you would like external users to know that this material has special sensitivities around it and should be treated with great care. These sensitivities could include: that it has only recently been reconnected with the community from which it originates, that the community is currently vetting and spending time with the material, and/or that the material is culturally valued and needs to be kept safe. This Label could also be used to indicate that there are cultural sensitivities around this material arising from legacies of colonialism, for instance, the use of derogatory language or descriptive errors within the content and/or content descriptions.

Each label is meant to be customized by a community. Click below for a label template text.

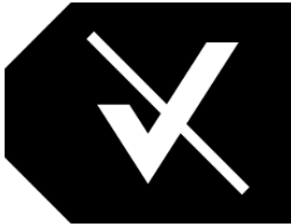
TK Label Template Text +

Español / Spanish +

Français / French +

For the Karuk Tribe in northern California, it was really important to be able to mark certain government and anthropological records that were inaccurate, derogatory and/or created with limited or no community input. Together we developed the Non-Verified Label for this purpose, which helps users of this kind of content know that the community does not agree or does not support the way in which it was collected or how they have been represented in governmental and anthropological documentation. This Label also points to problems of consent and permissions. It asks larger questions about the conditions under which the enormous Native American collections were made and through what means, and how they continue to circulate and with whose authority.

TK Non-Verified (TK NV)



**Why Use This TK Label?** This material has not been verified by the community. Reasons for this could include that it has not been appropriately vetted, has mistakes, omissions, derogatory language, lack of informed consent, or its process of creation was through dishonest research which did not follow proper community protocols.

Each label is meant to be customized by a community. Click below for a label template text.

TK Label Template Text

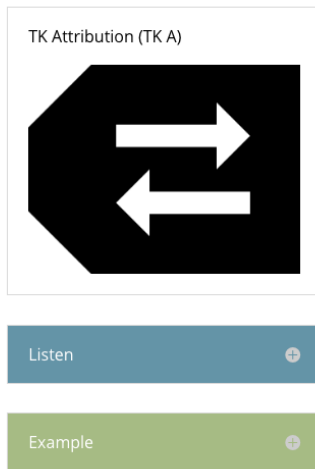
Français / French

Listen

Example

With 17 current labels and one final one in process (the Clan Label coming from Anishinaabe communities in Michigan), the suite of TK Labels function as a complex epistemological ecosystem conveying Indigenous protocols for the sharing and use of knowledge. All this is done outside a legislative framework, and they function as corrective and educative mechanisms, that taken together could also be understood as Indigenous developed policy for sharing of Indigenous cultural heritage that would largely otherwise be governed by copyright law.

As would immediately be apparent from the above Labels and for anyone who has visited the Local Contexts platform, each of the TK Labels has a unique icon, a descriptive text and a basic template text. In all local contexts where the TK Labels are being used, the icon remains the same, but the text can be customized to reflect local values and definitions. Keeping the icons static and stable produces a visual form of standardization across contexts and institutions for Label implementation and use (much like Creative Commons license icons are now easily recognizable). It also does not prioritize one Indigenous cultural form of visual expression over another. For instance, if the Labels were designed by a North-west coast Indigenous artist, communities in the US south east, in Australia and in northern Canada would be unlikely to use the label – as it reflects a clear visual tradition.



## TK Attribution (TK A)

**Why Use This TK Label?** This label should be used when you would like anyone who uses this material to know who the correct sources, custodians, owners are. This is especially useful if this material has been wrongly attributed or important names of the people involved in making this material or safeguarding this material, are missing. This label allows you to correct historical mistakes in terms of naming and acknowledging the legitimate authorities for this material. This label asks for future users to also apply the correct names and attribution.

Each label is meant to be customized by a community. Click below for a label template text.

TK Label Template Text

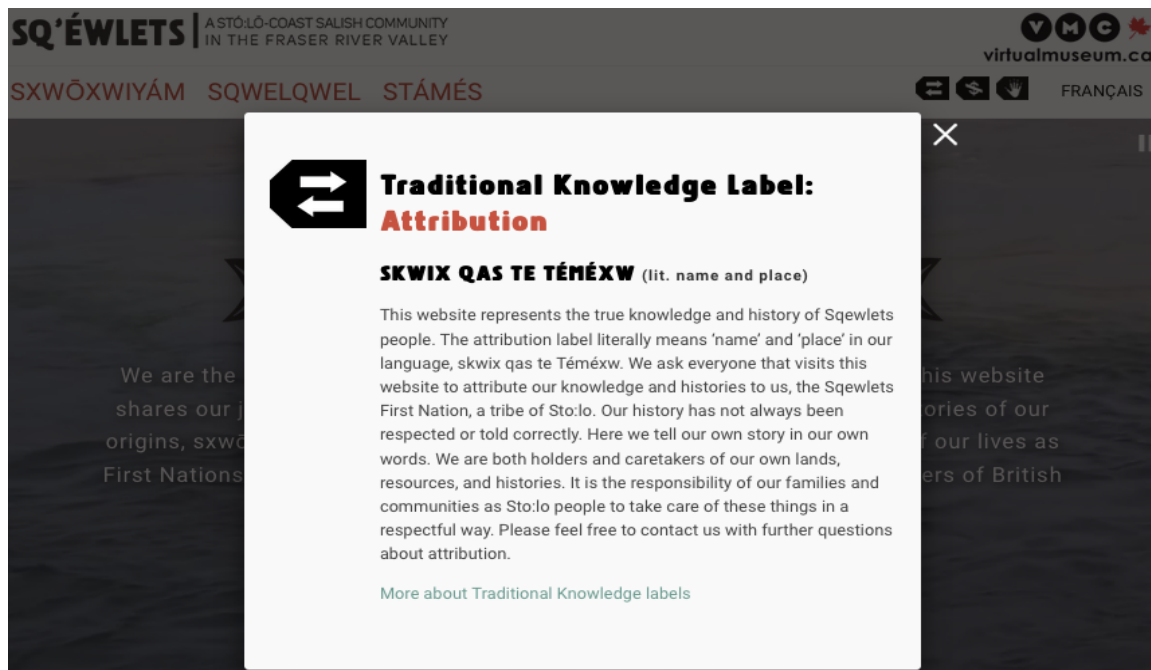
Español / Spanish

Français / French

The flexibility for community-driven expressions of attribution, for instance, exists in the *textual* component that can be adjusted according to translation and community articulation. This is the sovereign right that every Native American community has to determine and express their unique cultural protocols. Through this then, the TK Labels also expand the meaning of certain kinds of terms, which have been historically treated as normative – for instance, attribution. With the TK Labels – attribution is almost always the first label that a community identifies and adapts for their own purposes. This is because it is Indigenous names – community, individual, familial that have been left out of the documentation and then the catalogue and through digitization the metadata. The Labels also support Indigenous language sovereignty, the right for every community to use their own language to explain and locate their sense of name. For example, the Sq’ewlets, a band of Sto:lo in Canada translated attribution as “skwix qas te téméxw” which literally means name and place in their language Halkamelem.<sup>50</sup>

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<sup>50</sup> See how the Sq’ewlets use their labels here <http://digitalsqewlets.ca/index-eng.php>.



For the Passamaquoddy Tribe in Maine, attribution is translated into Passamaquoddy as Elihatsik, “to fix it properly”. The intention in this meaning of attribution is a specific call out for addressing mistakes in an institution and therefore also in settler cultural memory. For Passamaquoddy, their Attribution Label offers a previously unimagined opportunity to fix a significant mistake, to fix an erasure and exclusion, and to ask for that to not happen again.

This work adapting the labels has largely been done through specific community based workshops, which support communities in developing, translating and adapting the labels. As this project has grown and as more and more communities approach us for this work, our goal has been to transfer these workshops into digital contexts. Our development of the new TK Label Hub will allow for more adaptations as well as further implementation into institutions. We have also done work to make the labels accessible outside a dominant English tradition. The Labels have been translated into Spanish and French – which was a direct request from French speaking Canadian First Nations communities and Latin American communities in Mexico, Bolivia and Chile. In significant ways, the major work done building out elements of this platform comes from direct requests from Indigenous peoples seeking to use it and incorporate it into

community digital infrastructures and to transform relationships between communities and institutions that maintain control over community cultural materials.

The labeling initiative portion of the larger *Local Contexts* project can achieve several inter-related goals that historically have been difficult to get at in the current model of curation of digital content. The TK Labels render visible past practices of invisibility, while also bringing protocols of access and use into collections in dynamic and contemporary ways. The TK Labels also enhance possibilities of understanding and engaging with current Indigenous communities. One of the primary advantages of labeling is in the way it empowers Indigenous communities to include important access information about cultural heritage and this also provides more information to the public record. As the TK Labels have advanced in development through our testing both within Mukurtu CMS, the Plateau Peoples' Web Portal and beyond in other local customized community sites, it has become clear that the Labels not only serve Indigenous communities and non-Indigenous cultural heritage users, but also opens a space for a different dialogue with collecting institutions about access and the alternative cultural forms of ownership that have been haunting these collections. Importantly, the Labels are also a vehicle for providing a new set of procedural workflows that emphasize vetting content, collaborative curation, and ethical management and outreach practices.

### **3.1 Troubling Traditional Institutional Curation Workflows**

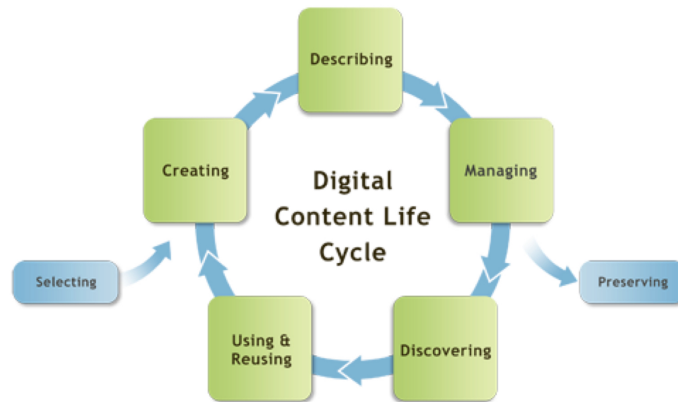
As mentioned above, the TK Labels are an intervention at a catalogue and metadata level. They seek to make visible and legitimate Indigenous protocols for access and sharing that were ignored or erased at the time when these kinds of collections were made. While this is not a legal intervention in the way that the Creative Commons intervention is, it does work to imagine the legal problem that Indigenous peoples have with copyright differently. It also recognizes the incapacity of law to remedy those original foundational exclusions. In this sense, the *Local Contexts* project points to the impossibility of asking for copyright law to rehabilitate itself in order to serve those communities that it was involved in dispossessing.

What is important about the TK Labels part of the *Local Contexts* initiative is that they are deliberately not licenses. That is, we are not limited by the cultural (in)capacities

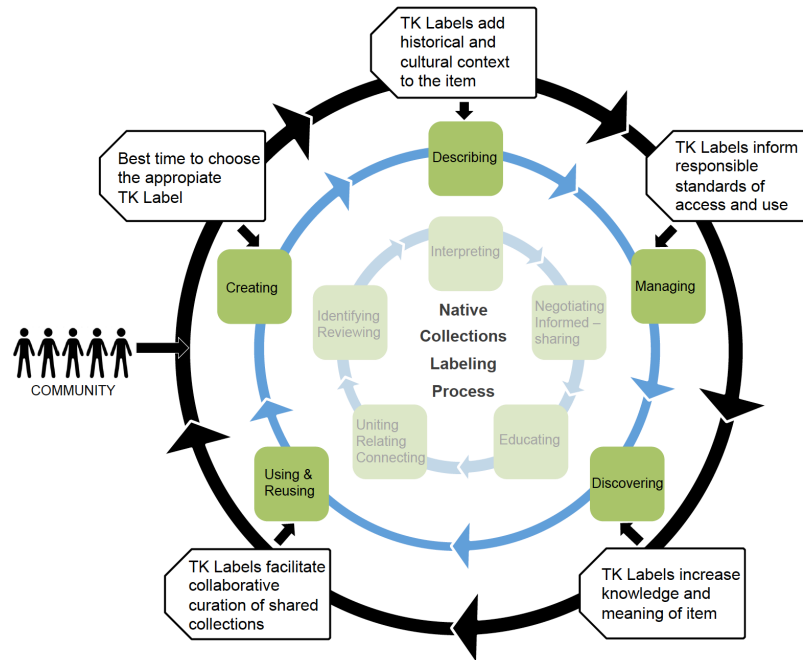
of the law. Indigenous protocols around the use of knowledge are nuanced and complex and do not map easily onto current legal frameworks. For instance, some information should never be shared outside a community context, some information is culturally sensitive, some information is gendered, and some has specific familial responsibilities for how it is shared. Some information should only be heard at specific times of the year and still for other information, responsibility for use is shared across multiple communities. The Labels allow us to get at this epistemological complexity in a different kind of way – and they allow for flexibility as well as community specificity to be incorporated in ways that settler-colonial law cannot accommodate. The Labels also take us into specific and deliberate spaces – like museums, archives and libraries – as sites where projects of settler-colonialism are elaborated and enhanced. Often these contexts are the first places where non-Indigenous peoples learn about Indigenous peoples. It necessarily takes us into the infrastructures of these institutions, and there we are asked to work with another kind of problem – the way in which Native American cultural heritage is curated and rendered visible.

Typical models of curation (see image below) begin with “discovery” or “collection” that implies a neutral cultural, social and historical field and promote “describing” and “sharing” without notions of vetting materials beyond Western legal systems of copyright. Instead, a model of digital heritage stewardship infusing Native/First Nations knowledge circulation systems through the idea of labels, for instance, promotes the care and stewarding of belongings based in *reciprocal and collaborative* curation. This model of curation involves a set of practices that redefine and interrupt the standard workflow of the digital content lifecycle, where content seems devoid of context or culture and where processes of discovery and re-use do not take into account colonial collecting practices, current political situations, and the biased classification systems that permeate curation models. Standardized digital life cycle models continue to unwittingly shore up Western understandings of information and objects detached from sets of social relations, histories of genocide, and systems of kin obligations that promote responsible sharing and circulation of knowledge between people through relationships.





Labeling offers an in-road at many levels of the digital content lifecycle (see image below). While adding a label at the ‘creating’ stage might be the best time to do so, it is certainly not the only time it can happen. What the *process of labeling* achieves at these other stages is an opening to new meaning, new conversations and new interpretation: not only do they add a critical voice and add important and previously missing information to the public record, but they enable an expansion of the very curatorial stage itself. If a non-Native collecting institution collaborates with a Native American community on a labeling project for a specific collection, every stage of the digital lifecycle will shift and benefit from thinking through how, when, and where to apply labels and which ones to use at series, collection and item level. For instance, when added to ‘Describing’, the TK Label adds historical and cultural context to the item; at the ‘Management’ stage the TK Labels provide information about the responsible and ethical standards of access and use; at the ‘Discovery’ stage the TK Labels increase knowledge and meaning at an item or a collection level; at the ‘Using and Re-using’ stage the TK Labels facilitate the collaborative curation of shared collections through the inclusion of community naming protocols and information about contact and accessing tribal policies for research and engagement.



Through the labeling intervention we can get at enduring questions from Indigenous, institutional and general user perspectives. Labeling provides more information and encourages a researcher, for instance, encountering a collection of Native American material for the first time, to make different decision about how to use, how to cite, how to attribute this newly marked song, photograph, or sound file. It also changes the temporal field of meaning and enacts what Mark Rifkin refers to as temporal sovereignty, where we are no longer bound to a linear framework of meaning and interpretation.<sup>51</sup> Multiple Indigenous temporalities are able to coexist and be expressed in the records for the first time.

### 3.1.1 The Passamaquoddy 1890 sound recordings – Ancestral Voices Project

In March 1890 Jesse Walter Fewkes made 31 wax cylinder ethnographic recordings with members of the Passamaquoddy community in Calais Maine. These were the first recordings of Native America ever made. In 1890, the legal protections that were in place for sound recordings were minimal; sound recordings were treated as property

<sup>51</sup> Mark Rifkin, BEYOND SETTLER TIME: TEMPORAL SOVEREIGNTY AND INDIGENOUS SELF-DETERMINATION (2017).

proper, which gave Jesse Fewkes exclusive property over these, in perpetuity. When sound recordings came under federal copyright protection in a special amendment in 1971, these first recordings were also brought into federal jurisdiction and are now protected by copyright until 2067, when they will then enter the public domain. Because they are not the ones who physically made the recordings, the Passamaquoddy community has no legal rights to any of these materials, even though they contain Passamaquoddy songs and stories sung by Passamaquoddy people, that only the Passamaquoddy can understand and interpret in culturally and linguistically significant ways.

In 1970 these cylinders were transferred from Peabody Museum of Ethnology and Archaeology at Harvard University to the American Folklife Center (AFC) at the Library of Congress through the Federal Cylinder Project.<sup>52</sup> In 1980 these recordings were returned for the first time to the Passamaquoddy community on reel-to-reel tapes. Because of the poor quality of the sound, only 4 cylinders could be identified and translated. In 2015, the Library's National Audiovisual Conservation Center (NAVCC) included these cylinders in their digital preservation program for American and Native American heritage. Using up-to-date technology, notably the Archéophone cylinder playback machine (invented in 1998 in France by Henri Chamoux), sound engineers were able to extract the content directly from audio cylinders to digital preservation master files. The digital files were then restored and enhanced, using the Computer Enhanced Digital Audio Restoration System - CEDAR. At the same time as this preservation work was initiated, the AFC, Local Contexts and the Passamaquoddy Tribe joined together for the Ancestral Voices Project funded by the Arcadia Foundation. This project involved working with Passamaquoddy Elders and language speakers to listen, translate and retitle the recordings; explaining and updating institutional knowledge about the legal and cultural rights in these recordings; adding missing and incomplete information and metadata; fixing mistakes in the Federal Cylinder Project record and implementing three Passamaquoddy TK Labels. These add additional cultural information to the rights field

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<sup>52</sup> See: <https://www.loc.gov/collections/ancestral-voices/about-this-collection/>

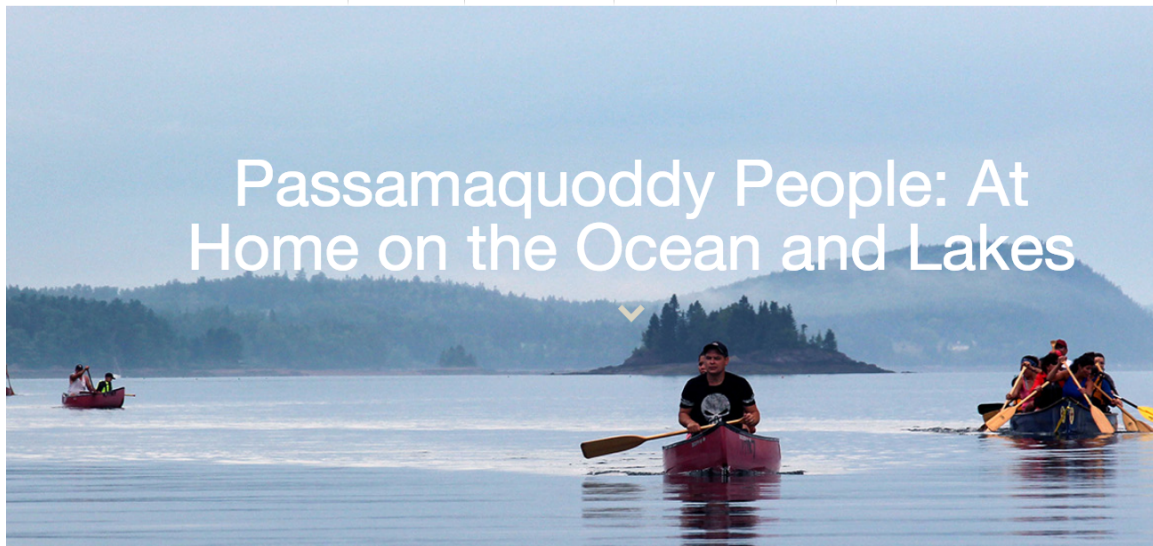
of the digital record and provide ongoing support for how these recordings will circulate into the future.<sup>53</sup>

The screenshot shows the Library of Congress digital record page for 'Passamaquoddy War song ; Trading song'. The page includes a navigation bar with the Library of Congress logo, a search bar, and a 'Subscribe' button. The main content area features the title 'Passamaquoddy War song ; Trading song' and a subtitle 'Mihqelsuwakonutomon (Song of Remembrance in the Passamaquoddy War Song Series) ; Esunomawotultine (Trading dance/song) / Jesse Walter Fewkes collection of Passamaquoddy cylinder recordings SR29'. Below the title, there is a section 'About this Item' with sub-sections: 'Title' (Passamaquoddy War song ; Trading song), 'Other Title' (Mihqelsuwakonutomon (Song of Remembrance in the Passamaquoddy War Song Series) ; Esunomawotultine (Trading dance/song) ; Jesse Walter Fewkes collection of Passamaquoddy cylinder recordings SR29), 'Summary' (The first song, Mihqelsuwakonutomon, means 'He/She tells memories of it'. This is a lament or mourning song. It is a fragment of one song in a series of songs and dances. Esunomawotultine, the trading dance, is the second song on Fewkes' wax cylinder 17 (Cylinder 4260; AFC 1972/003: SR29) recorded by Jesse Walter Fewkes in Calais, Maine, March 16, 1890.), 'Contributor Names' (Fewkes, Jesse Walter, 1850-1930, recordist, speaker. Selmore, Peter, performer.), and 'Created / Published' (1890.03.16). To the right of the 'About this Item' section, there is a 'Traditional Knowledge Labels' box with three icons: a double-headed arrow for 'Attribution - Elihtasik (How it is done)', a hand for 'Outreach - Ekehkimkewey (Educational)', and a dollar sign with a slash for 'Non-Commercial - Ma yut monuwasiw (This is not sold)'. Below the labels is a link 'Learn more about the traditional knowledge labels'. At the bottom of the page, there is a 'Part of...' section with the text 'American Folklife Center (32,872)'.

Changing how these recordings would be understood in the Library of Congress and in the meta-data into the future was only one part of this project. A complimentary part was working with the Passamaquoddy community to create their own digital platform for the cylinders, embedding them and relating them to other Passamaquoddy cultural heritage on Passamaquoddy homelands.<sup>54</sup> The Passamaquoddy site utilizes the CMS Mukurtu and allows for differentiated access at a community level and for various other publics. It does not assume that everything created by Passamaquoddy people is for everyone, including non-Passamaquoddy people. It embeds Passamaquoddy cultural protocols as the primary means for managing access according to Passamaquoddy laws.

<sup>53</sup> See: <https://loc.gov/item/2015655578>

<sup>54</sup> See [www.passamaquoddypeople.com](http://www.passamaquoddypeople.com)



Working with Passamaquoddy elders and language speakers to decipher the cylinders and for tribal members to now be singing these songs and teaching them to their children was what the work within this project required. When the Passamaquoddy recordings with community determined metadata and TK Labels were launched at the Library of Congress in May 2018, Dwayne Tomah called on the strength of his ancestors, and sang a song that had not been sung for 128 years. The ongoing strength of Passamaquoddy culture, language and Passamaquoddy survivance was felt by everyone who was in the room that day. The TK Labels were an important piece of this project as they functioned as a tool to support the correcting of a significant mistake in the historical record: namely that the Passamaquoddy people unreservedly retain authority over their culture which had been literally taken and authored by a white researcher from 1890 until 2018. As Donald Soctomah explained:

So, it goes with the wax cylinder recordings. The wax cylinder recordings, some of the songs almost disappeared in our community. The elders remembered bits and pieces of the song. They say, I remember that from when I was little, you know. And then when we're able to hear these wax cylinders, they broke out in song. *Now, we have our ancestors from 1890 speaking to us. You know that's really powerful, really powerful.* And you wouldn't believe, but some of the people, you know, the older people break

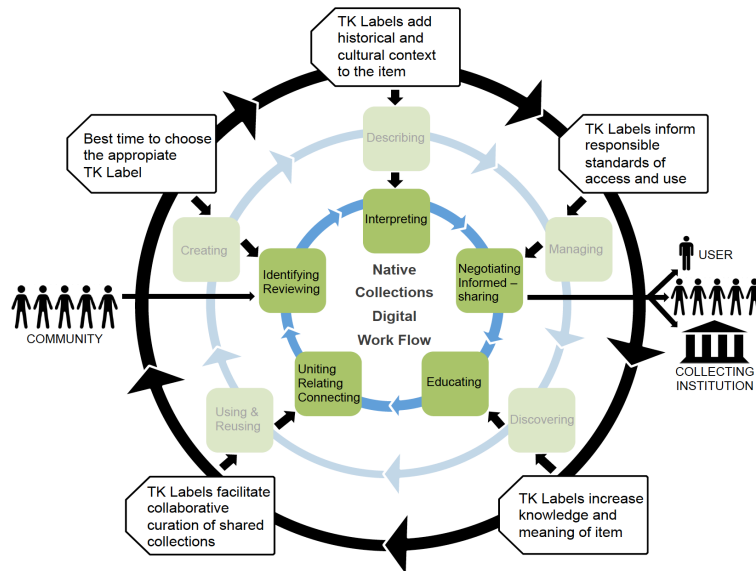
down and cry when they hear the songs of their great-great-grandfather, or the stories that they heard bits and pieces of before.<sup>55</sup>

This preservation and access project is one example of a new movement where institutional knowledge about the legal and cultural issues affecting Indigenous collections directly impacts decisions made around digitization and access wherein a descendent community is directly engaged. It is also listening to the different needs that the Passamaquoddy have in regards to what content is made accessible and why. The Passamaquoddy did ask for 4 of these cylinders not to be made publicly available on line, as these cylinder contain religious and ceremonial material that are special and restricted for Passamaquoddy people only. The American Folklife Center at the Library of Congress has built a new framework to honor and recognize this request from the Passamaquoddy. Education and training that the Local Contexts team delivered to the American Folklore Center led to the development of this new preservation and digitization process which importantly, allowed for a radical update of the historical record for these recordings.

This is just one of many examples where the TK labeling intervention opens these collections for new information, for new use, and for new meaning. It also begins to offer an alternative digital lifecycle workflow for Native American digital collections. This new workflow (see image below) brings into focus the cultural contexts that continue to inform these collections. The labeling process acknowledges this already existing context and adds capacity for cultural conditions of access and informed sharing to be included. In doing so, a new generalizable workflow is produced that enables the connection of current communities to their past collections and facilitates respectful and appropriate uses of this material into the future.

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<sup>55</sup> Donald Soctomah, Collaborations, Collections, and Connections Symposium (2016). *See*: <https://stream-media.loc.gov/webcasts/captions/2016/160913afc0900.txt>. Accessed on 23 Aug 2018.



#### 4. CONCLUSION

From the inception of the Local Contexts project, we recognized that one of the impediments for navigating the difficult questions of access and informed sharing of Native American cultural heritage is clear and accessible legal information about intellectual property law and copyright in particular. Providing this information is a cornerstone of our project and we are developing this to constitute a significant component of the Local Contexts site. Our learning and training modules seek to address legal, non-legal and ethical frameworks of practice, as we believe that these will help both Native American communities and non-Native institutions, make better and more informed decisions about when and whether copyright matters and works. Certainly Native American communities are not unique in having limited access to this kind of information and Creative Commons has done a service by providing easily digestible frameworks *for some uses* of copyright. Native American collections provide a unique case (much like software did for Creative Commons). When Native American collections disproportionately involve engagement with this area of IP law, not having access to educational materials concerning its use perpetuates conditions of exclusion and produces greater animosities towards holders of these collections. Our aim is to demystify copyright, to provide clear and direct information about how it affects cultural heritage material. For instance, this includes making the different time periods of protection for

the different ‘types’ of material (like photographs, films, sound recordings and written material) in a US context clearer. This helps communities understand the different kinds of rights that exist with their material, when their material might be going to enter into the public domain, and what kind of planning and negotiation with collecting institutions might be necessary.

While we work and prioritize local Indigenous contextual work, the TK Label initiative also has a life of its own. This is because at an international and national level, the TK Labels are an intervention directed at the level of metadata—the same intervention that propelled CC licenses to the reach they have today. Our current work at Local Contexts is threefold. Firstly we are finalizing the TK Label Hub. This will allow for a more widespread implementation of the TK Labels. It will be the place where communities can customize their Labels and safely deliver them to the institutions that request them and are committed to implementing them within their own institutional infrastructures and public displays. For example our current work with the Abbe Museum in Maine will see the TK Labels integrated into the Past Perfect software as well, allowing for implementation across a significant museum sector.<sup>56</sup> Secondly, we continue to expand our education work on IP law and Indigenous collections for communities and institutions. We have a new grant from the Institute of Museum and Library Services (IMLS) partnering with the Penobscot Nation in Maine, to provide education and training to 12 US based tribes over the next two years.<sup>57</sup> In December 2018, we received a new NEH grant that sets up a consortium of 6 US based libraries, museums and archives (state and non-state based) for site specific training and support in building collaborations and partnership with Indigenous communities whilst also developing institution-specific work-flows for TK Label implementation.<sup>58</sup> These institutions will help set up and become models for other institutions as this Consortium

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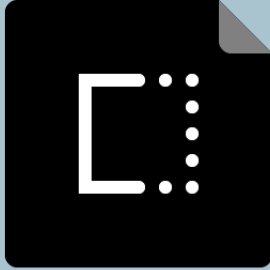
<sup>56</sup> For instance, Past Perfect serves over 10,000 archives, museums and libraries.

<sup>57</sup> Penobscot Nation (with Local Contexts), *Education in Intellectual Property and Tribal Governance For Negotiating With Cultural Institutions* IMLS Grant NG-03-18-0183-18

<sup>58</sup> Local Contexts, *Collaborative Curation Training and Education for Indigenous collections* NEH Grant PE-263553-19



grows.<sup>59</sup> As an additional part of this grant we will be beta-testing the new Cultural Institution (CI) Labels. The Cultural Institution (CI) Labels are:

	
<b>Open to Collaborate</b>	<b>Attribution Incomplete</b>
<p><b>Why Use this CI Label?</b></p> <p>The Open to Collaborate Label indicates that an institution is committed to developing new modes of collaboration, engagement, and partnership over collections that have colonial and/or problematic histories or unclear provenance. This label indicates an institutional commitment to change and to develop new processes for the care and stewardship of tangible and intangible cultural heritage.</p>	<p><b>Why Use this CI Label?</b></p> <p>The Attribution Incomplete Label is attached to collections or items that have incomplete, inaccurate, or missing attribution. This Label is a signal to viewers alerting them that the record and/or metadata is incomplete. Visibly identifying collections is the first step towards correcting existing attribution to include: contributors, collaborators, other authors and/or communities of origin.</p>
<p>CI Label Text <span>+</span></p>	<p>CI Label Text <span>+</span></p>
<p>How to Apply this CI Label <span>+</span></p>	<p>How to Apply this CI Label <span>+</span></p>

The newly emerging, diverse collaborations between communities and institutions are generating innovative initiatives and contexts for the sharing and interpretation of these wide ranging collections. But they remain institution and community specific despite the similarity of concerns and problems for wider Native American, First Nations and Indigenous communities internationally. What these initiatives clearly show is that concerns for access often go hand in hand with concerns for how these collections were made, and for finding ways to incorporate appropriate protocols for use and circulation of these cultural heritage materials. We are at a watershed moment where Indigenous

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<sup>59</sup> The six consortium institutions are: the American Philosophical Society in Philadelphia; the New York State Museum in Albany; Sam Noble Museum in Oklahoma; San Diego Museum of Man in California; Alaskan Native Language Archive at the University of Alaska, Fairbanks and the University of Hawaii Libraries. This is in addition to the Abbe Museum and the University of Maine Libraries who we are already working with.

communities all around the country and indeed, all across the world are facing exactly the same problems about what to do about access, ownership and the informed sharing of digital cultural heritage collections.<sup>60</sup> This is particularly acute for the enormous collections in the public domain that circulate with missing or inaccurate information, and because of this, re-inscribe colonial inaccuracies, biases and derogative framings about Indigenous peoples, cultures and lifeways.

Local Contexts is just one of many initiatives needed to support Indigenous decision-making and governance frameworks for determining ownership, access to and culturally appropriate conditions for sharing historical and contemporary collections of Indigenous material and digital culture. It does trouble existing classificatory, curatorial and display paradigms for museums, libraries and archives by also highlighting and being attentive to the legal infrastructures that are also digitally embedded within these contexts. It is committed to finding new pathways for Indigenous names, perspectives, rules of circulation and the sharing culture to be included and expressed within public records and into our social and cultural networks and future relationships.

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<sup>60</sup> See Mathilde Pavis and Andrea Wallace, RESPONSE TO THE 2018 SARR-SAVOY REPORT: STATEMENT ON INTELLECTUAL PROPERTY RIGHTS AND OPEN ACCESS RELEVANT TO THE DIGITIZATION AND RESTITUTION OF AFRICAN CULTURAL HERITAGE AND ASSOCIATED MATERIAL. 5 February 2019. <https://docs.google.com/document/d/1-RIGHXiYjB6nFhzeOn6gHapFL-w9oontJFZfAjlSXki/edit>