

A Broken Record: Subjecting 'Music' to Cultural Rights

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Introduction

Issues involving the appropriation of intangible cultural heritage have attracted new attention in the last decade, becoming the focus of domestic and international law and policy. Ironically, this renewed attention to cultural rights has occurred at the same time as growing concern about the expansion of intellectual property rights and their capacities for stifling creativity, limiting expressive rights, imposing unwarranted forms of censorship and restricting the growth of the public domain. Although most of this critique is quite properly levelled at the corporate cultural industries, one corollary is an intensified suspicion about any new limits being imposed upon cultural production.

This chapter concerns the ethics of appropriating 'artistic content', and draws primarily upon case studies about the loss of rights to musical forms from Canadian First Nations in the Northwest Coast cultural area. These groups have an interest in the history of their own music, particularly in ritual songs, whose performance rights were property in traditional legal regimes and may be unknown to current generations whose only access to them may be via recordings of their ancestors. The request for the repatriation of such recordings may be understood as an assertion of cultural rights; more specifically, it is one of many such claims to collective cultural heritage that look, to outsiders, suspiciously 'proprietary' in nature. In a public sphere in which it is popularly believed that 'information wants to be free', and 'free culture' has become a youth rallying cry for a progressive

movement to preserve the public domain, new articulations of cultural rights with respect to cultural texts are unlikely to be welcomed. Some of the fiercest battles are being fought with respect to rights over recorded music, with rights to record, download, sample, and recode musical forms asserted against the recording industries who continue to bring the full force of the law against those they accuse of ‘piracy’ (Halbert 2005). This is a difficult context, then, in which to make an argument for restricting rights to music.

Digital technology now enables sounds and images to be ‘captured’ and manipulated by anyone with a computer. In defense of musical sampling, the band Negativland asserts that

Artists who routinely appropriate . . . are not attempting to profit from the marketability of their subjects. . . They are using elements, fragments, or pieces of someone else’s created artifact in the creation of a new one for artistic reasons. These elements may remain identifiable, or they may be transformed to varying degrees as they are incorporated into the new creation, where there may be many other fragments all in a new context, forming a new ‘whole’. This becomes a new ‘original’ (Negativland n.d.).

Appropriation of music through technological means may be viewed as a continuation of a long Western artistic tradition of musical parody, mimicry and quotation. Even in classical music, ‘Bach and Handel borrowed from other composers . . . Stravinski referenced older styles . . . Other classical composers have based compositions on folk music, such as Bela Bartok’s works based on Hungarian folk music and Dvorak’s 1893 “Symphony No. 9 From the New World”, which quotes “Swing Low Sweet Chariot . . .” (Lindenbaum 1999). Within this context, appropriators may consider the sampling of the musical forms of Indigenous people in ‘world music’ and ‘world beat’ as a form of artistic homage and even a means of establishing forms of communication and respect across cultural, geographic and territorial divides. (Feld 1996: 15)

One irony of the artistic appropriation of Indigenous music is that, although the musicians who appropriate the music declare their ‘fundamental respect, even deep affection for the original music and its makers’, their music focuses on a small sample of the repertoire of the originating culture, in turn misrepresenting its musical achievements (Feld 1996: 26–7). With respect to the appropriation of Forest Peoples’ music, anthropologist Steve Feld notes,

The documentary records emphasize a vast repertory of musical forms and performance styles, including complex and original polyphonic and poly-rhythmic practices. Yet what of this diverse musical invention forms the basis for its global pop representation? In the most popular instances it is a single, untexted vocalization or falsetto yodel, often hunting cries rather than songs or musical pieces. This is the sonic cartoon of the diminutive person, the simple, intuitively vocal and essentially non-linguistic child. (Feld 1996: 27)

Contemporary practices of sampling and adaptation may therefore caricature the music and the communities for which appropriating artists profess aesthetic respect. Misrepresentation is thus one of the harms that may be done by insensitive forms of cultural appropriation. It is not, however, the only one.

When we frame our topic as one of 'appropriating artistic content' we may already be skewing our ethical considerations because the practice of art as an autonomous realm of individual creative production is a culturally specific framework that leads us to consider matters of appropriation through a lens that is both proprietary and expressive. When we characterize the ethical dilemma as one of conflict between a right to freedom of expression in artistic practice and a right to restrict the use of content based upon proprietary claims, we have already posed the issue in a misleading fashion that denies many of the equities at stake. Specific questions almost certainly emerge: is copying the theft of creative labor? is attribution necessary? Has a forgery taken place? Does the assertion of rights unduly limit the freedom of expression of others? These are not insignificant questions, but there is no reason for them to wholly orient our moral compass. Indeed, by categorizing the activity of cultural appropriation as the appropriation of artistic content, we may misunderstand the nature of cultural rights claims made by peoples for whom traditional cultural forms do radically different social work.

Articulating cultural rights in terms of a right to artistic forms similarly trivializes the issue at stake. For instance, Jeremy Waldron's argument against cultural rights as human rights characterizes the issue as a claim about artistic form. If a freewheeling cosmopolitan life, 'lived in a kaleidoscope of cultures', is both possible and fulfilling, he argues, 'It can no longer be said that all people *need* their rootedness in the particular culture in which they and their ancestors were reared in the way that they need food, clothing and shelter'. (Waldron 1995: 99–100) He contrasts the cosmopolitanism of Salman Rushdie's novels and life with the claims by

Will Kymlicka that 'stories' provide people with role models and values that allow them to make meaning of the world, arguing instead that meaningful options may come to us as items or fragments from a variety of cultural sources. Waldron uses as his example a passage from MacIntyre in which he lists recognizable stories from first-century Palestine, the Roman Republic and Germanic folklore. (Waldron 1995:106–7) This celebration of the ethical bricoleur privileges the Western aesthetic assumption that stories are fictions, oblivious to the social networks and/or cosmological ecologies in which many of the world's peoples' 'stories' locate their commitments and obligations.

Anthropologist Michael Brown, a keen observer of the politics surrounding proprietary claims in cultural heritage, notes that 'the rise of the Information Society' has produced 'a diffuse global anxiety around the movement of information between different cultures' and a contemporary 'crisis of cultural heritage' in which culture is now a scarce resource to be defended. (Brown 2005: 42–3) He suggests two main reasons for believing cultural appropriation to be wrong: the first is that appropriation is disrespectful of cultural values and has rarely been agreed to by the source community, and the second is that appropriation subjects the community to material harm by denying it economic benefits or undermining 'the shared understandings essential to its social health.' (Brown 2005: 44) Nonetheless, he argues that academic and advocacy work with respect to intangible cultural heritage must recognize the fact that 'Information answers to its own rules . . . By its nature, the Information Society undermines social norms and institutions.' (Brown 2005: 41, 43)

It is the relationship between social health and cultural forms that we wish to emphasize here. We do not intend to repeat, like a broken record, the assertion that 'Indigenous cultures must be seen as total social systems in which land, the natural environment, social practices and traditional knowledge form a seamless whole.' (Brown 2005: 45) Nor do we assume that any and all cultural appropriation is wrong. We will, however, argue that the appropriation of some recorded music needs to be understood as a violation of cultural rights and its 'repatriation' considered not only a partial means of restitution for historical injuries suffered, but as a provision of unique resources necessary to enable distinct futures to be articulated. Although the emergence of informational capitalism cannot be denied, and does indeed account for 'the meteoric rise of intellectual property rights (IPR) as a matter of global contention', (Brown 2005: 43) it is precisely this reduction of all cultural forms to information that must,

we insist, be avoided if issues of cultural appropriation are to be approached ethically.

To make this argument we will proceed historically to understand the dominant conditions under which recordings of traditional music have been made, historical records broken and injuries thereby incurred, and some of the equities involved in rendering their repair. We will suggest that some rights claims to intangible traditional cultural forms challenge modern understandings about tradition, art and the public domain while exposing their limits in societies committed to multiculturalism and or the establishment pluricultural values.

Tradition and Modernity: Culture, Works and Others

Although arguments about the injuries of cultural appropriation and requests for restitution of cultural forms are not limited to Indigenous peoples, the cultural rights claims made on identitarian grounds that most seem to offend defenders of the public domain are often influenced by the growing international politics of indigenism, which increasingly involves claims based upon tradition (Coombe 2008). The global position of indigeneity, it is important to emphasize, has no necessary ethnic referent. The international category of Indigenous peoples is, emphatically, a modern and postcolonial one in which human rights are asserted by and extended to ever-emergent groups of peoples who constitute their identities and make their claims by reference to their continuing survival as distinct societies despite their marginalization and oppression by the modern state.

It might be argued that Indigenous peoples are internationally defined as such precisely because of their commitment to their own cultural survival in the face of long histories of domination by others committed to obliterating their cultural traditions. Anthropologist Ronald Niezen suggests that

[W]hen we look for things that indigenous peoples have in common, for what brings them together and reinforces their common identity, we find patterns that emerge from a logic of conquest and colonialism. These patterns apply equally to people otherwise very different in terms of history, geography, method of subsistence, social structure and political

organization. They are similarities based largely on the relationship between indigenous peoples and states . . . usually [involving] . . . assimilative state education, loss of subsistence, and state abrogation of treaties (Niezen 2003: 87).

These historical injustices are understood by Indigenous communities to be denials of their specificities as culturally distinct peoples. As Niezen summarizes, modern state policies of cultural assimilation subjected Indigenous peoples around the world to schools in which their language and cultural understandings were targeted for eradication and children were treated as socially inferior because of their cultural difference, which authorities often viewed as undesirable forms of social backwardness. Coupled with these efforts were state or missionary endeavors that sought to destroy Indigenous spirituality, desecrate sacred sites, remove artifacts and prohibit social rituals and healing systems. State education systems also upset traditional patterns of mobility and undermined oral knowledge (and thus the authority of elders) while encouraging children to lose culturally significant connections to ancestral lands. A loss of subsistence due to modern development and settlement efforts and the intensification of extractive industry on traditional territories have compounded threats to Indigenous peoples' identities and autonomy.

A shared history of social struggle against these forces is constitutive of indigenism as a global movement. For better or worse, given the dominant ideological climate, 'the notion of belonging to a separate culture . . . [including] language, religion . . . laws . . . technology, art, [and] music . . . is central to Indigenous peoples' own self-definition'. (Berger 1987: 12) While this may seem 'essentialist' to critical theorists, these claims of belonging are not adequately understood as asserting proprietary rights; rather, they express alternative assumptions of and attachments to *obligation* that register an understanding of tradition long suppressed in Western thought. We are now witnessing a variety of projects that involve 'the advent of historical consciousness of defunct traditions, the reconstitutive recovery of phenomena from which we are separated, and which are most directly of interest to those who think of themselves as the descendants and heirs of such traditions' (Phillips, 2004: 9, citing Pierre Nora). The maintenance of cultural difference may well involve resistance to assimilation and a rejection of certain demands made by the modern state that those who bear tradition 'modernize' or become extinct. It may also include a celebration of the traditions that have enabled peoples to maintain their

identities, and efforts to recover expressions of their traditions that were appropriated from them under modern state directives that deemed their 'progress' necessary and their disappearance imminent. (for musical examples, see Frisbie 2001 and Gray 1997)

Many contemporary discussions of tradition are still, unfortunately, mired in a dichotomy between progress and backwardness such that traditions are deemed to be static and essentially incompatible with innovation, and any appeal to tradition is alleged to 'freeze' peoples in time. Claims to rights with respect to traditions are often suspect for this reason. Under such prejudices, 'movements for the defense or revival of tradition mark a break in continuity that signals that a tradition must be in the process of becoming an invented one', when, ironically, 'modern history is full of moments in which cultural continuities were in the gravest doubt, and it is also full of spectacular successes for those who struggled, through processes that mixed revival and invention, to renew their languages and cultures. (Phillips 2004: 6)

Unfortunately, tradition and modernity are so ubiquitously conceived in a dichotomous relationship that it is very difficult to use the terms in new and distinctive ways. Tradition has been understood as the antithesis of modernity, destined to disappear alongside it, and a barrier to national integration within the modern state. As Will Kymlicka points out, in the nineteenth century both liberal and socialist thinkers agreed that progress required a strong undivided nation state and believed the 'great nations' to be civilized carriers of historical development, while smaller nationalities were 'primitive and stagnant, and incapable of social or cultural development' (1995: 53). For instance, John Stuart Mill claimed it was better for a Scottish Highlander to be a citizen of Great Britain, 'than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world (J. S. Mill 1894 cited in Kymlicka 1995: 53). Similarly, Engels saw the subjugation, absorption and assimilation of small national groups as the entitlement of great nations, 'a right of civilisation against barbarism, of progress against stability . . . [This] is the right of historical evolution'. (cited in Kymlicka 1995: 70) Assuming either the inevitable assimilation or extinction of 'traditional' peoples, state authorities were (and many still are) ill-prepared for the survival of Indigenous worldviews, customs, and values under conditions of modernization. For the longer part of Western history, however, tradition represented a dynamic vision of society in which present generations were reflexive custodians of a legacy that linked

the living, the dead and those to be born in relationship. Only in the late nineteenth century did the concept of tradition acquire the negative valences of unthinking obedience to static conventions and become linked to a new distinction between Culture and cultures.

Literary theorist Terry Eagleton suggests that the clash between Culture (capitalized to convey its singularity and its elevation through Western aesthetics) and cultures is central to contemporary world politics (with respect to law see Coombe 1998). It is certainly pivotal to the way we imagine the ethics of cultural appropriation and issues of cultural repatriation. High culture (which we will designate Culture here to avoid confusion and highlight its ideological valences) Eagleton argues, has historically been used as ‘the spiritual badge of a privileged group’ and the collective works that constitute canons ‘are offered as evidence of the timeless unity of the human spirit; . . . of the truth that the individual stands at the center of the universe; . . . and other such modern prejudices’ (Eagleton 2000: 52–3). The point about Culture is it is cultureless; its values are not those of any particular form of life, simply human life as such. (32) The universalist self-understanding of Culture puts it in a relationship of superiority to ‘mere cultures’ as blatantly historical forms of life that value collective particularity. Culture draws a direct relation between the individual and the universal in Eagleton’s view:

Culture is itself the spirit of humanity individuating itself in specific works; and its discourse links the individual and the universal, the quick of the self and the truth of humanity, without the mediation of the historically particular . . . What else is the artistic canon, a collection of irreducibly individual works which testify in their very uniqueness to the common spirit of humanity? (55)

European intellectual property doctrines reflect this ideology quite clearly. In the rhetoric that legitimates intellectual property, the aesthetic work, be it literary, artistic or musical, both embodies the personality of its individual creator and makes a singular contribution to human civilization, universally conceived. As Geoffrey Galt Harpham astutely suggests, the aesthetic is a concept fundamental to European modernity and its self-description as an enlightened culture. Referring to particular categories of objects and the attitudes appropriate to judging them, it also registers modern understandings of the human faculties of imagination and creation, and the value of freedom itself. (Harpham 1994: 124–5)

Our failure to transcend what might be deemed the prejudices of the modern concept of tradition has left us with little critical vocabulary for appreciating the traditions claimed by others, which are ethnocentrically assumed to be 'the unselfconscious continuance of social institutions and practices'. (Phillips 2004: 18) Only by dissolving the binary of tradition and modernity, however, can we address increasingly important questions about the ways in which the life of cultures is passed on in works of art and religion, or indeed, the ways in which our understandings of 'works' of art and the expressions of cultures have themselves been limited by European modernity and its prejudices. Musicologist Philip Bohlman, for example, suggests that European aesthetic theory has disembedded music from culture by virtue of its refusal 'to admit to the full range of cultural work that music accomplishes'. (Bohlman 2003: 45–56) Similarly, sociologist Simon Frith has pointed out that in many societies, music 'could be described in almost exclusively social terms: music was used in games and in dancing, to organize work and war, in ceremonies and rituals, to mark the moments of birth, marriage and death, to celebrate harvest and coronation; and to articulate religious beliefs and traditional practice. People *might have* enjoyed music individually, but its purpose was not to make them feel good'. (Frith 2003: 98)

During the eighteenth century, music came to refer to a fine art, one designated by the mid-nineteenth century as the finest and most transcendental of the arts. 'Across the century from 1750 to 1850, music lodged itself at the heart of a discourse that pried Europe and its histories apart from non-European lives and cultures'. Music came to counter song, 'not conceived as a European version of worldwide activities, but as a European *métier* opposed to practices elsewhere' (Tomlinson 2003: 34). Kant's positioning of instrumental music in his analysis of beauty in the *Critique of Judgment* is an early and influential instance in which 'music' is defined as most valuable when it is without words, serves no ends or purposes, and is independent of actually existing social orders. Tomlinson suggests that 'song' serves here as music's implicit 'other', solidifying a philosophical conception of aesthetics in which singing occupies a categorically different and lesser precinct of beauty. Kant, in any case, is understood by musicologists to have prepared the ground for what became a dominant view that 'the achievements of recent European instrumental music could be viewed as the culmination of progressive world history' in which music, dispensing with words, became, in Herder's words, 'a self-sufficient art': (35)

The idea of instrumental music as an autonomous, nonmimetic expressive means, together with the emergent formation of the modern conception of the discrete musical work, invested new and substantial powers in the written form of the work. The notated music came to be viewed less as a preliminary script for performance than as the locus of the composer's intent, the unique and full inscription of the composer's expressive spirit, which was elsewhere—in any one performance—only partially revealed. (39)

The modern aesthetic valuation of music, then, is predicated upon significant forms of abstraction and decontextualization, in which social and creative matrices are denied and music is detached from situation, a 'conception of musical autonomy [that] appears as a powerful philosophical assertion by elite Europe of its own unique achievement and status' (38). Progressive evolution in music came to be associated with writing, relegating the sonic endeavors of others with oral histories to the lesser domain of folklore, conceived as primitive, static, and incapable of development. (37) Significant forms of delegitimation were thereby accomplished. An ethical consideration of rights with respect to 'music' must reconsider the social capacities of song, if cultures as well as Culture are taken into account and the injuries as well as the accomplishments of modernity are to be acknowledged.

Record Collection and Salvage Paradigms

The study of the world's musical forms can be credited to the invention of the phonograph and the rapid development of sound recording as a scientific tool that could be used for collection in the field and transcribed for study in sound archives. (La Rue 2002) Communications theorist Jonathan Sterne suggests that the history of sound recording is bound up with the Victorian culture of commemorating and preserving the dead. *Scientific American's* response to news of Edison's invention of the phonograph in 1877, for instance, stressed the possibility that future generations would be able to hear the voices of the dead as its most 'startling' implication; 'speech has become as it were, immortal'. (Sterne 2003: 298) There are many 'messages to future generations' found amongst early recordings. For their own purposes, modern peoples imagined the possibilities of cross-generational speech, in which learning could be passed along to descendants. Recording

was understood as a pedagogical technology to be put in the service of tradition, in that older sense of transferring knowledge through a handing down to the next generation.

If early recording enthusiasts praised sound recording for its preservative potential, the earliest ethnomusicologists more fully extended the metaphor. While Edison promoted the use of the phonograph to preserve the voices of dying persons, American anthropology justified the use of sound recording to preserve dying 'cultures'. Early ethnography depicted their Native subjects as living in a different temporal zone than modern society and this denial of coevalness has been shown to be a constitutive means by which European modernity dehumanized non-Western peoples. (Fabian 1983) This tendency was particularly acute in the Americas and in Australia, where the extinction of distinctive Indigenous societies was treated, not as the deliberate policy it was, but as the inevitable by-product of the force of civilization and the great historical march of progress. As Fewkes, one of the earliest practitioners of ethnographic and folkloric sound recording, wrote,

When one considers the changes which yearly come to the Indians, and the probability that in a few years many of their customs will be greatly modified or disappear forever, the necessity for immediate preservation of their songs and rituals is imperative . . . Now is the time to collect materials before all is lost. . . . The scientific study of these records comes later . . . Edison has given us an instrument by which our fast-fading Aboriginal languages can be rescued from oblivion, and it seems to me that posterity will thank us if we use it to hand down to future students of Indian languages this additional help in their researches. (cited in Sterne 2003: 318)

It was commonly known that Native populations had been in steady decline for over a century (due to disease, alcohol poisoning, warfare and some deliberate acts of genocide) when the earliest phonographic cylinders were being made, so this belief is not surprising, even if it turned out to be short-sighted. It had distinctive consequences for the way these recordings were valued and bears significantly upon the contemporary ethics of repatriation. For decades many anthropologists devoted themselves to producing fixed artifacts—bodily measurements and 'life masks' to document Native physiognomy, and photographs and phonograph records to document 'dying' peoples and their 'dying' cultures. In the process these

artifacts functioned to dehistoricize these cultures by presenting a dynamic tradition at a single moment in time so as to produce texts for future study. Recordings were valued primarily for the transcriptions they enabled. Transcriptions, considered the primary analytical basis for scholarly work, were the tools that enabled comparative musical study. Few records were made to preserve the performances of these songs themselves for posterity. A particular performance was of little scholarly interest; only insofar as it helped to reconstruct a paradigm for cross-cultural research that would illuminate a universal human history was it considered significant. (Brady 1999)

There is a fundamental difference, then, between the understanding and valuation of recordings made by and on behalf of modern subjects and those made to document the cultural forms of Indigenous peoples and traditional others. The preservation of phonographic records in dominant societies would enable respected or beloved individuals to speak to future generations and their heirs with their own voices to pass along their wisdom. The actual performances of Native others, however, were considered data, or mere information, to produce records to serve more universal (Western) scholarly purposes. Non-Western and folk music forms, even when they were not regarded as more primitive ‘ancestors’ of Western music, were deemed destined to disappear under the onslaught of modernity.

The context of understandings in which recordings were made suggests that the Indigenous performers being recorded were not seen as having any legitimate interests in the records being produced; the recordings were made for purposes that made their performances means for the ends of others. They were recorded so that their songs could be preserved and subjected to scrutiny by scholars with a disinterested curiosity about the human past. Indeed, the ethnographic information collected through salvage anthropology is today considered by some curators, anthropologists and Indigenous-rights activists to be as morally compromised as the medical information amassed by the Third Reich in concentration camps. (Brown 2005: 36) While this may be considered an extreme position, we would agree with Scarre (this volume) that to view people and their projects primarily as a ‘means’ for further research, that is, as objects of study and not also as ends in themselves, is a clear breach of the Kantian injunction to treat people with respect. The collaborations that produced these recordings were, in any case, the product of grossly unequal forms of cultural interchange.

Musical recordings of Indigenous performances of traditional songs, in particular, were collected under conditions of great social stress. In search of pristine and authentic records of 'dying' traditions, representative of western North America's 'disappearing' Indian cultures, salvage anthropologists often erased any reference to the time period in which they were working. In so doing, they represented one of the most traumatic and turbulent periods of Indigenous history as paradigmatic of a timeless Aboriginal culture. (Raibmon 2005: 5) In the Americas, the Northwest Coast was the focus of attention for some of this era's most influential producers of anthropological knowledge and the site of an intense 'scramble' for Indian artifacts. This was the area where Franz Boas, the foundational figure in professional anthropology in North America, conducted his fieldwork. (5) It was also the region where Ida Halpern, a Canadian musicologist of Dutch ancestry, recorded over 400 hereditary Indian songs over four decades from the 1940s.

Like her anthropological predecessors' collections, Halpern's activities were motivated by a desire to preserve First Nations cultures. It might be speculated that as a Jew who escaped Austria when Jewish culture and music were being actively suppressed, she had particular empathy. For Halpern, it would be a 'sin' if the songs and culture were lost; the imperative to record these songs was of supreme importance to her. (Cole and Mullins 1993: 24) Although she collected primarily from the Kwakwaka'wakw (then known as Kwakiutl), Nuuchahnulth (previously known as Nootka) and Haida nations of the northwest coast of Canada, Halpern also gathered songs from the Bella Bella, Bella Coola, Tsimshian, Coast Salish and Tlingit nations.

The songs Halpern collected were eventually published as records and used in television and radio broadcasts, museum galleries, theatrical productions, films, academic theses and by contemporary composers wanting to incorporate a 'native' element in their works. Her collections also formed the basis of an education study unit for grade 4 students. (34) In 1984 Halpern donated the bulk of her collection (which amounted to over eighty file boxes of textual records, publications, moving images, photographs and sound recordings) to the Provincial Archives of British Columbia and the remainder to the archives of Simon Fraser University. A case study of Halpern's research shows that we cannot always reduce 'cultural appropriation' to acts by bad people, or even acts by good people mistakenly engaged in salvage ethnography. Rather, it shows that cultural appropriation may occur simply through the imposition of dominant aesthetic

categories and that perfectly acceptable, indeed laudable activities in one era, may cause harms that affect injuries that we must ethically acknowledge in another.

Preserving Indigenous ‘Music’: Rights and Responsibilities

Many of the songs Halpern recorded were central to potlatch ceremonies. Potlatch means ‘to give’ and is a term used to describe ceremonies that mark status-defining events such as marriages, naming of children, memorials to the dead, raising a totem pole, and, most significantly, transfers of rights and privileges. Potlatches were the foundation of Kwakwaka’wakw economic, political, social, spiritual, and legal systems, and the means for transferring cultural knowledge to future generations (Bell *et al.* 2008: 46). Kwakwaka’wakw refers to people who speak Kwak’wala (known historically as the Kwakkewlths by the federal government and as Kwakiutl by anthropologists) whose ancestral territories extend from Comox to the north end of Vancouver Island and the adjacent mainland inlets from Smith Inlet south to Toba Inlet. They consist of a number of distinctive tribal communities with their own names and creation stories. The activity of witnessing enabled the potlatch to affirm status, fulfill chiefly responsibilities and mark significant family events. These ceremonies served, and may continue to serve, ‘as a means of sharing and verifying Kwakwaka’wakw history’ and the people’s connection to their lands; they also connected participants to the spirit world in a way that is often described by contemporary elders as healing (49). In these ceremonies, ‘entitlements to songs, dances, masks and regalia are demonstrated and transferred before witnesses’. (50–51)

The importance of songs to Kwakwaka’wakw and other peoples in the Northwest Coastal cultural area is not limited to the fact that they are held by right and performed in religious and social ceremonies. The songs do not *accompany* or *adorn* potlatch ceremonies. Their performance has a ‘performative’ value, demonstrating and enacting—indeed constituting—the transfer and possession of those rights which define the central bonds of the society. Similarly, anthropologist Brian Noble’s research (2008) shows that the Blackfeet of northern Montana and the Skinnipiikani people of southern Alberta also have orally based performative practices of law. Law is enacted in ceremonial protocols of transfer in which song

demonstrates transferred rights in witnessed ceremonies. The transferred song is the seal of right or 'ownership' and transferred songs are spoken of as akin to a credential or a license granted by an authority (Noble 2008). Although it is outside of the parameters of this paper to demonstrate this, song may well define the 'constitutions' of a number of Indigenous societies.

When Halpern arrived in Canada, bans on potlatch ceremonies (1884–1951) had been in place for nearly sixty years. The purpose of this ban, first introduced in 1884 and revised in 1895, was the cultural improvement, assimilation and, for some, the Christianization of the Kwakwaka'wakw, long viewed by missionaries as the most recalcitrant and uncivilized of Indians. (Raibmon 2005: 17) Although Kwakwaka'wakw had been interacting with Europeans for over a century, few outsiders settled in their territories until the final decades of the nineteenth century, precisely when government and missionary forces began stepping up their assaults on an Aboriginal life-world structured around extended kinship and inherited resource rights and anthropologists began to document their pending 'extinction'. Although performed in more remote locations to escape surveillance, the potlatch proved tenacious.

Amendments to the ban in 1918 made the celebration of potlatch a summary conviction offense so as to avoid the necessity of finding a judge to effect the sentence and enabling local magistrates (such as Indian Agents) to put practitioners in prison. Knowing their ritual significance, officials offered an ultimatum to people, agreeing to lenience and to forego prosecutions if people turned over their potlatch-related regalia. This truce was quickly broken. Following Dan Cranmer's potlatch in 1921, forty-five people were charged, mostly high-ranking chiefs and their wives, for criminal acts of singing, dancing, making speeches and giving and receiving gifts; twenty men and women were sent to prison, the rest receiving suspended sentences after agreeing to give up potlatch artifacts (most of which the Indian Agent, Halliday, personally sold to museum collections). The ceremony was driven further underground, almost disappearing in the next three decades.

During the period that Halpern made her recordings then, the potlatch system was in crisis, as were the social systems of many cultural groups in this region. Halpern, as well as the chiefs and artists with whom she worked, could have been imprisoned for these collection activities. Chiefs who are alive today acknowledge that their laws were not properly followed during this period of crisis and that many sacred possessions were illegally sold or

stolen as villages were abandoned and disease decimated populations, making it impossible to mobilize resources to support feasts and fulfill ritual obligations. 'It likely seemed to many that the predictions of the missionaries and government officials of their complete demise as a people was actually coming true'. (Overstall 2008: 99)

Halpern's first collection of songs was made in 1947 with Billy Assu, chief of the Lekwiltok Kwakwaka'wakw. Historians Douglas Cole and Christine Mullins suggest that it was Halpern's ambition to help keep Kwakwaka'wakw culture 'alive' that persuaded Chief Assu to record the songs: "What", Halpern asked the chief, "will happen to your songs if you die?" "They will die with me", was his fatalistic reply' (Cole and Mullins 1993: 21). But once he understood her intention, according to Halpern, he said, 'You come: I give you hundred songs'. (21) Her second singer, Chief Mungo Martin, was also concerned with cultural preservation, according to the historians. He had been influential in persuading people no longer interested in performing the potlatch to pass on their ceremonial materials to the University of British Columbia Museum. Cole and Mullins read this as evidence that the chiefs were 'not so much passing on their culture as a living continuity among their Kwakiutl people but as a memory culture in anthropological literature, in museums, and on Halpern's recording and tapes' (1993: 24). Thus they interpret the chiefs' intent as consciously supporting and engaging in a process of making a record 'for posterity' in the sense of disinterested study by later scholars. (24)

It is difficult to ascertain if the chiefs' understanding of and interest in 'posterity' dovetailed with Halpern's or if they shared the belief that they were bestowing these materials as a general record for humankind, as Cole and Mullins believe. There are reasons to suspect that the chiefs had other social motivations according to contemporary collaborative research being done with Kwakwaka'wakw partners (Bell *et al.* 2008). The imperative to pass on songs appears to have been crucial to many First Nations peoples in this region. Songs are connected with lineage, and are subject to rights under customary law. They are also 'evidence' of these rights and associated responsibilities with respect to territory and resources. This is the basis of their law (Overstall 2008: 101) or what we might consider their 'constitution' as a society. For example, elder Solomon Marden testified in legal proceedings that it is one of the Tsimishian and Gitxsan chiefs' main responsibilities to ensure that the *adaawx*, that is, the verbal record of the history of their peoples' origins, migrations, territories, and law, is passed on to the next generation. (*Delgamuukw v. The Queen* as cited in Marsden 2007: 118)

Let us consider the possibility that the imperative to pass on the law through the songs they held was one of the most important responsibilities of those people whom Halpern recorded. If, at this time, it was illegal to perform the songs, impossible to hold the ceremonies necessary to teach them to others, and (due to their acculturation in residential schools) the next generation were uninterested in, or due to their illegality, afraid of learning them, the chiefs may have had no other way of fulfilling their obligation to pass on the songs than through the making of these recordings, with the hope that their descendants would, in better times, be able to carry on the tradition. If these were their hopes, they have been fulfilled. Today there is an active cultural revitalization movement among the Kwakwaka'wakw. Seeking recovery of knowledge about the potlatch as well as repatriation of the objects and texts associated with it, they hope to repair the broken record of a tradition whose integrity they believe to be key to the social healing of a community harmed by the history of colonial encounter.

Halpern might be criticized for using First Nations peoples as 'a means', that is, as objects for research, rather than as ends. She might be accused of being more focused on her own reputation than on the needs of the people she studied. She was certainly well recognized for recording and analyzing First Nations music, as well as her other contributions to Canadian musical study. Her work with Indigenous peoples brought her great acclaim, as writer and critic for *Musical Courier*, regional director for the Metropolitan Opera National Council, vice chairman of the Community Music School in Vancouver, a life member of the Vancouver Academy of Music and a counselor for the Society for Ethnomusicology. In 1956, she was made a founding convocation member of Simon Fraser University and an honorary associate of their Centre for Communications and the Arts. The University awarded her an honorary doctorate in 1978, the same year she was named a Member of the Order of Canada. (Chen 1995: 44) But it would be a strange ethics, indeed, that found guilt in Halpern's success or failed to acknowledge the contributions of such risky endeavors to the field in which she so clearly made a contribution.

When Halpern began her collection, the aural cultural forms of these groups were not widely acknowledged to be music, although the Indigenous peoples whose songs she collected had been performing for non-Indian audiences for decades. (Raibmon 2005) Through her study of First Nations music, Halpern freed herself from the cultural assumptions of Western musical superiority with which she had begun with. Whereas

the prevailing assumption, influenced by Darwinian evolutionary theory, was that music 'progressed' from primitive to fine art, Halpern was eager to discount prejudices about 'Indian' primitivism and to present North American Indigenous music as developmentally like European art. (Chen 1995: 51; Cole and Mullins 1993: 36) If, as Charles Taylor (1994) suggests, cross cultural recognition and respect involves, at least in part, recognizing the artistic achievements of other civilizations, Ida Halpern's accomplishments were remarkable.

The music she encountered was complex and difficult to understand. The melody and the accompaniment were independent of each other. The vocalization included what were generally considered to be 'nonsense' or 'meaningless' syllables. Her research progressed slowly. Her method of analysis initially involved the separation of the rhythm from the melody, which she analyzed in turn, before she turned to the vocalization. Later research focused on the totality of musical forms and the stylistic elements distinguishing the songs of different groups, the classification of song-types related to different kinds of ceremonies and the comparison between the same songs sung by different generations of singers. (Cole and Mullins 1993: 29–33) She sought thereby to demonstrate the 'complex constructional principles underlying the compositional process' in this music, and her analysis of inter-generational interpretations of the song showed that the performers had 'a full awareness and conscientious respect for compositional principles and techniques [that was] refined over generations and restated, with creativity and regularity'. (33)

Halpern's interest in recording the songs appears, then, to be an interest in preservation in terms of affirming its value as music. This is a different kind of concern than that of the salvage anthropology that preceded her, which viewed such recordings as mere data. Her respect for the music, and the skills and sophistication of the performers, translated into a respect for the sophistication and artistic quality of the region's Indigenous culture. No one, after becoming acquainted with her work, would think that these people did not have art or were not contributors to human civilization. Politically, the very presentation of these songs *as* music, and as sophisticated music at that, brought Aboriginal creativity into the realm of Culture. Moreover, Halpern's research did not 'freeze' this music as a snapshot of an ethnographic past, nor did it obscure its practitioners' own understanding of their music. Her work explicitly focused on change over generations; changes she showed to be intrinsic to the dynamism of these musical traditions. In her liner notes she endeavored 'to foreground her "native experts"

as the primary and proper authorities and she kept ‘for authenticity’s sake the words [and logic] of the informants in the explanations . . . as close as possible to their way of expressing themselves [in English]’. (Chen 1995: 54) As one of her biographers points out, this form of ethnographic representation ‘would not even be considered by anthropologists until the appearance of Clifford’s “On Ethnographic Authority” in 1983’ (55) heralded the discipline’s postmodern turn.

It would be slanderous, then, to accuse Halpern of using people as means to her own ends, or to infer the full range of her intentions from the general circumstances and attitudes characteristic of salvage anthropology and the dominant function of recording in the ethnography of her era. The making of many other recordings that are now the subject of repatriation claims may indeed be understood in this fashion, but we chose Halpern’s recordings as examples precisely because her intentions were more sympathetic. What the example shows is that to focus primarily upon the character and motives of the person who did the original recording obscures a more crucial point about systematic injustice and the cultural losses that Indigenous peoples have suffered. In the mobilization of a universal category such as art, even well-intentioned people may unwittingly do harm. Indigenous music and songs are categorized as ‘folk music’ because they are traditional—handed down from generation to generation. They cannot be owned under Western legal systems because they lack an identifiable ‘author’ or creator, and are not ‘fixed’ in a tangible medium.

Under modern legal principles with respect to the ownership of works of Culture, no one could claim copyright in the music itself and the only copyright would have been created at the time Halpern made her recordings, albeit only in the recordings themselves. She may have assigned her copyright in the recordings to the archives or the university when she deposited them. If so, they may be able to charge a fee for their use, but simply by virtue of controlling these archives they can restrict access to these recordings and thus their use by others, including the descendants of those who originally performed the songs for Halpern. Moral rights, which enable artists to maintain control over a work, even against subsequent copyright owners, are only available to identifiable individual creators in deference to the individual’s link to Culture through his contribution to human civilization of an expressive work that, in Hegelian terms, projects their personality. Such moral rights are categorically unavailable to the endeavors of those who have not ‘transcended’ their immersion in local traditions and projected their individuality into the sphere of the universal.

Legally, however, Halpern is the only individual whose artistry is recognized; the First Nations peoples whose ancestors had songs recorded by Halpern have no rights to them and no other way, it appears, to gain access to songs that formed the basis of their customary laws.

The Harms of Appropriation

Categories do political work. How we categorize something and the priority we give to that categorization have consequences for how we think it ought to be treated, whether it can be owned and how access to it should be governed. Regardless of Halpern's good intentions, her valuation of the music, the creativity and artistry she acknowledged in her Aboriginal informants and the respect she accorded them as expert practitioners in deploying the creative resources of their traditions, Halpern's recordings of their music contributed to the disenfranchisement that the peoples of the Northwest Coast suffered at the hands of the modern state. This disenfranchisement, however, cannot ethically be reduced to a loss of property, nor can the act of restitution be ethically resisted simply in the name of an undifferentiated public domain.

For some First Nations peoples, clearly, songs were and are central to the maintenance of distinct houses, chiefdoms, families and lineages and their rights and responsibilities. Within oral traditions, references for law, jurisdiction and territory are encoded not in statute or treatise, but in mnemonic devices such as songs. Mnemonic devices do not record information in the way that written language does, but provide a code or symbol that serves to remind the user of important historical and legal information. (Goody 1998: 73–94) Gitanyow informant Robert Good, for example, links legally significant crest images 'to a song, a drama, and the *adaawk*, all of which recreate through display and performance the House of Luuxhon's possession of a particular fishing site and of its territories as a whole'. (Overstall 2008: 110) Tsiwa' wing chief Herb Russell indicates that oral histories, feast names, songs, crests and poles are House possessions; telling the *adaawk* at a feast is the key responsibility of a leader because it demonstrates the necessary familiarity with the history of House traditional territory and thus provides your deed to the land. (104) Given 'the central constitutional role of the protection and display of *adaawk*, crests, and songs, their misappropriation by others is a primary political concern'. (111)

In these societies songs may be a part of a cultural complex that defines a person's responsibilities as a member of a House and in relation to other Houses. The songs held by a House constitute the House as a legal entity amongst the Gitxsan and with respect to wider society. Such songs may therefore be considered essential to the maintenance of a group's social identity as a distinct people (Coleman 2006: 170) and to their self-determination. Historical evidence of the use of songs in Indigenous ceremony suggests they have a similar function in many societies. Within those traditions, such songs should properly be regarded as 'law'. Our 'expressive' rights with respect to the use of such recorded songs should not, we would argue, be permitted to degrade the authority of legal records, or to extinguish a community's political future. To the extent that new regimes of rights pertaining to traditional knowledge and cultural expressions proposed by the World Intellectual Property Organization will acknowledge customary law (Taubman 2005) those laws would appropriately bind others in a future where rights pertaining to tradition were respected. (Coombe 2008)

If certain songs are constitutive of a people's law, it is also the case that the customary rights to territory and resources they represent may be unrecognized by the dominant societies in which they reside. For those without written records, recordings of songs may be the only legal 'records' they possess. However, in many cases, they do not possess them and must seek to retrieve them from others. The capacity of Indigenous groups to make legal claims within Western legal systems may thus be harmed by the unauthorized use of such songs in other contexts, their dissemination to other groups or the failure to provide exclusive rights of access to recordings to the descendants of the original performers. For example, amongst many Aboriginal Australians, songs provide dynamic proof of land ownership and the owners of songs and the ceremonies associated with them also own the land that these songlines trace. Anthropologists used sound recordings to assist in Aboriginal land claims as early as the 1970s (Koch 1997).

Since the rights of Australian Aboriginal and Torres Strait Islander peoples to hold title to land were finally recognized in 1992, wax cylinder recordings of ancestral song performances from the turn of the twentieth century have assumed even greater significance as forms of proof of customary legal title. They are now used in legal proceedings to help identify the families of Aboriginal people who were removed from their communities, in Native title cases as proof of continuity of cultural practice and in

statutory land claims where recorded ceremonies may be accepted as deeds of land. (Koch 1997) The same uses offer hope for others. Gitanyow people, for example, are challenging the Canadian federal government's surrender of traditional House lands to the Nisgaa people under treaty settlement; recordings of their songs would be helpful to their case. It is not entirely clear, however, that judges have the capacity or the inclination to understand the legal function of song. This was illustrated in the case of *Delgamuuku v. British Columbia*, in which the Gitxsan of the Tsimshian nation needed a year to perform their stories and songs before a judge in their pursuit of a land claim:

On one occasion . . . Antgulilibix (Mary Johnson), was telling her *ada'ox* to the court. At a certain point, she said she must now sing a song. Judge McEachern . . . tried to make the plaintiffs understand that this was unlikely to get him any nearer to the truth he was seeking. He asked the lawyer for the Gitksan whether it might not be sufficient to have the words written down, and avoid the performance. Finally he agreed to let Mary Johnson sing her song; but as she was about to start he fired his final salvo. 'It's not going to do any good to sing to me,' he said. 'I have a tin ear'. (Chamberlin 2003: 20)

In the end, Justice McEachern dismissed the case. He claimed that he believed Mary Johnson but not her *ada'ox*. (21) We have suggested that many First Nations songs do not merely record history and rights, but that correct performance, by a person with authority to perform the song, provides a rule for recognition of First Nation law. The song was presented as evidence of legal title. If a law can be 'true' it is not by virtue of correspondence, as history may be, it is true because it is an institutional fact, or has what is known as 'validity'. (Hart 1961: 92) Had the justice been prepared to 'hear' Johnson's song as proof of the validity of the Gitksan claims about the law, he may well have recognized it as the evidence that it was. His 'tin ear' had nothing to do with his failure to appreciate music, but it does nicely characterize his juridical failure to recognize customary law.

The manipulation, adaptation of and experimentation with songs such as these diminishes their effect as mnemonic and performative devices encoding law for communities. If a constitutive proof of the validity of a law is a song's correct performance by particular people in a particular performance, then its use as a resource in the 'musical' creativity of others strips it of its most significant power. It is not, in other words, information,

and its use is not, in economist's terms, non rivalrous. There is a real difference between the artistic appropriation and adaptation of folk music generally and the artistic appropriation of the songs of Indigenous societies in which music functions institutionally as law. Whether artistic appropriation and adaptation is morally acceptable, therefore, bears a crucial relationship to the social role of the cultural form in the society from which it was appropriated (for a broader discussion, see Walsh and Lopes, this volume, for presentation of a 'relational model' for considering art objects). Certainly not all social functions are deserving of deference, but the constitution of a people's rights and responsibilities as a people surely merits the utmost consideration as a matter of justice and as a matter of human rights. (Ahmed, Aylwin and Coombe 2008)

Finally, and perhaps most significantly from an Indigenous perspective, people are harmed when their abilities to fulfill their fundamental obligations to others (past, present and future) are thwarted. Moriori lawyer and scholar Maui Solomon points out that his own people 'are as much concerned about their obligations to one another and to the natural world at large as they are concerned with asserting their cultural rights. But without access to their rights they cannot exercise their responsibilities. Such is the relationship of respect and reciprocity' that he believes to be true of Indigenous and traditional peoples all over the world. (Solomon 2004: 222) The loss of Indigenous peoples' capacity to fulfill traditional obligations and to meet responsibilities that they believe to be bestowed upon them by their Creator is a form of harm.

We need not define this as a harm that is specific to Indigenous peoples, or only those people who hold religious beliefs, but, following Paul Bou-Habib, argue that this is an injury to an individual that derives from a person's need to maintain their integrity. 'Integrity' in this context may be defined as 'what is maintained when acting in accordance with one's perceived duties'. (Bou-Habib 2006, 117) The kinds of activities that may constitute such duties include activities like caring for the elderly and sick, protecting the environment, preserving cultural heritage, and respecting religious observances—activities that people perceive they are required to perform 'even if they do not derive happiness from performing them'. (117) Integrity, Bou-Habib argues, is a basic good but it is not an absolute good and may be outweighed by other detriments. (121) The good does not justify the need to accommodate all the perceived duties of people. However, to the extent that religious duties do not harm others and are not outweighed by other detriments, it may be argued that they should be

accommodated because the failure to accommodate an individual's perceived religious obligations is a harm that undermines that person's capacity for well-being. If the loss of traditional rights interferes with obligations to protect and to pass on rights intrinsic to music, to perform ceremonies, or to maintain spiritual heritage, then Indigenous people may be harmed by a loss of integrity.

Considered as traditional songs, outside of, or at best approaching, the lesser aesthetic realm of folk music, Aboriginal aural efforts were unable to attain the full status of music, which enabled anthropologists and musicologists to record and collect them and to claim authorial rights in their own recording efforts; this effectively also gave them rights to control what we might call their musical content. Categorized as recordings of public domain content, it seems utterly appropriate for them to be used as background for films, as advertising jingles and as the basis for expressive articulations with other musical material. Even if fully valorized as music, however, these songs have no weight as legal evidence nor as evidence of a broken social record of peoples and their histories, entitlements and responsibilities with respect to territories and resources. The harms to Indigenous people are not simply reminders of historical injuries inflicted by colonial regimes intent on destroying their cultures. They are systemic; they result from the imposition of categories that enable these harms to continue to be perpetuated. In 'appreciating' First Nations' 'musical' contributions to Culture, ironically, we may still fail to recognize First Nations societies and their cultures. Nonetheless, as Brown implies, it is frequently assumed that it is now too difficult or, indeed, undesirable to reclaim cultural texts such as Indigenous songs from the public domain. (Ziff and Rao, 1997: 249; Brown, 2005) We beg to differ.

Information Society

Information is not free-floating data without context but the means of forging and consolidating relations of sociality (Webster 2000), as even the practices of Creative Commons denizens and other ardent information society activists are well aware. Feld (1996) suggests that ownership and control of recording technology creates a new organizational network for the economy of music. Music, which in Western societies once supported diverse forms of sociality, became repetitive, mass produced and

stockpiled, and in the process enacted a repetitive mass-production of social relations. Musicians, with their ability to copy at will, secure in the knowledge that what they are copying is 'folk music', and convinced of the importance of their artistic creations for civilization, appear to be 'ideologues working alongside powerful technocrats and a knowledge-rich minority'. (Feld 1996: 15)

Brown correctly identifies 'the Information Society' with processes of globalization but fails to consider globalization as anything other than inevitable in its current course. Critics of globalization, however, argue that globalization is not an expression of evolution, but rather a process designed to give primacy to economic values and to aggressively install those values globally (Struhl 2006). Communications theorist Armand Mattelart (2002) suggests that the idea of the information society was carefully cultivated to represent efforts to Westernize the world as inevitable, depoliticizing this by projecting it as a natural progression of a unilinear development process. A purely instrumental concept of the information society was encouraged to indicate the new destiny of the world; it obscured the interests of those who controlled information technologies and helped to forge the new enclosures of a contemporary informational feudalism. (See Drahos & Braithwaite 2002; Kellner 2002; May 2000)

This reductionist or 'techno-determinist' position unfortunately appears to be adopted by Brown when he assumes decontextualization to be a necessary by-product of digitalization (rather than see it as providing new opportunities for forging contextual relationships, for instance). His discussion of cultural heritage never challenges the legitimacy of the 'knowledge economy' and he comes dangerously close to characterizing those who question the tendencies of the Information Society (which he routinely capitalizes) as Luddites resisting the inevitable. Although Brown argues for a more holistic approach, he places his discussion squarely within a technical framework without questioning the underlying relationships between people and things that animate it. By so doing, he legitimates a political economic structure by repeating its ideologies, and is quiescent in the face of the historic inequalities that are further entrenched by contemporary 'information society' relations.

In the words of Jeremy Waldron, '[T]he world we know is characterized by patterns of injustice, by standing arrangements—rules, laws, regimes, and other institutions—that operate unjustly day by day . . . To judge that establishment unjust is to commit oneself to putting a stop to the ongoing situation; it is a commitment to prevent the perpetuation of the injustice

that the law or the institution embodies; it is to commit oneself to its remission'. (Waldron 1992: 14) This suggests, we would assert, a need to reconsider the concept of the public domain. This is a legal term. The fact that something is in this domain on the basis of a legal definition does not make its use morally justifiable. Moreover, it suggests that rights lost through injustice should be rectified, or compensation made. It is not sufficient to say that the past is the past, and nothing can be done about it. Three philosophical arguments may be posited for the restitution of rights in Indigenous or traditional music. The first argues for the restitution of rights and depends on the music being the subject of customary rights within the originating society. The second is also a rights-based argument, but considers rights to be created through the process of recording, as rights arising from an agreement between a performer and a publisher. It does not create a right for the restitution of music, but it creates rights for an audience, and limits the rights of the owner of the recording accordingly. The third argument is consequentialist in nature. It argues that because of the mnemonic power of music, the repatriation of recordings may be an important aspect of the cultural renewal and historical recovery vital to Indigenous self-determination.

Rights-Based Arguments for Restitution and Limited Properties

The Kwakwaka'wakw are today amongst the best organized of Canadian First Nations in terms of their efforts 'to repatriate cultural items, revive cultural practices, and reclaim knowledge, values, laws, principles and beliefs associated with them'. (Bell *et al.* 2008: 33) Of particular significance to them are cultural items surrendered or sold as a consequence of anti-potlatch laws, whose repatriation is 'linked to community well-being and healing through revival of traditions and acknowledgment of injustices suffered at the hands of the Canadian government'. (34) Recovery of objects, stories and songs associated with the potlatch is important for the purposes of reviving a brutally suppressed ceremony that the Kwakwaka'wakw and related peoples consider essential to rights and responsibilities as nations. The U'mista Cultural Society, whose objective is to 'ensure the survival of all aspects of the cultural heritage of the Kwakwaka'wakw' (36), is engaged in repatriating potlatch artifacts and researching the traditional

potlatch protocol many community members regard as the historical foundation for their legal system. (46)

The basis of this argument is an historic injustice: the potlatch laws. It makes a claim for rights from which its practitioners have been dispossessed, and seeks the repatriation of cultural artifacts ‘surrendered or sold’ as a consequence of these laws. One problem with this position is that First Nations peoples sold some of their ceremonial regalia, and, in the case of music, appeared to have agreed to its recording. These agreements, regarded contractually, however, would appear to have been made under conditions of duress or unconscionability, particularly the agreement to forfeit ceremonial objects so as to avoid imprisonment. Moreover, even if the contractual limitations argument fails with respect to the recordings, this does not mean that current generations of First Nations peoples have no moral claim on the recordings their ancestors agreed to have made or that they are not properly asserting their cultural rights when they seek repatriation.

Robert Nozick argues for the rectification of historic entitlement on the basis of two principles of justice, justice in acquisition and justice in transfer, as well as rights against interference. (discussed in Thompson 2001: 8) This principle takes into account the best information about what would have occurred, had the injustice not taken place (in this it is similar to the equitable principle of restitution). Claims for rectification are restricted to ‘the restoration of expropriated possessions or the provision of an equivalent for these possessions’. (120) The moral claim for repatriation therefore rests on an entitlement, such as the well-recognized rights enjoyed by First Nations peoples prior to colonization.

The potlatch bans, which effectively halted the process of inheritance, are appropriately characterized as an interference with the legitimacy of the transfer of significant property. Thus, to follow Nozick’s argument, the sale of objects and the recording of songs would be illegitimate because the legitimate transfer of rights had been precluded, adding to the social situation of duress. The argument from duress is not always available as a general argument for the repatriation of cultural forms from the public domain by Indigenous groups. While similar forms of forced assimilation and outlawing of traditional practices may be found in diverse colonial histories, not all of these will involve interference with the transfer of rights. In other cases, the claim might rest on the injustice of assuming that these songs were part of the public domain as salvage recordings or as folk art. Nozick’s argument for rectification makes ‘no distinction between

dispossession caused by injustice and dispossession that results from a mistake—a belief that something was unowned when this was not so'. (Thompson 2001: 120) This point is significant; it does not require that what was lost was lost as a result of fraud, or theft or even under duress. Rights to music may have been lost because of a belief that songs were not owned, based on the wrongful assumption that, like ancient Greek myth, or European fairy tales, they were not subject to rights within a group.

Some moral philosophers consider Nozick's argument to be beset with a significant flaw: the need to identify rightful inheritors. Jeremy Waldron (1992), for instance, believes that an individual has the right to leave their property to whomever they please. This might be considered a reason for believing that contemporary First Nations people do not have rights to the repatriation of potlatch items that members of previous generations voluntarily sold or to songs they allowed to be recorded. This, however, assumes that property has certain features that are actually far from universal. Inheritance rights based on primogeniture are far more common than those based entirely on individual will, and immediate family members may, and frequently do, make claims against estates when they have not been adequately provided for. (Thompson 2001)

Nonetheless, not all Indigenous groups have the kind of institutionally defined rights to songs for the purposes of transferring social obligation that can be found in Canadian First Nations or Australian Aboriginal societies. A second rights-based argument for the limits to the rights of copyright owners of Indigenous music may be derived from a little known or discussed analysis of the nature of publishing by Kant. (1993: 225–39) Kant is concerned here not with intellectual property rights—the nature of a work or who has property in it—but instead, with the morality of publishing in terms of a speech act. (239) What is particularly important for our argument is how this agreement between the author and the publisher also creates rights for the intended audience of the recording. Kant writes that:

In a book as writing the author *speaks* to his *reader*; and he, who printed it, speaks by his copies not for himself, but entirely in the name of the author. The editor exhibits him as speaking publicly, and mediates but the delivery of this speech to the public. (Kant 1798: 229–30)

Moral rights in this situation are premised upon a series of agreements or promises. The author gives over his manuscript to the publisher in

return for the publisher delivering the intended ‘speech’ to the intended audience. The author, having made this agreement, cannot make agreements with other publishers for the same work. The publisher has the right to benefit from the reproduction of the work, and has the power to make over the publication to another. But this is the limit of the publisher’s powers, and the new publisher is also bound by the original agreement. (232) Kant believed that the right to use a manuscript to create copies created rights but rights with respect to the copies could not override the publisher’s obligations to respect the rights of the author in the work so copied. Speech acts cannot become ‘property’, he writes, as they are not ‘things existing of themselves, but . . . have their existence but in a person. Consequently these [speech acts] belong to the person of the author exclusively’. (238) Thus Kant insists on what we would now legally consider moral rights of publication, attribution and integrity.

Kant imagined a situation in which the author died before publication; in such a case the publisher could not morally suppress the book as if it were his own property:

[T]he public has a right, in case of a want of heirs, either to force him to publish the book, or to give up the manuscript to another, who offers to publish it. For it is a business, with which the author had a mind to transact with the public, and which he [the publisher] accepted as a transactor. (235)

Moreover, the manuscript must appear in the author’s name, may not be altered and a sufficient number of copies had to be furnished *to the author’s public* to convey the author’s sentiments. (238)

Many legal jurisdictions have long recognized a right to prevent the unauthorized transmission or dissemination of recordings of live performances without the performers’ permission, a legal provision that has indeed been used to prevent the unauthorized sampling and appropriation of traditional music, even when the recording was originally made with the performer’s consent. (Coombe 2003, 2005) These laws appear to echo the Kantian argument for moral rights with respect to speech acts because they are not dependent upon whether the material performed is itself protected by copyright. However, the Kantian argument does not provide moral rights merely for the author, but links these to the rights of the public to receive the latter’s message.

Kant had in mind the rights of a public who are not merely an amalgamation of intended recipients but a politically vital collective,

privileged as such by virtue of their use of reasoned judgment and its necessary influence upon the state. The circulation of written works played a particularly crucial role in constituting this public and its capacities; it was primarily imagined as a reading public. It is not insignificant that Kant's own publishers thank *das Publikum* in anticipation of their first issue of the journal that was to publish 'What Is Enlightenment?' and that philosophers of the time declared that they served no prince but only the public (Laursen 1986: 587). Publishers had an important role—even a fiduciary obligation—to assist writers to meet their responsibility to inform the public and to do so faithfully. In later work, under pressure from authorities, it appears, Kant limited the privileges of free debate and the scope of the public to a 'learned community' that was smaller than the 'civil community' and explicitly distinguished between philosophers, on whose public judgments the state's well-being depended, and other less disinterested men of affairs—clergymen, magistrates, and physicians whose public use of learning need not be so protected. (Laursen 1986: 591)

Taking Kant's injunctions out of their contemporaneous political context—and certainly many have found in Kant's works more universal precepts and principles—we might argue that any speech act belonging to an author has an intended audience and that the agreement with a publisher must respect the author's intentions as reflected in the nature of the agreement that constituted the *consent* to publish. The current owner of the recording is not entitled to any further publication than was intended and agreed to by the performer or to publish the work in a fashion that does not respect the integrity of the performance as a speech act. Property rights in the original recordings cannot authorize re-recordings as pop music, or as film soundtracks. These would infringe the performer's right, as well as the audience's right, to the integrity of the work. Distribution is limited to the intended audience agreed to by the performer, and that audience has a right against the publisher to receive the author's work as delivered to and for them. The contemporary law of moral rights has certainly moved in this direction.

The First Nations chiefs who collaborated with Ida Halpern provided her with a message for publication in the absence of access to their usual traditional means of passing along their songs (and thus their territories and resources) to future generations. It does not follow from this that current First Nations peoples have a right to possess the music as recorded, but they have a right to receive the message or speech act that these recordings contained. Halpern, for her part, appears to have met part of this

obligation by publishing the songs and using the chiefs' explanations of them. The current owners of the copyright in the recordings (usually archives) have a duty to provide access to them and to deliver them or faithful copies of them to the generation that seeks to fulfill its obligations as conveyed in these recordings.

The Kantian argument may fail to capture the full moral dimension of the situation for First Nations peoples if the speech act is not simply a message but a 'performative' that brings other social roles, obligations and relationships into being. Current generations of First Nations peoples whose ancestors collaborated with Halpern thus have moral rights to have adequate access to it for these traditional purposes. As a performative that aspired to reach future generations of these songholders' nations (and/or as a proud declaration of identity and territory to non-Indigenous Canadians), the songs inscribed in these recordings create obligations that remain unfulfilled. To the extent that a current generation perceives themselves as having such obligations, withholding the cultural resources that enable them to fulfill them harms their integrity.

A final moral argument for repatriation of music to Indigenous groups involves the capacity of such recordings to enable groups to recover their histories and rebuild their communities under postcolonial conditions. This moral argument need not be based on rights, but on the potential benefits to the recipient community and the social goods thereby realized.

Repatriation and Recollection

During the 1930s potlatches were forced underground and became more sporadic; after this it appears that they became far less frequent. Knowledge of the potlatch system was lost to many people because they were forbidden to speak their language for most of the year and could never fully participate in the traditional legal system. A younger generation now wants to learn the system but their parents and grandparents no longer know the names of their relatives or the songs and dances. The revival of the potlatch has been acknowledged as a place where the Kwakwaka'wakw can reinforce who they are, where people get spiritual connection as well as learn protocols and traditional law. (Bell *et al.* 2008: 60–61) The challenge for contemporary traditionalists is to ensure not only that the songs are protected

but that they are reintegrated with the teachings that historically accompanied them so that people can know their history and thus fulfill their responsibilities.

Kwakwaka'wakw peoples are grateful that their ancestors recorded many of their songs and thus that they can now do the research to learn about their traditional responsibilities. They are not interested in 'going back to the past' but in revitalizing their traditions to serve them in the present and into the future. Today, the descendants of those alive when the potlatch was outlawed—and almost extinguished—seek to bring their ancestors' songs 'back to life' and thereby to re-establish their connections to territories and their responsibilities to ancestral homes. Hereditary chiefs were known by their songs and had important roles in performing the oratory necessary to maintain the law in the potlatch ceremonies whereas elders had primary responsibility for maintaining knowledge within families. Although there is now some confusion as to ownership of some songs given the gaps in knowledge and practice over the years in which the tradition was under siege, most people believed that even when songs were 'borrowed' by others in times of hardship, seeking permission and acknowledging ownership remained important. (Bell *et al.* 2008: 65–66)

The existence of recordings of Indigenous peoples' songs in public archives neither addresses nor resolves contemporary claims for their repatriation. With respect to the relationship between archives and power, anthropologist Peter Toner suggests that 'we must lay aside naive assumptions about archival neutrality and impartial guardianship of the truth. In reality, decisions are constantly being made about what kinds of records are worthy of archiving, how they should be described, to whom they should be made available, and under what conditions'. (Toner 2004) Many archivists now recognize that by treating records 'as contested sites of power, we can bring new sensibilities to understanding . . . archives as dynamic technologies of rule which actually create the histories and social realities they ostensibly only *describe*'. (Schwartz and Cook 2002: 7)

If we treat recordings of Indigenous songs as mere records of archaic folk music in the public domain, we arguably ratify a colonial history in which Indigenous peoples were treated as doomed to extinction and deny them the capacity to recover their traditional resources for the purposes of forging their own futures. To the extent that repatriation is often expressed and experienced by Indigenous peoples as a form of healing from the historical traumas of colonization, it may also be understood as a form of restitution. Activities of restitution, moreover, may be both innovative and

collaborative. The use of the information society communications technologies in repatriation efforts may, surprisingly, serve *both* contemporary archival and Indigenous social needs, as the following example illustrates.

In the course of the 'Yolngu Music: Anthropological and Indigenous Perspectives' collaborative research project undertaken in the early 2000s, it became clear that songs functioned traditionally as law for Yolngu people. The project involved the digitization and community recovery of audio recordings made in northeast Arnhem Land in Australia between the 1920s and the early 1980s. The recovery of these recordings was considered necessary for the purposes of helping Yolngu peoples to 'remember' their heritage. The issue of memory is particularly important and sensitive for Aboriginal land rights where connections to 'traditional owners' must be traced. These connections are difficult to establish in areas where European ideological conditioning had for decades encouraged Aboriginal peoples to regard their pre-contact ancestors as savage 'wild blackfellows' from whom they should appropriately distance themselves and *declaim* relationship.

Amongst the Yolngu, most sacred religious and ceremonial knowledge was traditionally stored in memory and orally transmitted. Memory, however, is shaped by current needs and concerns and the continuing 'integration of the past within the consciousness of the present' is the way that 'history enters, in an active way, the system of social reproduction'. (H. Morphy and F. Morphy 1984, cited in Toner, 2004) Listening to old recordings, Yolngu participants were stimulated to trace kinship relations as a means of educating youth about their ancestors, to reconstruct social networks, and to recall suppressed matrilineal genealogies. The latter were particularly relevant to the traditional transmission of cultural knowledge; this knowledge helped both to re-establish traditional systems of content management over repatriated heritage properties and to integrate these into contemporary ritual life based on a foundation of ancestral law, itself reinvigorated by the recovery of these songs. Listening to the recordings, people felt they were exposed to a higher level of performative competence, and to key representatives of their group's cultural expressive capacity. Often, people would find themselves performing the appropriate dance and hand movements to accompany the song; memory, it seems, is an embodied phenomena. The recovery of music or other forms of what we might consider 'artistic content' may help to trigger the recovery of other memories relevant to mending broken historical records. In the process new forms of contextual 'metadata' may be collected, making these songs far richer and more meaningful, even as objects for 'universal' study.

(Toner 2004) As Aboriginal peoples become research partners in such processes of repatriation, broken records may be mended by the reanimation of archival objects in new forms of collaborative sociality.

Conclusion

Our consideration of the harms of appropriating artistic content legally considered to be traditional music through usages made of historical recordings has engaged in the anthropological exercise of thick description as well as moral and philosophical argument to forge a richer field of ethical inquiry to guide considerations of cultural rights claims. Some forms of harm from the categorization of traditional cultural forms as expressive work that is either protected or in the public domain are not specific to Indigenous peoples but may be shared by many cultural minorities, such as harms of misrepresentation or caricature. Other harms are more likely to be suffered by those who share particular histories of oppression by modern states that sought to assimilate them and/or welcomed their extinction as distinct nations and races. These are peoples for whom the cultural forms the Western world addresses aesthetically may do other kinds of performative work; their contemporary capacities to meet traditional responsibilities and thus to exercise their territorial, environmental and cultural rights may depend upon access to these cultural forms and require some restrictions on their use. Repatriation arguments may be made for the rectification of historical entitlement based on justice of acquisition, justice of transfer and rights against interference in a speech act; they may also be based upon principles of restitution and self-determination. The ethics appropriate for the reparation of injustice are never simple and are importantly related to patterns of historic dispossession. These cannot be addressed and indeed are likely to be exacerbated by quiescent inclinations to reduce charged issues of cultural access, meaning, and appropriation to the inevitable tendencies of 'information', technologically rather than sociologically imagined.

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