Memoranda of Understanding & Researcher Contracts
Respecting Ownership, Benefit & Control in Language Documentation

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Mahalo to the Hawai’ian people for welcoming us to their beautiful territories

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INTRODUCTION

Ethical concerns in Documentation of Indigenous Languages

– Who has ownership & control over project outcomes?
– Who benefits from a project?
– Who determines answers to these questions?
– Who has access to language information?
– What instruments or mechanisms can be used to address these questions?
Coast Salish Partner-Community Concerns

At the outset of a wide-ranging long-term project the Elders Advisory Groups expressed

- concerns about how academic researchers would treat knowledge of land and culture
- wished to retain ownership to customary stories and related teaching
- did not want outsiders to profit from TK and/or oral narratives
- wanted to protect “very special forms of knowledge held by families as their intangible property”; this protection rooted in customary laws respected and upheld in the communities
- outsiders not often accountable to customary laws
- wanted to mitigate potential social or spiritual impacts that could arise from mis-use of private family knowledge

Rationale for Concerns

“rooted in both the economic disadvantage these [Canadian] First Nations are in relative to neighboring non-native communities, and their long-standing sense of community propriety over their cultural traditions”

(Thom 2006: 3)

“[...] violations of copyright [and IP concerns …] must be understood as part of the wider issue of outsiders’ appropriation and use of indigenous groups’ linguistic and cultural knowledge. These violations must be understood in light of the imbalance of power and resources that aboriginal groups face vis-à-vis the exploitation of their tangible and intangible cultural heritage by members of the dominant society.”

(Ignace & Ignace 2008: 433)
What we suggest....

• In a language documentation project it is essential to develop structures for encouraging
  – respect for community control, benefit, ownership and protection of intangible cultural property
  – responsibility to the community members and/or to community partners
  – reciprocity and relevance in research process and results
  – framing and being accountable to research relationships for the long-term, beyond the project
  – (the R’s of Indigenous/Indigenist research; e.g., Kirkness and Barnhardt 2001; Wilson 2008; Weber-Pillwax 2001)

• One way to do this is through formal agreements and arrangements
  – e.g., Memoranda of Understanding and/or Researcher Contracts that respect and refer to customary laws and protocols of each Indigenous community (as appropriate to the context of the research; Dobrin 2009, Robinson 2010, etc.)

What we illustrate....

• One collaborative, community-based (CURA) project on Coast Salish territory that tried to address conventional intellectual property
  – by enacting a formal arrangement between a university and its researchers and two Indigenous organizations
  – In ways that are appropriate to the particular cultural context and according to particular customary laws and protocols

• In our illustration, intellectual property has been addressed by
  – laying out principles for how to respect and protect Indigenous intangible property in ways not covered by conventional IP systems
  – grounding agreements in Indigenous community protocols around intangible cultural property
  – defining researcher responsibilities

• Practicing Research in a Coast Salish Way
  – Indigenous (Coast Salish) → Canadian (OCAP), International (UNDRIP, WIPO)
BACKGROUND: THE COAST SALISH CURA PROJECT

The Coast Salish Language Revitalization CURA Project

SSHRC Community-University Research Alliance Program

8 years (application process + 1 Jan 2004 – 31 Dec 2009 + wrap-up)

• Initiated 2001-2002; Southern Vancouver Island, Canada
• Language projects
  – 10 Hul’qumi’num documentation and revitalization projects
  – 9 SENĆOŦEN documentation and revitalization projects
• Governance and intellectual property projects
• Linguistics projects and methodology projects
Coast Salish Language Revitalization CURA Project Partners

Saanich Native Heritage Society (4 FNs)

Hul’qumi’num Treaty Group (6 FNs)

First Peoples’ Heritage, Language and Culture Council (Crown corporation)

First Peoples’ Cultural Foundation

University of Victoria

Coast Salish First Nations
Island Hul’qumi’num and Saanich Native Heritage Society First Nations

Hul’qumi’num’ Treaty Group:
Hul’qumi’num’ language
6 First Nations
-Lyackson, Chemainus, Penalakut, Halalt, Lake Cowichan, Cowichan
-6,200 people

Saanich Native Heritage Society:
SENĆOŦEN language (aka as Straits Salish)
WSÁNEĆ peoples
-4 First Nations
-Pauquachin, Tsartlip, Tsawout, and Tseycum
-approximately 2900 people

Purpose of the project

• To contribute towards rebuilding living language in HTG and SNHS communities
• To produce research and materials, and build capacity in research, culture and protocol
  — Relevant to language revitalization, useful to communities, in the communities, and in the university
• To establish solid partnerships between the Coast Salish communities and UVIC
  — To learn more about how to work together, respecting culture and protocol
• To enable conditions that would allow revitalization to continue after the project
An Empowering Governance Structure

**Elders’ Advisory Committees**
- one EAC for HTG, one EAC for SNHS
- provided direction and guidance for the Project and for individual projects
- made recommendations to the Steering Committee regarding major decisions

**Steering Committee** (1 elected Chair)
First Peoples **CHAIR**; SNHS 2 members; HTG 2 members; UVIC 2 members
- provided senior leadership regarding how money was spent and what sub-projects were prioritized

Indigenous/Indigenist Research Processes on the CURA: Coast Salish Practice

- **Community Based Research model**: (accountability, respect, reciprocity)
  - The community had the say on what they wanted in language revitalization (committee, Indigenous partners, Elders, planning document)
  - Protocols and agreements were followed in an Indigenous (Coast Salish) way. (Indigenous processes in place)
  - Indigenous ways of knowing came from the Elders and participants.
  - There was respect for culturally sensitive information.
  - Most language work was done in the communities, not at the University.
  - There was little domination or interference by the institution, and lots of support.
  - Equal participation of the two communities and the University.

(Daniels, Harris & Kell 2015)
INTELLECTUAL PROPERTY RIGHTS AND COPYRIGHT OVER KNOWLEDGE?

Relevant Terms

Indigenous Customary Law(s)/Legal Protocol
- Intangible Cultural Heritage/Property (ICH)
- Traditional Knowledge (TK)
- Traditional Cultural Expressions (TCE)

“Conventional”/Mainstream Legal System(s)
- Intellectual Property (IP)
- Intellectual Property Rights (IPRs)
- Copyright, Trademark, Patents
- WIPO
Instruments & Mechanisms

“...community-level instruments are ideally located to articulate the aboriginal community’s rights and expectations (both positive and negative) in important areas such as data acquisition, possession, ownership, access and access mechanisms, and dissemination [...]”

(Bannister 2009 p. 300)

Ownership and Control in Coast Salish Territory: agreements & arrangements

• Memoranda of Understanding
• And Researcher Contracts
  – developed between Hul’q’umi’num’ Treaty Group & University of Victoria
  – adopted and adapted by Saanich Native Heritage Society & University of Victoria

Defining MoU & Researcher Contract

• Memorandum of Understanding
  – provides guidance for a relationship but is not legally binding for the parties

• A contract
  – is a legal covenant between parties
  – legally binding relationship that can be enforceable in a court of law
  – establishes each party’s rights and privileges, is binding until dissolved in writing, is unassignable, and binds any successor in interest to the terms.

THE PRINCIPAL COMPONENTS OF THE MOU
Memorandum of Understanding

between

The HTG-UVic Research Group, representing the collective of the following First Nation groups:

Ka’kwetlo (Kwakwaka’wakw First Nation),
Haida Gwaii (Haida First Nation),
Namgis (Wakashan First Nation),
Sliammon (Cowichan First Nation),
Kwakwaka’wakw (Kwakwaka’wakw First Nation),
(abbreviated to HTG)

and

The University of Victoria, acting on behalf of the Department of Linguistics

(collectively referred to herein as the “Parties”)

BACKGROUND

A. The HTG-UVic Research Group and the University of Victoria have a shared interest in preserving and promoting the use of languages spoken by Indigenous Peoples. This Memorandum of Understanding (MoU) is intended to

B. The Parties have entered into a collaborative, community-based research project to work towards the following goals and objectives:

1. to ensure the success of the project through effective communication among all parties;
2. to identify potential areas for further research and development in the field of Indigenous language documentation;
3. to establish a collaborative framework for future research projects;
4. to foster a greater understanding of Indigenous language documentation among the wider community;
5. to support the ongoing development of the language documentation process;
6. to promote the use of Indigenous languages in education and community development.

C. In support of these practical goals, the Parties will seek to combine traditional and innovative forms of research and documentation.

HTG-UVic Research MoU

• sets out mutual goals and clear, inclusive processes for how decisions will be made
• establishes agreement on the short and long-term relationships for protecting and respecting Aboriginal intangible property
• provides details which can guide knowledge-holders in deciding what information to divulge, including the process for gaining individual informed consent
• clarifies who owns the copyright in audio-recordings with both the aboriginal knowledge-holders, and with the researchers making notes and recordings
HTG-UVic Research MoU (continued)

• describes what will happen to the recordings and notes in the long-term, including how long-term confidentiality will be addressed
• establishes First Nation control of intellectual property rights, with a limited use licence for researchers
• set outs parameters for how royalties, if any, will be distributed back to the First Nation
• Importantly, it defines areas of cultural knowledge that are “off-limits” to researchers operating under the research agreement

Intangible Customary Property-MoU

• sets out guidelines for researchers to not record very specific categories of aboriginal knowledge that are locally acknowledged as intangible property
  – specifically, ritual power words, family-owned stories and ritual prerogatives, and private family ritual and technical knowledge – all of which defined succinctly using Hul’q’umi’num’ language terms – are specified as areas that researchers commit to not record.
• provides a mechanism for researchers to seek the guidance of elders if they are uncertain about any materials they have worked on.
The Researcher Contracts

• used for researchers so the terms are in effect for the long-term, as information recorded needed to be covered by the terms of the agreement in perpetuity

• firm covenants between individual researchers and the First Nations organization
  – holds researchers to their commitments not to publish or make available private knowledge, personally acquire any royalties from publishing materials from the information shared.

• contracts require that any publication must disclaim any potential assertion of intellectual property over stories, myths, legends, and folklore

The Researcher Contracts (cont.)

• assigns IP in the materials collected to the First Nation

• provides a license from that First Nation to the researcher to publish released data for scholarly and educational (non-commercial) purposes
  – As a term of the license, the researcher must provide two copies of all publications, conference papers and other works deposited with the First Nation
The Researcher Contracts (cont.)

– demands that scholars use a permanent repository for their research materials
– requires researchers to ensure that, as a condition of the deposition of their research records, the repository will provide access to the First Nations members and that the repository will adhere to any confidentiality or use restrictions made by the individual community members

Consent Forms & Information Release

• it is critical for participants to know what will happen to the information they share, including to what information may be made public, and who the trustee (the First Nation) for the information will be.

Example of wording for confirming release of interviewee ownership interests and any restrictions interviewee may wish to place on its use.

I, ___________________, donate to the [First Nation] the audio tape recordings and written transcripts of interviews of myself which took place on the dates listed below.

☐ I transfer full title and all literary rights to this material to the [First Nation] and understand that use of these materials will be as outlined on the attached letter.

☐ I wish to place the following restrictions on the transfer of title of these materials (i.e. review or correct before use; contact myself or designee for permission to use for purposes other than those outlined in the letter; do not release materials for uses other than those agreed to for n years, etc.):
DISCUSSION

Value of MoU and Contracts

• Bannister (2009: 293-295)
  – requires researchers to observe cultural customs and Coast Salish customary laws
  – clarity about levels and processes for consent and other permissions in the community
  – recognition of need for Indigenous peoples to have an equal or lead role in decisions, processes, and negotiation of associated rights for research involving their own culture and heritage.
  – “university intellectual policy applies to project activities and outcomes, subject to the agreements in the MoU and research contract”
  – ensured that the Hul’qumi’num and W̱SÁNEĆ peoples’ customary stories and related teachings did not become the property of UVic or the CURA supported or affiliated researchers.
Value of MoU and Contracts

The MoU and Contracts

− help achieve dual goals of encouraging teaching, research and revitalization of language and culture, while providing a degree of security and protection for their intangible property
− provided an effective formal mechanism for research governance
− provided an inclusive and empowering process for First Nations involved
− provided clear processes for decision-making and dispute resolution.

Limitations of this process

• The MoU and contract system is not a complete solution to all Indigenous intangible property concerns.
• These intellectual property tools do not protect all oral traditions, only the expressions or performances of the oral traditions by individuals.
• The protection that copyright does provide is time-limited and does not prevent derivative works from being produced by others.
• Enforcement of the terms of the contract may be challenging to monitor over the longer-term.
Questions.....

• **Who is involved in development in a small nation?**
  – (HTG had a legal team; SNHS did not; most nations/groups do not.... but it is still possible to work out agreements like MoUs if one keeps principles of respect in mind)

• **Other questions:**
  – What if community members are the researchers?
  – What if community members do not want their recordings to be owned by their tribal organization?

CONCLUSION
Ownership and Control in Coast Salish Territory

- Memoranda of Understanding & Researcher Contracts
  - Define and protect Customary Intangible Property in language documentation
  - Spell out researcher responsibilities, publication
  - Spell out disposition of research
  - Spell out ownership, consent, confidentiality and royalties
  - UVic intellectual property
  - Dispute resolution

Canadian First Nations: Ownership, Control, Access, Possession

- The First Nations principles of OCAP® are a set of standards that establish how First Nations data should be collected, protected, used, or shared. They are the de facto standard for how to conduct research with First Nations.
- Standing for ownership, control, access and possession, OCAP® asserts that First Nations have control over data collection processes in their communities, and that they own and control how this information can be used.
- OCAP® respects that rights of First Nations communities to own, control, access, and possess information about their peoples is fundamentally tied to self-determination and to the preservation and development of their culture.

(First Nations Information Governance Centre http://fnigc.ca/ocap.html)
International: UNDRIP Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

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

Self-determination

“The Union of BC Indian Chiefs put it succinctly: "Indigenous Peoples' own languages, knowledge systems and laws are indispensable to their identity, and are a foundation for self-determination" and "inextricably and inalienably connected with their ancestry and ancestral territories." …Neither UN bodies nor state governments have been willing to consider that acknowledgement of indigenous rights with respect to traditional knowledge or traditional cultural heritage necessarily involves acceptance of the principle of self-determination for indigenous peoples.” (Coombe 2009: 255)

Therefore to support self-determination, it is useful and arguably essential to use “local” instruments, arrangements, and mechanisms for protecting IP.

Increasing self-determination is closely connected to well-being in a community.
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HÍSWKE HUY CH Q’ U THANK YOU

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- Staff, faculty, & students of UVIC

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