

# Knowledge Sharing & Repatriation

Jaime Arsenault & Trevor Reed | IAT | February 13, 2024

Disclaimer: This presentation is for informational and educational purposes and does not constitute legal advice nor establish an attorney-client relationship. We recommend you consult with an attorney prior to making any decisions about intellectual property or related topics.

# Presenters



**Jaime Arsenault** (White Earth)  
Tribal Historic Preservation Officer, White  
Earth Band of Minnesota Chippewa



**Trevor Reed** (Hopi)  
Professor of Law, Sandra Day O'Connor  
College of Law

# Agenda

- NAGPRA & Repatriation / Rematriation (Jaime)
  - Repatriation Q&A
- Intellectual Property for Indigenous Archives
  - IP Q&A
- Breakouts – More on Specific Questions
  - Repatriation (Jaime's Room)
  - IP (Trevor's Room)

# Key Questions

- What is **intellectual property (IP)**? Does my Indigenous community have intellectual property? What does IP have to do with our community's ownership of cultural and historical information?
- What are some common mistakes non-Indigenous institutions make regarding **Indigenous intellectual property**?
- How can I use NAGPRA and intellectual property law to help **repatriate / rematriate** cultural and historical information?
- How does putting archival materials **online** affect their copyright status?
- How do you repatriate **public domain** materials?

# The Need

## Voices (Song, Oral History)

- 100,000 Indiana University Archives of Traditional Music
- 30,000 Columbia University
- 10,000 Library of Congress
- 10,000 Cleveland NHM
- 6,000 Dorris Duke OH Collection

## Representations (Photographs, etc.)

- 300,000 Smithsonian NMAI
- 534,000 Canada Reciprocal Research Network
- 40,000 Cleveland
- 18,000 Bureau of Indian Affairs
- 17,000 Library of Congress

## Culturally Expressive Objects

- 8,000,000 Peabody Museum
- 825,000 National Museum of Am. Ind.
- 70,000 Chicago Field Museum
- 47,000 Am. Museum of Nat. Hist.
- 36,000 Heard Museum
- 10,000 Eiteljorg Museum

**What is the material I am most  
concerned about?**

**What uses of this material most concern me?**

# IP Can Help Repatriate & Protect Some Kinds of TK/TCE

## Traditional Knowledge

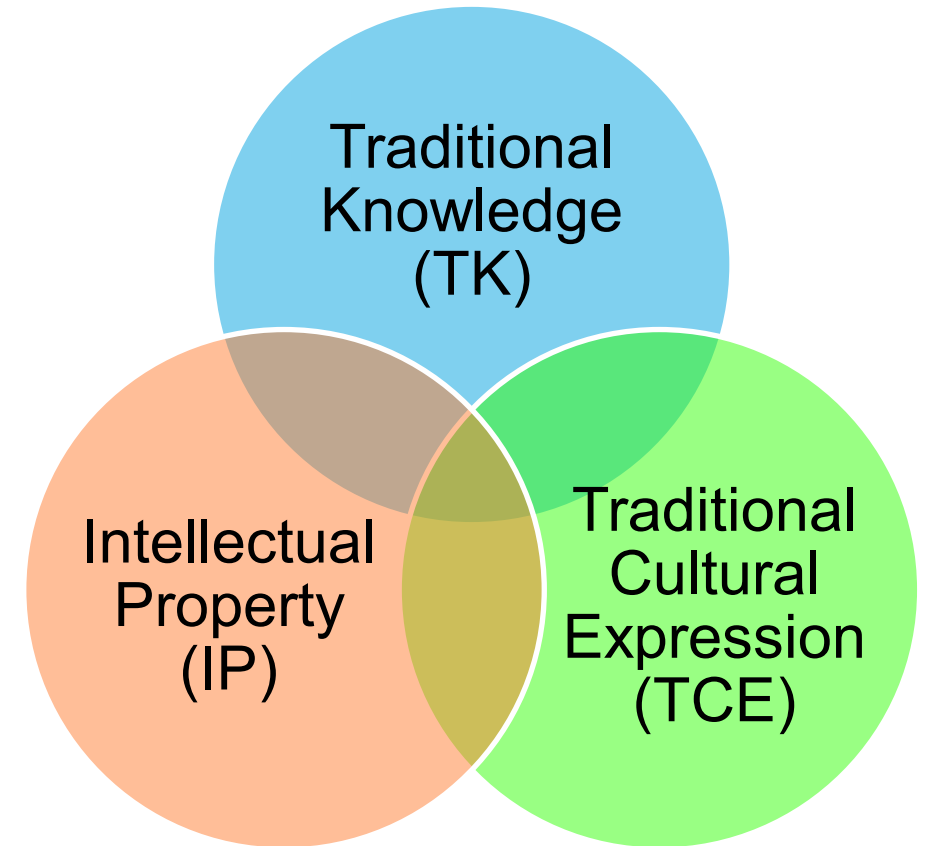
Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.

## Traditional Cultural Expressions

Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.

## Intellectual Property

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.





**What Tribal Laws and Protocols  
protect this material?  
What do these laws do?  
What are the consequences?**

# Tribal Law Can Protect TK/TCE

Define a  
new  
Category of  
IP

Apply  
Western IP  
to  
Reservation

Restrictions  
on Cultural  
Appropriation

Right to Use  
Tribal  
Language

Regulate  
Use of TK /  
TCE

Duty of  
Care for TK  
/TCE

Cultural  
Privacy

Protect  
Tribal  
Names,  
Flags, and  
Insignia

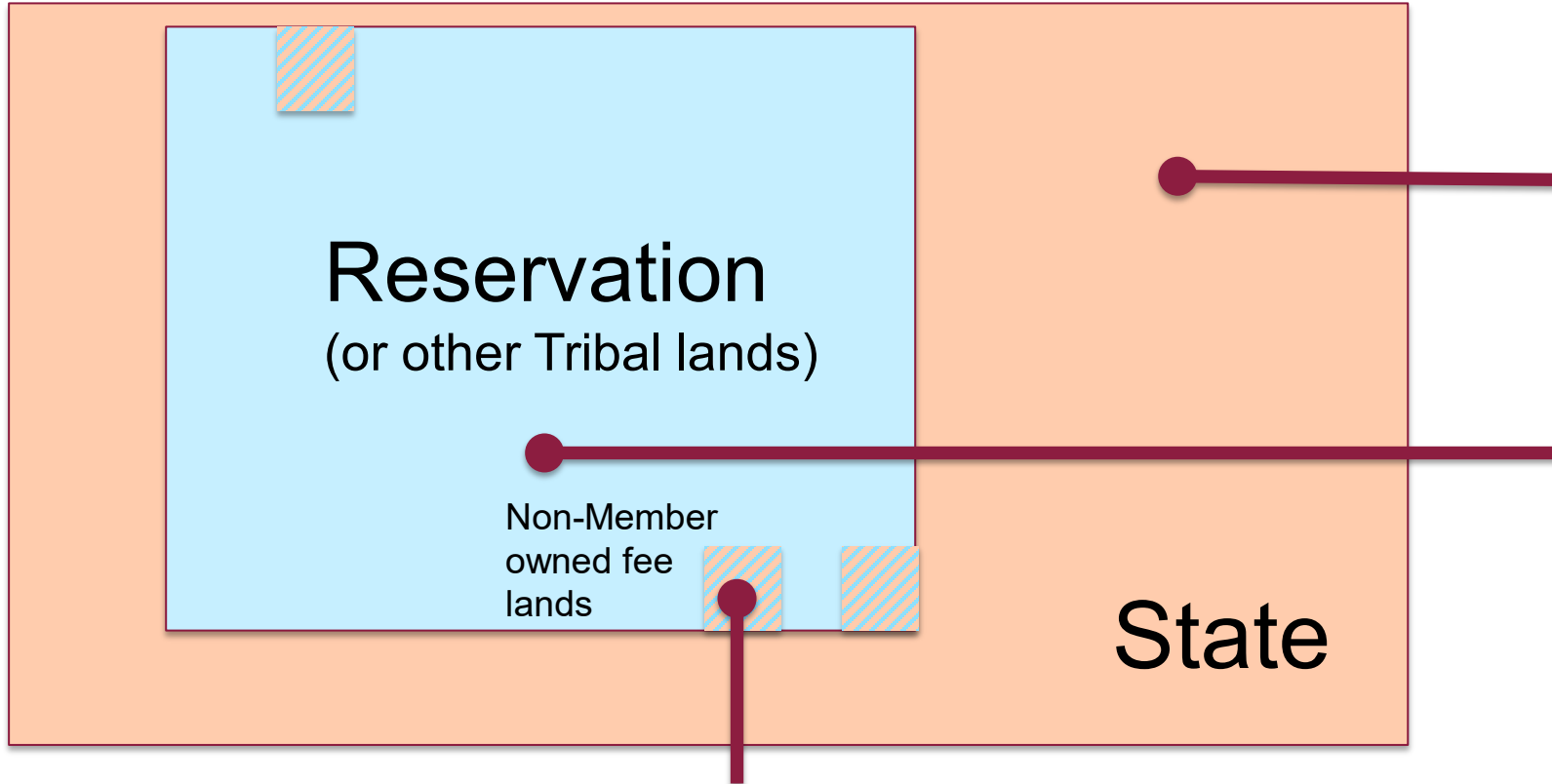
Certification  
Marks for  
Tribal  
Artisans

Protections  
for Data

Protection /  
Regulation  
of  
Agriculture

**Who enforces Tribal laws?  
How can the archive help?**

# Tribal Jurisdiction is Limited



**Within a state:** State IP law applies to everyone; Tribal IP law may apply to Tribal members and non-members who agree to it by contract; some Tribal treaty rights may also apply.

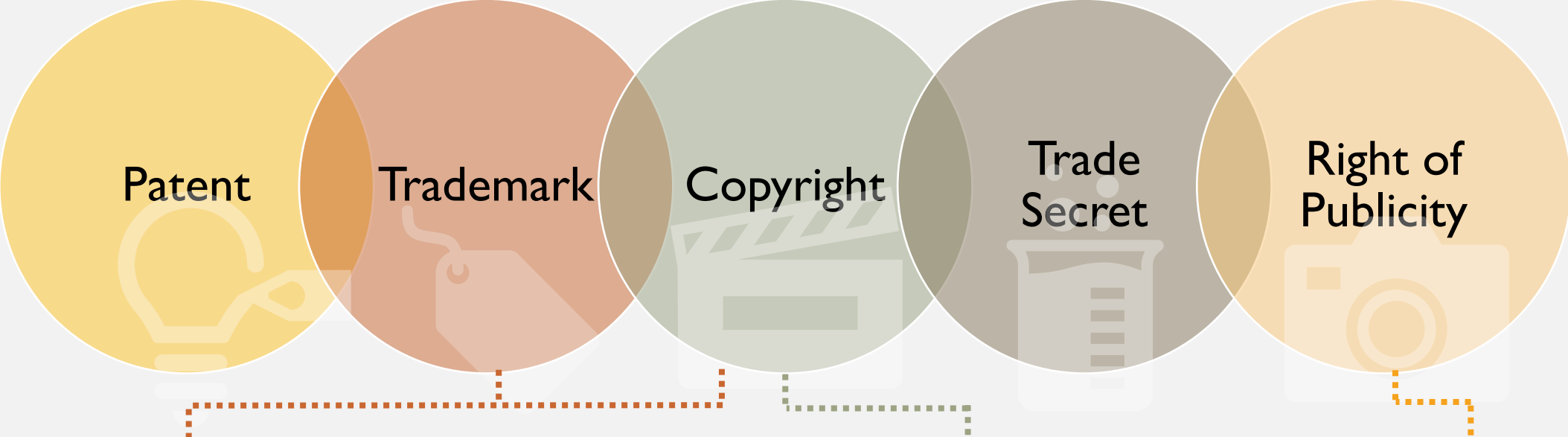
**On Tribal Lands :** Tribal IP law applies to everyone; State IP law may apply to non-Tribal members where it is not preempted by Tribal or federal IP law.

**Non-member-owned fee land within a reservation:** Tribal IP law applies to Tribal members and to non-members when they have a contractual relationship with the Tribe or their actions have a direct effect on the Tribe's health & welfare, economic security, political integrity. State IP law applies to non-members, unless preempted by federal law.

Federal IP laws apply within states and probably on reservations.

**What IP Laws protect this material?**

# Types of Settler IP Laws



Courtesy Sealaska Heritage Institute / KTOO



**SMITHSONIAN FOLKWAYS**

### Indian Music of the Southwest

**Various Artists** PW08850 / FW 8850

Recorded and produced by Laura Boulton (1899–1980), an American ethnomusicologist, this collection of songs includes music from rituals in several tribes from Arizona, New Mexico, and the northern region of Mexico. Mostly male voices perform all of the songs either solo or in chorus, accompanied by rattles, bells, or drums. The liner notes contain in-depth descriptions of the rituals of which the songs are a part, in addition to other cultural context. Boulton studied music all around the world, from Africa and Eastern Europe to the South Pacific and the Arctic Circle.

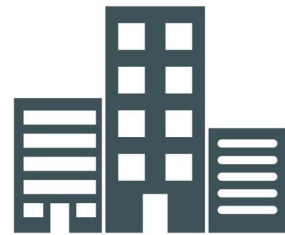
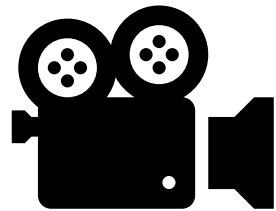
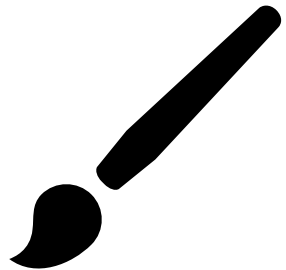
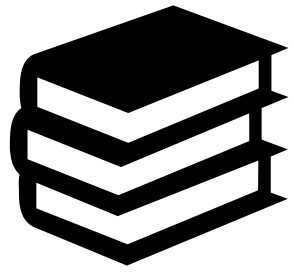
**YEAR RELEASED** 1957  
**RECORD LABEL** Folkways Records  
**SOURCE ARCHIVE** Smithsonian Center for Folklife and Cultural Heritage  
**COPYRIGHT** 2004 Smithsonian Folkways Recordings / 1957 Folkways Records

**GENRE(S)** American Indian  
**COUNTRY(S)** United States  
**CULTURE GROUP(S)** Apache; Hopi; Mohave; Navajo; Pima; San Ildefonso Pueblo; Santa Ana Pueblo; Taos Pueblo; Tohono O'Odham; Zuni

**BUY CUSTOM CD** \$16.98  
**BUY CASSETTE** \$21.98  
**DOWNLOAD** \$9.99



# Copyright: What does it protect?



...and more?

## Not Copyrightable



Works Not Original to Author



Not Fixed in tangible medium

Expression  
vs  
ideas

Facts, histories, ideas



Too Old (author's life + 70 yrs)

# What control does a copyright give a creator (or owner, authorized user)?



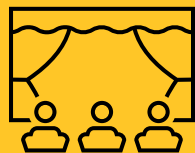
Copying



Adaptation

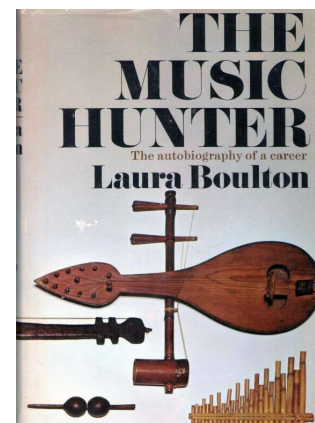


Public Distribution



Publicly Performance, Display, Streaming

- **What is INFRINGEMENT?** Using a copyrighted work in one of these protected ways without the copyright holder's permission:
- You can ask a court to enjoin (stop) an infringer. And, you can sue an infringer for damages, up to \$150,000 per instance of willful infringement.
- BUT, the Copyright Act waives statutory damages for good faith fair use copying by nonprofit libraries/archives.





# Copyright is Long, but Temporary

Date Copyright Begins		Sole Author	Joint Authors	Work Made for Hire
Created or Published before 1923*		Public Domain	Public Domain	Public Domain
Created after January 1, 1978		Life of Author + 70 years	Life of Last Surviving Author + 70 years	Earlier of 95 yrs. from pub. or 120 yrs. from creation
Created, but unpublished before January 1, 1978; Unpub. Sound Recordings 1972-1978	Still unpublished on or after January 1, 2003	Life of Author + 70 years	Life of Last Surviving Author + 70 years	Earlier of 95 yrs. from pub. or 120 yrs. from creation
	Published before January 1, 2003	Later of December 31, 2047 or Life of Author + 70 years	Later of December 31, 2047 or Life of Last Surviving Author + 70 years	Later of December 31, 2047 or the earlier of 95 years from publication or 120 years from creation
Published before January 1, 1964	Copyright registration renewed in 28th year after publication	95 years from publication	95 years from publication	95 years from publication
	Copyright registration not renewed in 28th year after publication	Public Domain	Public Domain	Public Domain
Published between January 1, 1964 and December 31, 1977; Sound Recordings published between 1972-1978.		95 years from publication	95 years from publication	95 years from publication
*Sound Recordings made anytime prior to Feb. 15, 1972		Expires in 2067	Expires in 2067	Expires in 2067

# Not all uses of archival materials require ownership.

<b>Likely requires Copyright ownership or permission from Copyright holder</b>	<b>Copyright permission might have been implied from the context</b>	<b>Probably Fair Use (§ 107), Preservation or Study Copies (§ 108), or In Classroom Use (§ 110)</b>
<ul style="list-style-type: none"><li>• Assign rights to a book publisher for publication and distribution</li></ul>	<ul style="list-style-type: none"><li>• Make a transcription from interview recording</li></ul>	<ul style="list-style-type: none"><li>• Reproduce published or unpublished works for preservation or personal study*</li></ul>
<ul style="list-style-type: none"><li>• Make a work available online to the public without any restrictions</li></ul>	<ul style="list-style-type: none"><li>• Make copies for preservation</li></ul>	<ul style="list-style-type: none"><li>• Citation or quotation of works in scholarly publications.*</li></ul>
<ul style="list-style-type: none"><li>• Include full text in third party database</li></ul>	<ul style="list-style-type: none"><li>• Making grammatical edits to a transcript</li></ul>	<ul style="list-style-type: none"><li>• In class performance or display of audio recording or transcript.*</li></ul>

# The Effect of Fair Use

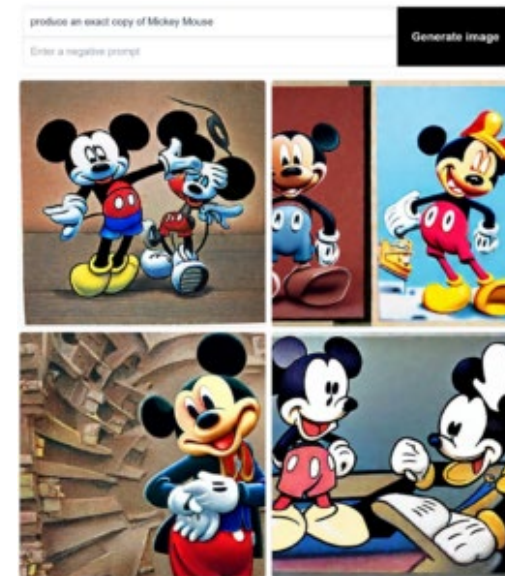
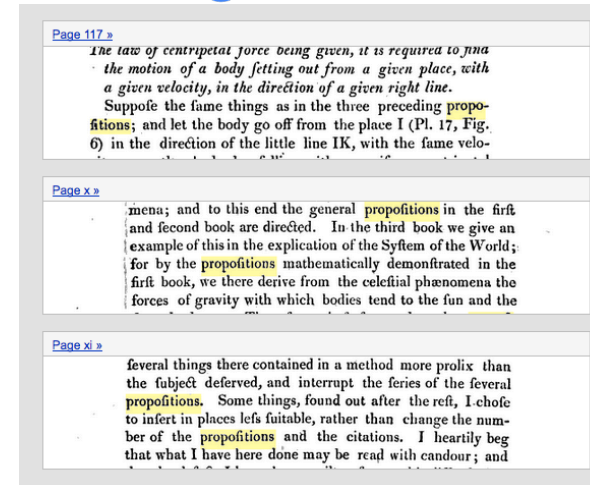


Fair use allows you to **use someone else's work without their permission** when the public benefit of your use outweighs the private interests of the copyright owner.



**Left.** Lynn Goldsmith photograph of Prince. **Right.** Andy Warhol, *Orange Prince*. See Brief of Lynn Goldsmith, *Andy Warhol Foundation v. Goldsmith*, No. 21-869 (Aug. 8, (2022))

## Google Books



# Trademarks: Defining



## Definition:

A **word, name, symbol, or device**, used by a person . . . to **identify** and **distinguish** his or her goods . . . from those manufactured or sold by others and to **indicate the source** of the goods, even if that source is unknown.

## Trademark Infringement:

- (1) You own a valid TM
- (2) Someone uses it without permission
- (3) Likelihood that consumers will be confused about who made the product.



# How Tribes are Defending TMs:



**Top Left:** Neiman Marcus  
Alanui Ravenstail Knitted Coat  
(2019)

**Bottom Left:** Clarisa Rizal  
Ravenstail Coat (1996)

Courtesy Sealaska Heritage  
Institute / KTOO.org



**Right:** Urban outfitters  
NAVAJO line.



**Ecote Navajo Wool Tote Bag**  
\$39.00



**Wide Navajo Scarf**  
\$29.00



**Navajo Hipster Panty**  
\$8.00  
5 For \$25



**Deter Navajo Tee**  
\$28.00



**Navajo Feather Earring**  
\$16.99 (was \$24.00)



**Navajo Print Fabric Wrapped Flask**  
\$18.00



**Jeffrey Campbell Navajo Fringe Crossbody Bag**  
\$169.00



**Vintage Men's Woolrich Navajo Jacket**  
\$249.00



**Vintage Woolrich Navajo Jacket**  
\$349.00



**Pendleton Navajo Weekender Bag**  
\$239.00

# Potential TM Issues:

- Creating a likelihood of confusion about origin of product
  - Using Tribal names as product name
  - Using Tribal flag, insignia on products without permission.
- False advertising / false endorsement
  - Using Tribal names in a way that suggests sponsorship or endorsement (ex: non-Navajo Covid relief funds using Navajo name)
- Dilution
  - Using a famous Tribal mark in way that makes it less distinctive or that tarnishes its reputation.

# Right of Publicity

## Definition:

Your Right to Publicity is your right to control uses of your name, likeness, image, and sometimes other personal attributes (sound of voice, signature, persona) without your permission.

Right of Publicity lawsuits require proving:

1. **You didn't grant permission** for the use of your identity.
2. Someone else **utilized** a protected aspect of **your identity**.
3. That person gained an **immediate and direct benefit**.



<http://naadvbrand.blogspot.com/2011/12/crazy-horse-malt-liquor.html>



# Trade Secrets

## Trade Secrets are:

- 1) information, recipes, know-how, formulas, devices, techniques
- 2) not known to the public or easily found out
- 3) gives the owner a competitive edge
- 4) you make reasonable efforts to keep the information secret

Trade Secrets protect some of the same kinds of things as patents, but without some of the limitations and without the need to file with the USPTO.



	% Daily Value*
Total Fat 11g	17%
Saturated Fat 3g	15%
Trans Fat 1g	
Cholesterol 5mg	2%
Sodium 90mg	4%
Total Carbohydrates 24g	8%
Dietary Fiber 1g	4%
Sugars 8g	
Protein 2g	
Calcium	2%
Iron	4%

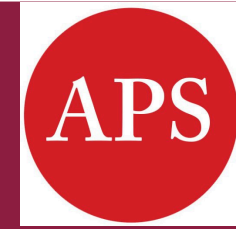
\* Percent Daily Values are based on a 2000 calorie diet.

INGREDIENTS: Unbleached Wheat Flour, Cane Sugar, Kosher Vegetable Oil, Shortening (Partially Hydrogenated Soybean and Canola Oil with Less than 15% Palm and/or Cottonseed Oil), Chocolate Chips, Sugar, Cocoa Liquor, Cocoa Butter, Soya Lecithin [an Emulsifier], and Vanilla), Pasteurized Whole Eggs, Walnuts (May Contain Other Tree Nuts), and Baking Soda (Sodium Bicarbonate).





**What Private Agreements or Policies protect this material?**



**Recognition of Tribal & Federal IP Rights**

- Acknowledges existence of Federal & Tribal IP Rights
- Tribes have “primary rights” for all culturally sensitive materials.
- Tribal IP rights supersede donor/collectors’ restrictions.
- Tribal moral rights are enforceable.

- No acknowledgment of Tribal IP rights.
- “Shared Stewardship”

- APS is sole owner; no acknowledgement of Tribal IP Rights
- Tribes have right to “keep their respective cultures sacred.”
- Tribal rights do not supersede institutional goals for open access.

**Acceptance of Responsibility for Harms**

- Institutional holding of Indigenous IP sometimes had “disastrous” consequences.
- Collectors may have violated Tribal or Federal IP laws.

- No institutional responsibility.
- Collectors may have acted illegally or unethically.

- No institutional responsibility.
- Collectors may have acted unethically.

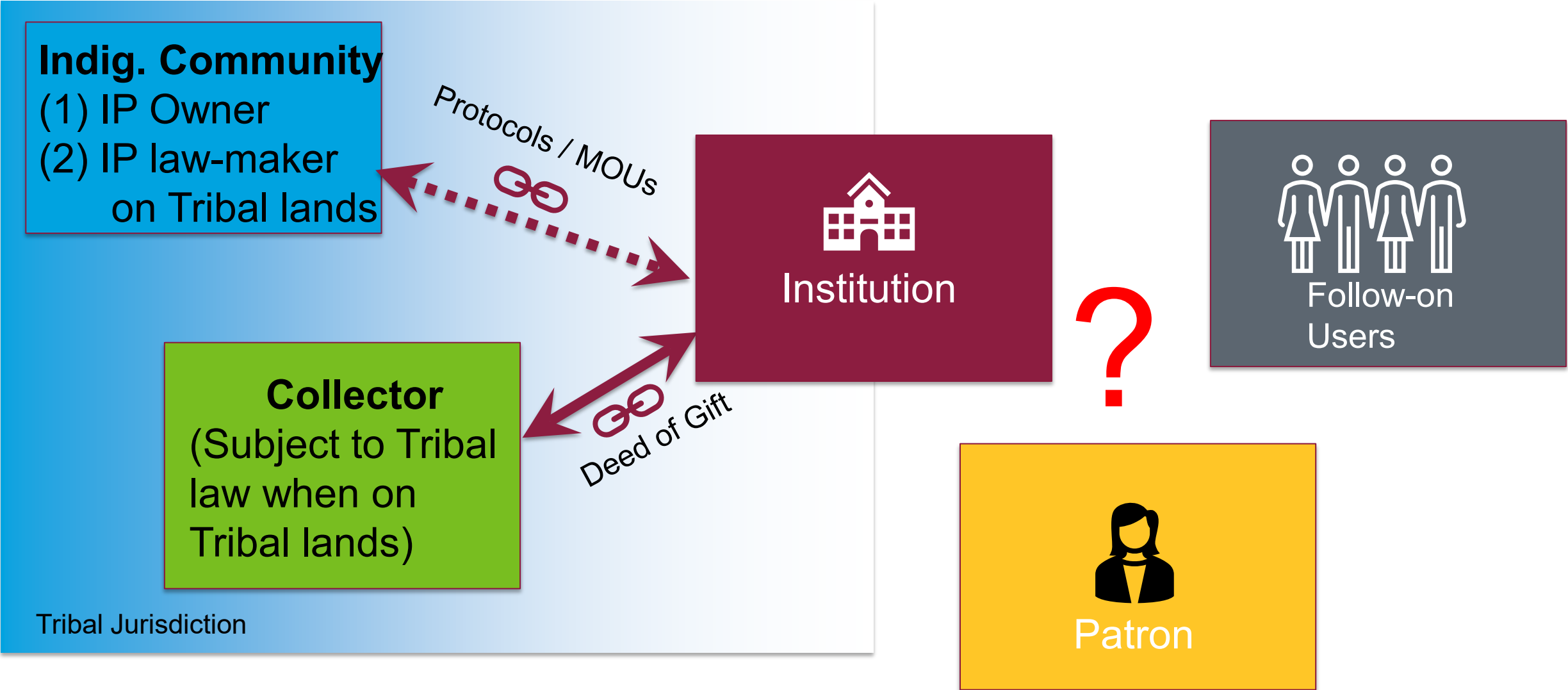
**Remedies Available**

- Consultation and restriction of patron access.
- Limitations on patron use.
- Repatriation

- Consultation and restrictions on access.
- Limitations on patron use.
- Repatriation

- Consultation for “culturally sensitive” materials only; no restrictions on access; but may allow limitations on publication.

# The limits of protocols...



# Cloud and Social Media

“[Y]ou retain ownership of the intellectual property rights in any such content that you create and share on Facebook . . . However... when you share, post, or upload content . . .

you grant us a **non-exclusive, transferable, sub-licensable, royalty-free**, and **worldwide** license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content.”



Facebook Terms of Service (August 7, 2023)

# Cloud and Social Media

1. You may not use our Products to do or share anything:
  1. That violates these Terms, the [Community Standards](#) . . .
  2. That is unlawful, misleading, **discriminatory** or fraudulent (or assists someone else in using our Products in such a way).
  3. That **you do not own or have the necessary rights** to share.
  4. That **infringes or violates someone else's rights**, including their intellectual property rights (such as by infringing another's copyright or trademark, or distributing or selling counterfeit or pirated goods), unless an exception or limitation applies under applicable law.



Facebook Terms of Service (August 7, 2023)

# Cloud and Social Media

When you use our Services, you provide us with things like your files, content, messages, contacts, and so on (“Your Stuff”). Your Stuff is yours. These Terms **don’t give us any rights to Your Stuff except for the limited rights that enable us to offer the Services.** **We need your permission to do things like hosting Your Stuff, backing it up, and sharing it when you ask us to.** Our Services also provide you with features like commenting, sharing, searching, image thumbnails, document previews, optical character recognition (OCR), easy sorting and organization, and personalization to help reduce busywork. To provide these and other features, Dropbox accesses, stores, and scans Your Stuff. You give us permission to do those things, and **this permission extends to our affiliates and trusted third parties we work with.**



Dropbox Terms of Service (April 3, 2023)

# Rematriating Public Domain Materials

1

## Relationality (Preparation)

- Free, prior, informed consent of participants
- Equal footing
- Offender accepts responsibility for bad act

2

## Consultation (Conferencing)

- Community narrates harms
- Community Sets Expectations for Redress
- Offender offers explanation of bad act
- Offender proposes Remedial Plan

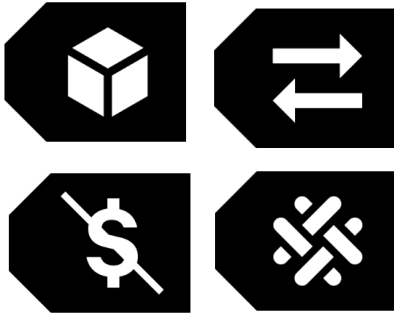
3

## Consent & Repair (Agreement)

- If accepted by Community, offender enters into binding agreement to fulfill remedial plan.
  - Enforceable
  - Follow-up Mechanism

# Restoring Sovereignty: Potential Strategies

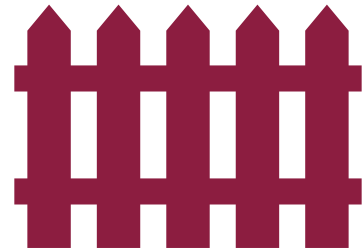
Labeling



Courtesy localcontexts.org

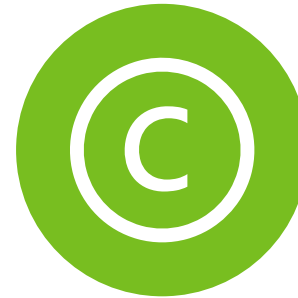
Add metadata  
and publish

Restriction



Amend internal  
policies, bylaws,  
or local law

Ownership Rights



Register, transfer, and  
defend IP rights; set  
procedures for  
licensing, permissions

Reciprocity



Create membership  
w privileges/duties  
or align with existing  
structure