

Itaataawi:

**Hopi Song, Intellectual Property, and Sonic Sovereignty
in an Era of Settler-Colonialism**

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ABSTRACT

Sonic Sovereignty: Hopi Song and Indigenous Authority in an Era of Settler Colonialism

Trevor Reed

Hopi traditional songs or *taatawi* are more than aesthetic objects; they are sound-based expressions of Hopi authority. As I argue in this dissertation, creating, performing, circulating, and remembering *taatawi* are what we might call acts of *sonic sovereignty*: a mode of authority articulated within ongoing, sound-based networks that include Hopi people, plants, weather systems, land, and other living things within Hopi territories.

I begin by exploring the generative process through which *taatawi* do their connective work, which includes long-term collaborations between *yeeyewat* (composers) and environmental actors that establish a collective vision of prosperity that is realized when these songs are performed. Hopi composer Clark Tenakhongva's *taatawi* performances during Grand Canyon National Park's Centennial (a Hopi sacred space currently controlled by settler governments) exemplify the ways Hopi people are actively using *taatawi* to (re)assert Hopi relations to colonized territories.

Because *taatawi* are closely tied to Hopi relations to one another and the land, and sometimes contain specialized forms of knowledge held closely by Hopi clans and ceremonial societies, their ownership and circulation remains of vital concern to Hopi people. Laura Boulton's recording of Hopi singers Dan Qötshongva, Thomas Bahnaqya and David Monongye in the Summer of 1940, and the travels of those recordings afterwards, show us the complex politics of Hopi song circulation in the early Twentieth Century up through the present, and how settler cultural and intellectual property laws provide only limited possibilities for indigenous groups seeking to bring their ancestors' voices back under their control. And even if tribes could

reclaim *taatawi* under settler property laws, these laws require physical and conceptual transformations that effectively sever them from the networks of relations from which they were created.

To better support Hopi sonic sovereignty going forward, I offer brief sketches for three potential interventions: (1) an indigenous works amendment to the United States Copyright Act; (2) the use of indigenized licensing frameworks to embed indigenous protocols into the governance and circulation of indigenous creative works both on and off indigenous lands; and (3) establishing a right to indigenous care, similar to Europe's right to forget, whereby our ancestors' voices can be subject to indigenous care rather than preserved anonymously and perpetually as archival objects. My hope is that these will allow indigenous communities to better assert and maintain control over their modes of sonic sovereignty despite the increasing colonization of the sonic world by global intellectual property regimes.

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Dedication

For the Hopi People

Chapter 1:

Introduction

“No one just sings out here.”

Wilton’s answer to my question about how Hopi songs work took me aback. As a musician, I had always admired Hopi song as an art form. Hopi songs contain sophisticated poetry and complex melodic shapes coupled with driving, yet seemingly unpredictable rhythms. But after several years of working with members of the Hopi community, including several Hopi ceremonial composers, I was beginning to sense that songs were doing more work on Hopi lands than simply giving people on the Hopi Reservation a personal sense of enjoyment or aesthetic satisfaction. Wilton’s response seemed to confirm that.

Wilton and I often had deep conversations about music during the eight years that I knew him. Songs from recent ceremonies seemed to be regular parts of our conversations, but there were also other topics that seemed to always come up as well--topics like traditional farming (an area in which I often struggled), histories of the peoples of the Southwestern United States, the rate of change in Hopi life (which Wilton often thought was accelerating), and politics (both local and national). Wilton, nearly 80 years old, was an active *yeewa* (ceremonial composer) who regularly composed songs for our village’s ceremonial dances. He lived most of his later years alone in a secluded field house in the valley below Third Mesa on the Hopi Reservation (present-day Northeastern Arizona), but he seemed to know everyone in the villages—he even knew who I was, though my family had been absent from Hopi lands for decades. As I would come to realize later in our conversations, Wilton was an important leader in our village, though

no one ever said anything about it, and neither did he. He didn't need any recognition; in fact he avoided it. But at the same time, he made it a point to speak his mind, and most everyone would listen.

Wilton explained to me in an interview in 2014 that singing has always been part of Hopi life ever since we emerged into this world and even well before then—"many, many million years go" he said. From the beginning, rehearsing songs has been one of the ways Hopi people carry knowledge (*navoti*) with us about the world and the migrations of our many Hopi clans—knowledge that gives each clan its identity and legitimacy. Songs also power the ceremonies and dances that occur in our villages that bring about much needed precipitation and good harvests. "Our religion has never been changed," Wilton tells me. "It was so effective to anything that---their knowledges were strong. . . their [religious] songs are still in place right now." Over his lifetime, Wilton had learned and embodied probably thousands of songs. He seemed only to be waiting for the moment to come when people who were fully prepared could hear them and remember them.

In twenty-first century Hopi life, *taatawi* (Hopi traditional songs; *tawi* in the singular) continue to have significance and power despite the longevity of their form. They seem to always be present. *Taatawi* are a mode of composed relation with the world that is distinct in fundamental ways from the wide range of musical forms that are created and circulated on Hopi lands today. On any given day driving down State Route 264, which now connects the Hopi villages, you might hear the Cajun Queen giving her Cajun and Zydeco show on KUYI Hopi Radio 88.1, pass by a country dance with local bands like the Hopi Clansmen happening at Kōōtka Hall in the village of Polacca, or hear a rock or reggae concert with Ed Kabotie or Casper Lomayesva at the Moenkopi Legacy Inn. But the biggest crowds always seem to come for the

performances of Hopi *taatawi* during a *tiikive* (ceremonial dance day) in the 12 Hopi villages. While many non-Hopis (and admittedly some Hopi people) come for what they likely consider to be exotic cultural performances, *taatawi* are always in the foreground, actively doing something in those spaces. As I argue in this dissertation, *taatawi* function as a vital link between Hopi people, and between Hopi people and other living things in the cosmos. Creating, performing, circulating, and remembering *taatawi* are what we might call acts of *sonic sovereignty*: a mode of authority drawn from ongoing relations between Hopi people, the land, and other key actors in the world and beyond, that have real effects on the world. As such, they and other similar expressions of indigenous sovereignty have a distinct ontology, one that I believe merits more complete articulation in contemporary legal and political discourses.

The perpetuation of *taatawi* has taken on a new urgency at Hopi given the lasting effects of colonization. Widespread fears over language and cultural loss have brought renewed emphasis on song learning and performance: as fewer people speak *hopilavayi* (Hopi language), *taatawi* become a kind of lifeline that connects people to the Hopi community and to Hopi lands despite the imposition of settler-colonial political and social structures on Hopi lands.¹ Given their power, the performance of meaningful *taatawi* have also historically functioned as a means of moving the Hopi community to action and bringing attention to core social and political issues.

Tiffany Bahnimptewa, who was crowned Miss Hopi in 2006, memorably demonstrated how *taatawi* exist as something more than a mode of artistic or cultural expression. Miss Hopi is an important figure within the Hopi community. Given the central role of women in Hopi society,

1. See Sheilah E. Nicholas, *I Live Hopi, I Just Don't Speak It'—The Critical Intersection of Language, Culture, and Identity in the Lives of Contemporary Hopi Youth*. 8 J. LANGUAGE, IDENTITY & ED. 321, 331-32 (2009) (discussing the role Hopi song plays for teens who are not fluent in the Hopi language.); see also MESA MEDIA official website (last visited on Mar. 28, 2018), <http://www.mesamedia.org> (describing the efforts of Anita Poleahla to teach Hopi language and culture through songs, spoken word and other formats).

Miss Hopi gives voice to important community issues, and has considerable influence on social policy. During the 2006 competition, Bahnimptewa was asked to perform a cultural talent and then give a speech to the public on an issue of importance to the community. In the time she was allotted to give her speech, Bahnimptewa chose to perform a *tawi* she had learned from her *taaha* (maternal uncle) as a means of advancing her platform of reducing substance abuse. Her *tawi* talked about the value of family, and how important the role of the *taaha* is in a young woman's life. Using a Powerpoint presentation, she showed images of corn grinding as a girl grows into a woman.² The song was particularly emotional as many Hopi girls today lack the support of their maternal uncle—the one who is supposed to be one of their strongest advocates in life—due to the effects of substance abuse. As she explained,

Back then I knew what the song was about, and every time I sang it, I would see a lot of people crying, because it was a very heartfelt song, and a good reminder of many of our cultural values which aren't really being talked about or shared as much any more.

For Bahnimptewa, singing has a way of reaching audiences in a more complete way. “You can say a lot through speaking, but Hopi song is a whole other language. . . . Hopi song language is more poetic. It brings more meaning, brings more character, more fullness to it . . . It's going to another level.”

Bahnimptewa's choice to sing as a form of political speech, rather than as a “cultural talent” demonstrates the notion that “no one just sings” at Hopi. *Tawi* does not necessarily exist to showcase “talent” or function as an object of “culture.” Rather, it is a mode of collective action, an assertion of sovereignty that moves beyond settler political frameworks. It is an

2. See Tiffany Bahnimptewa begins her reign as Miss Hopi 2006-07, Navajo-Hopi Observer (Jul. 27, 2006), available at <https://www.nhnews.com/news/2006/jul/27/tiffany-bahnimptewa-begins-her-reign-as-miss-hopi/>.

example of the many ways indigenous peoples continue to generate social, environmental, and political networks of sound-based relations to accomplish change in the contemporary world.

Indigenous Ethnomusicology

Like Ty Tengan (2005, 2008), Jessica Bissett-Perea (2011), Tevita Ka’ili (2017) and other indigenous anthropologists working by, for, and with the communities they study, I approach ethnography of ‘my people’ self-consciously, but also with an understanding of my connections within the community and territory that animate my work. I am keenly aware that seemingly every aspect of Hopi “traditional” life has been thoroughly documented by many of the great anthropological minds (*see* Laird 1977)—what else could I bring to such an established canon? I also recognize that by identifying as a member of the Hopi community I run the risk of appearing as if I were somehow a cultural expert or a representative of *itaahopisinom* (our Hopi people). I acknowledge from the outset that I do not represent the Hopi people—as I explore here, that is not my place. Rather, I write from a point of view arising from relationships I have with members of the Hopi community, particularly people from my home village of Hotevilla, who have generously extended to me their time and thinking. But I also acknowledge that, unlike many who have studied aspects of Hopi life before, I (like most Hopi scholars today) am under obligations to the Hopi people arising out of our relations to Hopi land and community that make the work I do worthwhile even beyond limited scope of scholarship. And the Hopi Tribe, for its part, has required those of us who do research at Hopi to enter into legal agreements codifying many of these obligations and establishing shared research goals.³

3. *See* Hopi Cultural Preservation Office, Protocol for Research, Publication and Recordings: Motion, Visual, Sound, Multimedia and other Mechanical Devices (Feb. 27, 2010), *available at* <http://www8.nau.edu/hcopp/ResProto.pdf>.

Linda Tuhiwai-Smith has argued that impactful and decolonizing research in indigenous communities requires not only constant personal reflexivity, but also working toward achieving community goals (Smith 1999). Tengan (2005) and Ka'ili (2008) have identified several methods specific to indigenous anthropology which I think are useful in identifying and achieving these kinds of shared goals: (1) building relationships with informants through shared genealogies, (2) emplacement (time and space) of the researcher in locally meaningful ways over an extended period of time, (3) taking on obligations of reciprocity associated with discussing and acquiring local/indigenous knowledge, and (4) commitment to working through subjective differences with collaborators as a means of producing unifying (not divisive) knowledge. Building on these insights from indigenous anthropology in the Pacific, my research methodology has drawn upon a diversity of observational and applied methods in order to gather the necessary descriptive and discursive data that I use in the chapters that follow. These methods included near “complete participation” within Hopi village life (Spradley 1980) during certain periods, pilgrimage, repatriation of Hopi archival recordings to community members, production and documentation of a series of live Hopi Radio talk shows, co-composition work with Hopi ceremonial composers, and informant interviews and focus groups.

Participant-Observation

In order to experience and document how Hopi song is created, performed and circulated among various networks of actors, I often took part in or observed song creation and performance at a variety of events and within daily life at Hopi, recording (as permitted) what I thought were some of the core features of Hopi song practices through field notes and audio recordings. I attended community events involving Hopi *taatawi* throughout my time researching *taatawi* production, including village-based ceremonies and rehearsals, celebrations

and symposia, non-traditional performances by Native and Non-Native groups in local performance venues, and performances by Hopis outside of the reservation (including the diasporic Hopi community in Flagstaff). In my work to document song performance practices, I paid attention to the ways people and environmental actors became involved in the performance of songs in certain spaces; their modes of inflecting speech or song to give voice to certain perspectives during song performances; norms surrounding the creation, performance and circulation of Hopi song; and the ways people would approach listening to songs.

Collaborative Composition

One mode of participant-observation that ended up being particularly helpful for me was co-composition. Over a period of about 5 years I worked with Hopi traditional singer/composer Clark Tenakhongva to create and perform a work we called *Puhutawi* (new traditional song) that was performed by both Hopi- and classically trained musicians at the Grand Canyon Music Festival in 2016. Our work together helped me to see how Tenakhongva created *taatawi* in real-time, and how he conceptualized their circulation into new sonic spaces, with both Hopi and non-Hopi performers and audiences in mind. In a way similar to what Kristina Jacobsen describes in her ethnographic songwriting work with Navajo youth, composing and orchestrating songs using Hopi creative practices also helped me to think through the ways *taatawi* connect people, and understand how they function in relation to *Hopitutskwa*, our Hopi lands.⁴ Finally, as Steven Feld discovered through collaborative editing with his interlocutors in Bosavi (Feld

4 As Jacobsen (2017) explains, songwriting allows the creator to use herself as an instrument of knowing—in a way similar to ethnographic writing. For Jacobsen, the focus of songwriting is to tell “an emotionally authentic story” that “humanize their subject” and “take the particular and make it universal” (117). Song-making is intended for an audience, which means the songwriter’s efforts must “allow listeners to connect back to their own humanity and to connect to each other, as well.” A songwriter also takes the particular and makes it universal, “allowing others to latch on at whatever entry point they’re able,” which requiring the songwriter to show rather than tell (117-18). Songwriting, perhaps to a greater extent than traditional ethnography, is a mode of creative storytelling that has the potential to foster human empathy and connection “across racial, socioeconomic, and cultural divides” (125).

[1990] 2012:241-42), co-composition allowed Tenakhongva to assess my understanding of the songs he had composed, and to evaluate whether or not I had grasped the aesthetic components well enough to translate the concepts and functions of his songs for non-Hopi audiences. In the initial phases of our work, Tenakhongva would often tell me something sounded to Disney-like, “Asian,” or “old West.” And at other times, these were the kinds of effects he wanted embedded. He would also point out relationships between cosmological entities that I didn’t fully understand. During one rehearsal of *Puhutawi*, for example, Gary Strautsos, a jazz musician performing with us who had learned to play what we believed were ancestral Hopi flutes, had attempted to introduce a wind-producing instrument into the mix during a sequence depicting thunder, lightening and rain. Clark quickly corrected Gary, telling him that wind never happens at the same time as thunder and lightening. It was an organizing principle I had never considered, but one that was key to a Hopi sonic sensibility and senses of place (*see* Chapter 2).

Public Discourse

There is a coyness involved in doing anthropology that I have never been entirely comfortable with—the ability of anthropologists to have experiences in a community that seem sincere, only to have them lose that sincerity when they return to their “everyday” lives in their “home” world.⁵ Wilton, who worked with anthropologists for decades, identified this attitude as characteristic of a “forked-tongued *pahana* (white settlers),” someone who does the dark work of reconstituting people (and theorizing their motives and relationships) away from the oversight of

5 A significant body of work has tackled this issue in much greater depth than I can here. The reflexive turn in Anthropology of the late 1980s and early 1990s revealed the privilege of the anthropological gaze, and how it skewed the way ethnography represented “other” cultures. *See, e.g.,* James Clifford and George Marcus, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1988). Indigenous critiques of the anthropological gaze have been a potent counternarrative to ethnographic writing at least since the 1960s. *See, e.g.,* Vine Deloria, Jr., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969). As mentioned earlier, indigenous scholars in the Pacific (Tuhivai-Smith, Tengan, Ka’ili, etc.) have emphasized the necessity of maintaining obligations of reciprocity to communities. In addition to asserting the necessity of maintaining these critiques in the construction of research methodologies, I argue that our field must also begin to work notions of sincerity into anthropological fieldwork to further address problems of authority inherent in the production of ethnography.

the community. In my research, I have tried my best to do most of the behind-the-scenes theoretical work in an open way, helping to organize public events to talk about the issues included here (particularly the Natwani Coalition 2014 Hopi Food and Agriculture Symposium), collaborating with KUYI Hopi Radio on broadcasts addressing some of the key concepts (“Farm Talk,” and various programs and interviews organized), and presenting my work to Tribal representatives, relatives, or groups tribal members in various settings. I wasn’t perfect at it by any means, but doing these events helped me to be more accountable to people for my research and allowed community members to ask sometimes pointed questions. As a byproduct, these public-facing events I think benefitted everyone who participated, and at the very least generated an archive of Hopi public discourse aimed at understanding the relationships of *taatawi* to Hopi lives.

Interviews/Focus Groups

While in some contexts formal interviews are not ideal for anthropological data-gathering, as they happen out of the context of everyday life and may reduce spontaneity, oral interviews have seemed to be a preferred mode of conveying insights and information at Hopi. Interviews work, I think, because most Hopis I know are deeply self-reflexive and socially conscious already. I also think most people out home learn early on that different people in Hopi society know different things, and that knowledge is valuable. Orally elaborating knowledge, especially when the one seeking knowledge brings a gift for the one being interviewed, is a normal way of learning: the speaker has control over his or her words and can ensure that the listener understands each concept--or ensures that the conversation ends.

As I will explain later in this dissertation, person-to-person exchange of information allows knowledge to be disclosed within embodied relations. Thus, interviews and dialogue have

become vitally important in the recent work of Hopi scholars. Sheridan, et al. (2015) put into conversation Spanish historical records, roundtable events with Hopi elders, and interviews conducted by Hopis with Hopis to draw out memories of our traumatic colonial encounters with the Spanish, and present-day relations to them. Nicholas (2009) includes interview segments in her work in a way that demonstrates her relationships to her Hopi informants, and also connects readers with her interlocutors' voices. Finally, Colwell and Koyiymptewa (2015) and many other recent interviews between Hopi intellectuals and non-Hopi researchers, have been published in conversation format to show the importance of orally conveyed information and dialogic learning.

Focus groups also played an important role in this project. These included meetings with government entities (Hopi Cultural Preservation Office, Cultural Resources Advisory Task Team, Hopi Education Department, Office of Aging & Adult Services), junior and senior high school students, nonprofit organizations (Hopi Foundation, Natwani Coalition), groups from other tribes (Zuni Cultural Resources Enterprise), and groups of family members, clans or ceremonial society leaders. Sometimes these conversations were formally structured, and other times they were spontaneously organized as people walked into the room while I was playing a recording for someone.

Community-Partnered Repatriation

Reciprocity is an important feature of doing decolonizing fieldwork anywhere, but it is particularly important in the Hopi community. From the outset of this project, one of the goals I shared with others in the Hopi community was to return our ancestors' voices from institutional archives back to our people in a meaningful way. I did this initially by working to return 121 recordings from the Laura Boulton collection currently held by Columbia University's Center for

Ethnomusicology back to the appropriate villages, ceremonial societies, or the Hopi Tribe.

However, this project has continued to expand and develop to include other collections at other institutions. By doing repatriation work, I learned about the ways songs circulate at Hopi and beyond, both ideally and in practice, and how songs are classified and sometimes restricted to certain people or certain uses. Much of the repatriation work is ongoing because of the complexities and ambiguities of the law, as will be discussed in the following chapters.

However, repatriation has provided fertile ground for discussions about issues of creativity, ownership, and circulation, which might not have come about outside of the repatriation context.

Theoretical Goals and Frameworks

This project's theoretical goal is to further destabilize the static, universal notion of musical creativity as presently defined by global intellectual property regimes. As anthropologists in Papua New Guinea have recently asserted, the way indigenous creativity is defined and celebrated by colonizing states—often in terms of “property”—may have serious side effects for indigenous peoples. Imposing settler property law on indigenous creativity runs the risk of limiting the circulation of indigenous creativity (Brown 2003); but, as Leach (2007) argues, it may also flatten or diminish the subjecthoods at play in the creation and ownership of creative phenomena by framing them within misleading nature/culture binaries (Strathern 2003; Leach 2007). Further, as creativity is quickly becoming homogenized into discrete categories for the sake of faster, more efficient transmission and commodification (“music,” “books,” “film”), the wider value and benefits of indigenous creativity may never fully be accounted for within these kinds of categories (Leach 2012). Rather than considering Hopi *taatawi* as “music” or “property” at the outset, I want to start at a more fundamental, ontological level of inquiry—what

is *taatawi*? What networks of relationships does it have within a Hopi worldview? What does it do in the world?

Examining the ontology of music is a complex task, but one that has been important to music scholarship in recent years. Bohlman (1999) identifies at least four ontological modes of existence for music: as an object (e.g. score or recording), as a process (performance), as embedded within other social phenomena (dance-music), or in negated form when it cannot or should not exist (deaf conceptualizations of music). For Bohlman, musicological analysis has historically lacked the necessary frameworks to allow a reader to “step into and analyze ontologies of music other than his or her own” (18). While musicology may have been so limited at the time Bohlman was writing, the ontological turn in anthropology has shown that there may be ways music scholars can relate one ontology to another if the researcher has the ability to inhabit both cultural worlds and thus to build analogical bridges between them (Wagner 1981; Viveiros de Castro 2004). Bohlman provides a methodological basis for accomplishing this—what he describes as tracing the “metaphysical routes that connect self to others” (18), effectively mapping the networks surrounding music and sound based on an individual’s or culture’s worldviews. Among the routes Bohlman identifies as entrypoints are: local conceptions of musical ownership, ways identity is generated through music, how universality is perceived in music within a culture, and the means through which music comes into existence. Importantly, while Bohlman’s routes provide a starting point for ontological analysis when notions of the subject are relatively constant between the culture of the musicologist and the music culture being studied, for those researching music and sound in contemporary indigenous communities, this may not always be the case.

For many indigenous communities, song is a powerful heuristic for understanding, experiencing and ultimately conveying how entities in the cosmos exist and relate to one another. Ethnographic evidence from Amazonian indigenous tribes suggests that ceremonial songs have the capacity to redefine and re-order bodies and space in a way that allows groups to establish relations with an ancestral past or unseen actors within the cosmos (Seeger 2004). An object that is viewed as “nature” within one society may also be an integral part of another’s “culture” (Viveiros de Castro 2004), and what some scholars think of as culturally grounded figures or metaphors about “nature” in mythical representations may actually depict or describe the dynamic relations between different species or environmental entities who purport to be human (Viveiros de Castro 1992; Stolze Lima 1996). Depending on one’s point of view, making or performing new songs might be understood as “creativity”—an aesthetic re-working of an object or idea taken out of its “state of Nature” by human creators (Locke 1689:§27)—whereas to others it may be site of “productive explosion,” a means by which matter becomes expressive, intensifying and generating sensation as environmental and bodily forces come into productive relations to create a new, experiential domain or “territory” (Grosz 2008:2-4). Under the latter philosophical framework, the creation of song emerges not simply as a manipulation of signs to evoke feeling or emotion (Turino 1999), but as a means of controlling forces existing within or outside of the creator in a way that makes them generate palpable, vibrant sensation perceivable to a wide array of human and non-human actors.

The processes through which indigenous composers generate new songs are undoubtedly filtered through social experiences within the composers’ cultures (Blacking 1973). In Bosavi, Papua New Guinea, for example the sonic forces generated by singers, memories and the local environment through a waterfall-esque flow of sounds and the repetition of placenames, were

understood by Feld to be generating a culturally attuned sensation of place as well as intensified emotions within his interlocutors (Feld 1990, 1996). If the goal of a composer's music is ultimately communication of experience or meaning, the sonic forces captured in the creative act must necessarily be molded to forms provided by culture, even if those forms are altered or revised in the process (Blacking 1995:52). Especially in the case of indigenous peoples, a thorough understanding of local concepts of creativity and creative circulation would need to account for the experience of colonization, and the ways creative discourse and creative possibilities have been impacted by the logics imposed by colonizing states and their most powerful actors (Tuhiwai-Smith 1999). Changes in how indigenous creators structure their creative networks or how they value their creative acts appear to be particularly important to gauging shifts in communities' understanding of their own subjectivity (Yudice 2003; Thrift 2009).

Studies of Hopi Sound

Scholars have heard Hopi song from a variety of vantage points within the humanities and social sciences. In particular, two early sets of field recordings and transcriptions of Hopi ceremonial and everyday songs, one by ethnologist Jesse Walter Fewkes (1889) and the other by composer Natalie Curtis (1903-04), have produced a substantial amount of ethnographic and musicological literature and continue to find relevance in the works of contemporary Hopi and non-Hopi scholars. Fewkes's collaborator, Benjamin Ives Gilman, a Harvard-trained philosopher of aesthetics, was the first to use recordings to test Hopi song for 'musicality'—something he thought derived from finding that Hopi song lacked key components of scale integral to Western musical practice and theory (Gilman 1908). Natalie Curtis's (1907) musical ethnography found Hopi song to be a primeval American musical genre with scale, musical structure, and to some

extent, harmony (though she notes that Hopi harmony is rendered through the counterpoint of the sonically rich Hopi environment). Rhodes (1973) and List (1993) employed Fewkes's, Curtis's, other ethnomusicologists', and their own field recordings and song transcriptions to speak to the musical structures of Hopi songs, Rhodes using the songs to discuss the characteristics of certain Hopi song genres, and List exploring diachronic change in song texts and melody constructions over nearly a century. The poetic texts of the songs recorded by Fewkes and Curtis have been of particular interest to linguistic anthropologists since the 1980s, with Black's (1984) elucidation of Hopi concepts of gender, ethics, and kinship and Sekaquaptewa and Washburn's (2004) study of Hopi cosmology in Hopi kiva murals, drawing heavily from these archival resources and some newer field recordings. Other lenses for understanding Hopi song have included Shaul's (2002) study of Hopi song as performed literature, examining the structure and meaning in Hopi song texts, and Loftin's (2003) exploration of Hopi song as prayer. Building on these studies of particular structures and components of Hopi song, I seek to situate *taatawi* conceptually as a connecting link within a vibrant network of diverse actors in the Southwest—a point-of-view that treats *taatawi* as a generative mode of what we might call Hopi sovereignty.

The Nature of Hopi Song

Hopi *taatawi* are composed and performed as a means of connecting living things to the rest of the universe. As Lee Wayne Lomayestewa, a Hopi ceremonial leader from the village of Songoopavi, explains, “When the priest does the ceremony...when he sings, it's not just for us Hopis. It's for all the little insects that crawl the earth, the animals, the plants, the birds, the butterflies, all the people that live on the earth...even the stars, the galaxies” (personal interview, 5 February 2011). Hopi songs are created by a *yeewa*—someone who has the ability to envision *natwani* (prosperity, wellbeing) and can encode that vision, including the relations and labor that

go into it, into sound. Thus, the term *yeewa* is also synonymous with concepts like strategic planning. As many Hopi composers explained to me, *yeewa* requires entering into musical relations with human and non-human collaborators over extended periods of time. These collaborators include the generations of more experienced men and women within one's family, clan, *kiva*, or ceremonial society, but perhaps more importantly, it involves collaboration with corn plants, which many Hopi farmers call their "children."

In the following excerpt from a 2009 interview, Hopi composer Leigh Kuwanwisiwma describes through his own experience of becoming a composer the kinds of relations involved in *yeewa*. The story begins with Kuwanwisiwma's dad, a respected ceremonial drummer, praising him for his first attempts at composing ritual songs by rearranging songs he had heard from other members of his *kiva*. As his father pointed out, this kind of appropriation—something common to contemporary musical composition practices—was not necessarily the way good Hopi songs are composed:

My dad was sitting there listening like this [arms folded], and I was intimidated, and I was stuttering, trying not to lose memory and all of that, so I was singing my song staggering through it. Finally I got my song together, and then he started tapping his feet. He looked at me, straining the eyes, and said:

"Is Áli! Good song! But," he said, "no feeling."

So I said, "What?"

"I'll tell you what. You composed your song here [pointing to his head] You didn't compose it here [pointing to the heart], the spiritual part of you. . . . You need to know that if you really want to get that feeling, you've got to get it yourself, too, not just the others [meaning other members of the *kiva*]. And the way that the old folks do it, to get it in here, so that your *kiva* group can feel it too, you've got to do it like the old folks."

And, as a thirty year old, I was slowly shrinking. . . . So he said, "you've got to do it like the old folks. You've got to get up early in the morning, every morning. Greet the sun, son. Ask for your spiritual well being, physical well being, a good day...that's one—that's the discipline. Second, if you really want to have these [ceremonial] songs really mean something, you've got to go sleep in the corn field, be there with your

children. Be there and witness . . . the horizon as it comes up in the morning. Figure out which birds are the first to chirp, look at the dew on the corn plants, and sing down there, and witness once you start singing and composing these songs, then these corn plants will start dancing to you.” (L. Kuwanwisiwma, personal interview, 2 September 2009).

From this and several other interviews with Hopi composers, it became apparent to me that creating the right “feeling” in a Hopi *tawi* is not just a matter of putting a new spin on existing aesthetic tropes. *Yeewa* isn’t just reworking other people’s creative work or progressively building on an established musical genre, though *taatawi* may sometimes do both of these. Good songs have real implications for living things like plants, birds, clouds, and galaxies, which can hear and respond to *taatawi* performances. A composer can only get the appropriate “feeling” of a ceremonial song through establishing disciplined relations with those entities and observing their response, or learning to hear from someone who does understand those entities.

How do Hopi *taatawi* influence things that we might otherwise think of as either non-agentive or non-musical—things like insects, plants, water, and clouds—when music is presumably a human art form? In her work to understand the subjectivity of non-human actors described by the Juruna people of the Amazon, Tania Stolze Lima (1999) argued that relations to non-humans in indigenous discourse may not just be metaphorical. Rather, inter-species relations should be examined from the perspectives of the actors themselves, which requires making analytical space available for what some might consider to be an “underlying logic of apparently irrational propositions” (116).⁶ In line with Stolze Lima’s suggestion, I agree with

6. In parsing her ethnographic material surrounding the peccary hunt, Stolze Lima (1999) finds that the Juruna people of the Amazon always insert linguistic markers denoting perspective (e.g., to the peccary he was X; to me, the peccary was a Y), implying that “the world only exists for someone...there is no reality independent of the subject” (117). In this way, the Juruna conceptualize the world in such a way that humans are not the only ones with a subjective “point of view”—human speech (and, as I will argue for the Hopi context, song) “is a part of the various realities for others” including some, but not all, species of animals, plants, and other cosmological entities. The fact that Juruna think and exist within the perspectives of other subjects whose temporalities and conceptions of space

Hopi linguist Emory Sekaquaptewa's conceptualization of *taatawi* as *condensations* (literally, making perceptible that which exists in the "ether") of lived, culturally attuned beliefs (Sekaquaptewa & Washburn 2004). As I will explore in the next chapter, the evocative language and melodic contour of Hopi ceremonial songs consists of more than just artful poetics—it is a physically perceptible manifestation of Hopi relations with humans and others within a particular territory. While *taatawi* draw from a cultural sensibility or "ethos" based on poetic devices like rain metaphors and onomatopoeic environmental sounds (cf. Feld 1990), there are key cosmological relations that become activated in the production of Hopi song. While song may be performed by humans, its resonance need not be confined solely to the human ear. As Kuwanwisiwma and others suggest, Hopi *taatawi* affect multiple kinds of entities at once by speaking/singing to their unique auditory perspectives, which is key to understanding these songs' power within the cosmos.

Overview of the Chapters

The chapters of this dissertation tack back and forth between ethnographic, historical, and legal analysis, to get at the notion of sonic sovereignty from multiple contexts. In chapter two I argue that Hopi *taatawi*, like all indigenous expressions of sovereignty, must be respected not just for their differences from settler culture, but for the authority they have that arises from the land. For many Hopis, songs are deeply rooted in collaboratively shaped senses of place and our relations with other actors in the cosmos. When songs invoke these sensibilities and relations, they perform work in the world that sets entire networks in motion to bring about an envisioned benefit for the world. But colonization of Hopi lands by Spanish, American, and Navajo conquest has posed challenges for the assertion of Hopi sonic sovereignty, affecting our

are distinct from their own means that their own understanding of self is dispersed and decentered across multiple realities (127).

geographies, temporalities, and the way our songs are performed and perceived in the world.

The performance of *taatawi* in presently colonized spaces allows us to not only express a diverse perspective within a multicultural political environment, but also works to (re)indigenize these spaces through sound—working out decolonization and respect for Hopi sovereignty in tandem as we learn from and collaborate with settler actors.

In chapter three I trace the circulation of *taatawi* both within Hopi ownership structures and through settler intellectual property regimes by examining an encounter between early ethnomusicologist Laura Boulton and three Hopi singers in August 1940. The hybridization of Hopi sound with settler technologies provided new opportunities for indigenous peoples to assert their sovereignty within settler spaces, but it also allowed new opportunities for colonization. The circulation of Hopi materials in the music market allowed for Hopi voices to be heard around the world in a way that seemed less mediated by politicians, government agents, missionaries and anthropologists (among others); but it also meant that Hopi songs would circulate outside of the protocols and controls rooted in Hopi networks of relations. Settler intellectual and cultural property laws, while powerful instruments for asserting rights because of their direct linkage to the coercive mechanisms of the state, were simply not developed with the care of indigenous voices in mind.

In chapter four, I argue that, rather than being objectifiable property *taatawi* should reside in bodies that are fit to handle them, and should not be severed from the networks of relations from which they are generated. For one, some *taatawi* are harmful when ingested by those whose bodies are not prepared to receive them. Second, converting *taatawi* into property tends to replace our modes of relation between our bodies, our voices, and our creative networks with capitalistic modes preferred by the settler-state and our global intellectual property regimes.

Ultimately, placing recorded *taatawi* on the shelves of settler archives rather than in the care of indigenous communities means our ancestors' voices will likely be cared for anonymously, perpetually in the servitude of the settler-state and further eroding indigenous sovereignty, unless indigenous interventions are made.

I conclude this dissertation by articulating three interventions that I think are necessary to support indigenous sonic sovereignty going forward. These include:

- An indigenous works amendment to the United States Copyright Act
- The use of indigenized licensing frameworks to embed indigenous protocols into the governance and circulation of indigenous creativity both on and off indigenous lands.
- Establishing a right to indigenous care, similar to Europe's new right to forget, whereby our ancestors' voices can be subject to indigenous care rather than preserved anonymously as archival objects.

While these are just brief sketches of what I hope will become actual interventions, my hope is that these will allow indigenous communities to better assert and maintain control over their modes of sonic sovereignty despite the increasing colonization of the sonic world by global intellectual property regimes.

Chapter 2:
Sonic Sovereignty:
Performing Authority in *Öngtupqa*

***Kyapsi* (Respect)**

In the evening of August 25, 2016, the Grand Canyon Music Festival held the premiere performance of *Puhutawi* (new traditional song) at the Desert View Watchtower located on the edge of the South Rim of *Öngtupqa*, what is now Grand Canyon National Park. The concert had been organized to commemorate the Park’s centennial and that of the United States National Parks Service, supported with Parks Service funds as well as funds from the National Endowment for the Arts and New Music USA. As a Parks Service press release explained, its sponsorship of *Puhutawi* was aimed at “celebrating the magnificence of America’s national cultural treasures through art . . . [b]y connecting art projects with the natural, historic and cultural settings of the National Park System and [to] inspire a new generation to discover these special places and experience our great heritage.”⁷ In particular, the Parks Service was interested in motivating more Native American visitors to America’s Parks—a population it had apparently struggled to attract, particularly at the Grand Canyon.

The Park’s decision to hold the premiere of the work in the Desert View Watchtower was filled with significance. Designed by Mary Colter in the early 1930s as a tourist venue for travelers along the Santa Fe Railroad to engage with indigenous artisans, the circular building made of sandstone and steel combined Hopi-influenced architectural style with the functionality of a panoptic observatory overlooking the majestic 6,000 foot canyon below. To construct the

7. Office of Communications, National Park Service. “More than \$1 Million Goes to Fund Arts Projects in National Parks.” (May 10, 2016), <https://www.nps.gov/orgs/1207/05-10-2016a.htm>.

building, Colter had traveled throughout the Southwest by plane, and then by car through the desert, searching out, studying and sketching lookout towers built by *hisat'sinom* (Hopi ancestors) at Mesa Verde, Canyon de Chelly, Hovenweep, and others. Colter's watchtower was massive in comparison to those sites, measuring approximately 70 feet tall and 30 feet wide, giving "the height we needed for view rooms and telescopes" while maintaining "the character of the prehistoric building" by "harmonizing of its lines and color with the terrain" (Colter 1933, *in* Shepherd-Lanier 1996). Colter also included traditional ceremonial spaces, including a *kiva*, ritual alters, and murals painted by Hopi artist Fed Kabotie in homage to the Hopi clans that had migrated up the Colorado river (191). Today, the ritual alters have been covered to preserve their sacred character, and the building now functions as a gift shop.

Seated or standing on the floor of the Watchtower, 100 or so spectators—including several members of the Hopi tribe who had traveled across Navajo Nation lands to attend the performance—applauded as Clark Tenakhongva, Hopi composer and singer (and now Tribal Vice Chairman), offered a welcome:

"Thank you, good evening. And I want to welcome all of you here, first of all, to our land."

While many in the audience probably did not fully grasp the meaning of Tenakhongva's statement, his claim in both speech and song that the Grand Canyon is "our land" was not made in jest, as a historical curiosity, or in the multiculturalist "This Land is Your Land" sense. It was, as I will argue here, a very present performance of Hopi authority within territory—an enactment of Hopi sovereignty.⁸

8. Sovereignty is a deeply troubled concept, especially as applied to indigenous peoples. As Joanne Barker (2005) explains, sovereignty originally referred to the divine authority of kings, and later to individual citizens, particularly in the exercise of an "inherent right" to make war and to govern domestic affairs in the name of Deity (2). However, as bodies of citizens assumed the role of "sovereign," a key philosophical tension arose. As Esposito (2010) relates through his reading of Thomas Hobbes, European-descended popular sovereignty only became a reality through the establishment of a stabilized political structure where the power of the individual to harm was recognized, but also

After briefly telling the audience about the emergence of our *hisat'sinom* from within the Grand Canyon, Tenakhongva introduced the first of the eight songs that would make up the night's performance. Tenakhongva explained to the audience that he had composed the song he was about to sing during a 2014 pilgrimage he and I (and several other Hopi men) had undertaken down the Colorado River through the bottom of the Grand Canyon.

The first song is a . . . It's a personal song. . . If I say some words that offends you, I'm glad you don't understand. [Everyone laughs.] Because [the song] is in Hopi. And to translate it a little bit, it's just telling, and its advising all of you that this is a sacred place for Hopis and other tribes. And that we need to look at it in a different view other than this thing is a big ol' canyon, a big hole here. This is a place where we call home. And it needs to be respected. One of the biggest things that upsetted Trevor, Lasso [who also traveled with us], and myself, was people floating down the river in these little string bikinis, because that's not the way we do things, and that's what was happening, and partying along the way.

After a brief flute prelude, Tenakhongva made out a steady pulse with an egg-shaped shaker, and began to sing:⁹

Okiwa Okiwa, sinomu
Yep i' Öngtupqa pas himu

Pay nu' yayniwa niikyango
Hiisavat nu' umumi yep lavaytinit yep'e.

I pity you, I pity you, people.
Here this [Grand Canyon] is a very important
(sacred) place.
Now, I am just beginning, but
I have something brief to tell you while I am
here.

immunized against through the organized disassociation of individuals from their prior modes of relation and the appointment of a representative to speak with authority (and act coercively) within the territory of the nation's citizens (26-30). While this arrangement may have become the building block of Western sovereignty, Barker argues that indigenous sovereignty arose through different means—what she calls “resonant” modes of relation: “sovereignty has been solidified within indigenous discourses as an inherent right that emanates from historically and politically resonant notions of cultural identity and community affiliation” (20). It is, for Barker, “more of a continued cultural integrity than of political power.” Bruyneel (2007) similarly finds that sovereignty is an inherent right—“the ability of a group of people to make their own decisions and control their own lives”—but he adds that this right is always “in relation to the space where they reside and/or that they envision as their own” (23).

⁹ I want to thank Daryn Melvin for his assistance in reviewing my translation of this song and providing additional insights. This transcription is of the full song composed by Clark Tenakhongva and performed in a subsequent performance on August 27, 2016 at the Shrine of the Ages, also located on the South Rim of Grand Canyon National Park. As discussed later in this chapter, this text and the text of the performance at the Watchtower are very similar but not identical. I have included this text here as it corresponds with the version that Tenakhongva intended to be made available for public broadcast.

Okiwa, oheyiye oheiyē, Sinomu	I pity you, <i>oh-eyi ohi-ye</i> [a man’s expression of regret], people.
Pay yep Öngtupqa pas himu Yep i’ qatsi yayniwa Yep i’ qatsi ahoy tiitso’tiwa	This [Grand Canyon] is a very important place. This is where this life began. This is where life returns when we have finished our part.
Paas’i ¹⁰ yep himu, noqw yep uma sinom it qa kyaptsi’yyungwa. Okiwa, Okiwa sinomu	You should be careful of what is here; yet, you are disrespecting it. I pity you, I pity you, people.
Oheyi Ohiye, Sinomu	<i>Ohe-yi Ohi-ye</i> , people.
Pay uma yep i’ Öngtupqa Qa, qa sòosoyam pas kyaptsi’yyungwni sinomu.	You who are present at Öngtupqa No, you will not disrespect it, every one of you people.

If this song were spoken in English, it would be hard to imagine a more severe rebuke. But, as I will explain, the fact that this is spoken in *Hopilavayi* (Hopi language) and comes in the form of a *tawi* (traditional song) is both significant and powerful. I argue that this song enacts Hopi sovereignty. It is a command to refrain from acting in a certain way within a place, backed by the authority of powerful, long-term relations existing within that territory. It is in some ways an expression of jurisdiction, which is typically defined as “a government’s general power to exercise authority over all persons and things within its territory.”¹¹ And yet, coming in the form of a song, it seems fundamentally distinct from legal constructions of authority. In this chapter, I ask, what is the nature of the authority whereby Tenakhongva, a 60-year old Hopi man and United States Army veteran, could command all present—United States officials, tourists, Navajo Nation residents, and Hopis alike—and all those who would hear the performance on radio, social media, and physical media, to conform their actions to his voice?

10 This word could also be “pas’i,” which would mean “this place is sacred.”

11 See Jurisdiction, BLACK’S LAW DICTIONARY (10th Ed. 2014).

To begin to answer this question, I explore the notion of sonic sovereignty or the resonance of political authority with the performance of indigenous sound. As discussed in the introduction, Hopi *yeeyewat* (composers) generate *taatawi* (traditional songs) through their collaborations with plants and other living things within a territory over the course of months and years. As Lee Wayne Lomayestewa explained, these songs are “not just for us Hopis. It’s for all the little insects that crawl the earth, the animals, the plants, the birds, the butterflies, all the people that live on the earth . . . even the stars, the galaxies.”¹² As I attempt to show, song is a vital component of contemporary governance within many indigenous territories; for Hopi people, song-based authority has been practiced since our emergence—far longer than the kinds of jurisdictional discourse which make up European settler forms of political sovereignty.

Hopi *taatawi* have several components that generate authority. In the sections that follow I will discuss how *taatawi* operate at the level of the linguistic sign, producing a cognitive response in listeners who have attuned themselves to the poetics and other sonic structures gained through their individual and collective experiences within Hopi territories (Basso 1996; Feld 1996). At the same time, Hopi *taatawi* also operate at the level of sensory perception, generating feelings and memories of particular times and places within those who hear them (Samuels 2004). *Taatawi* also reveal networks of relations between actors in Hopi territories and throughout the cosmos, and function as a means of engaging with and encouraging diverse actors to come together in productive labor. As I will argue, in the Hopi context, sovereignty is a performed, acoustic reality in addition to being a political or juridical fact—a reality that is not necessarily dependent on present-day Euro-American legal forms.¹³

12 See Podcast: Returning Hopi Songs—A Hopi Perspective [Sound Recording], Hopi Music Project (Feb. 5, 2011), <https://hopimusic.wordpress.com/2011/02/05/podcasting-returning-hopi-songs-a-hopi-perspective/>

13 See Stephanie Nohelani Teves, Andrea Smith, and Michelle Raheja, eds., *Sovereignty In NATIVE STUDIES*

The voicing of authority through *taatawi* challenges the territorial sovereignty imagined by the settler-state. It disrupts settler notions of time and place that have been superimposed on histories and geographies of the Southwest generally and Hopi lands in particular. Spanish, American, and now Navajo colonization, all of which contributed to the urgency of Tenakhongva's sharp rebuke in the song I just shared, have attempted to superimpose their own constructions of sovereignty within Hopi territories, leading in some cases to catastrophic results. The negative effects of colonization, and our efforts to open up a "third space" to recognize and hopefully overcome these effects, reveal themselves at several moments in *Puhutawi*, during its composition, negotiations with performers, the rehearsals, in its performances and later rebroadcast, and in audience responses as questions of musical authority on Hopi lands continue to be debated and tested.

What does Indigenous Sovereignty Sound Like?

Anthropology of indigeneity has long recognized deep connections between sound and place within indigenous societies, a linkage which directly contributes to the construction of indigenous identities and the definition of territories. As Steven Feld observed among his Kalului collaborators in Papua New Guinea, "the experience of place potentially can always be grounded in an acoustic dimension" (Feld 1996:97). Throughout Feld's collaborations with Kalului, sound was a predominant source of truth; it was a vital component of Kaluli memory and key to Kaluli understandings of themselves in space. The sound of water, for example, was a critical basis for locating one's self in relation to other entities in the Bosavi rain forest. The sound of water was also an essential aspect of Kalului aesthetics and song performance practices,

KEYWORDS 10-12 (2015) (briefly discussing the diversity of ways sovereignty is expressed by indigenous peoples which appear to be beyond the conceptual limitations of settler political philosophies).

which were reflected in Kaluli social attitudes. As Feld explained, the vocal practice of “life-up-over sounding”—in which singers both compete and cooperate in a “tense egalitarianism”—created an “interlocked and seamless” ground against which “there are no single discrete sounds to be heard.” (100). Kaluli knew how to sense and make sense of their territory: the cognitive interdependence of Kaluli society and the local environment (what Feld called “accoustemology”) is clearly manifest in the kind of “sonic epistemology of emplacement” Kaluli practiced in many aspects of everyday life (105).

In addition to connecting knowledge and truth to place, indigenous songs also attach people, their histories and genealogies to places, both by indexing particular memories individuals have had in places, but also by generating a particular feeling or feelings that become iconic of places. As these feelings are re-experienced, the person shares the same space as those of an (imagined) past. As David Samuels has observed over years spent on the San Carlos Apache reservation,

“The recurrence of a song played on the radio or on the jukebox at Curley’s, on a boom box or by a band at a party, allows a building up and layering of experiences and feelings. These experiences and feelings are recoverable by being linked to the repeatability of the mediated expression. Repetition brings these feelings—linked to past experience, places, and people—back into the apprehension of the listener, so that what once was is again . . . This layering of people, places, events, and music is the thickening of experience, the knowledge of what it means and how it feels to be from San Carlos. This thickening becomes historical consciousness, for more accurate than saying that music triggers memory is to say that music triggers the imagination through the evocation of mood. The feelingful layering of indexicality and iconicity brings listeners to the sense that they share that feeling with the past.”

Importantly, the origins of the musical styles themselves do not necessarily determine which places and memories will attach to which people, only that the sound and the people are present on the land over time.

What has not been explored as fully is how performances of song might generate authority

within a territory. In other words, how might songs become expressions of sovereignty, particularly when other performances of sovereignty seek to compete with or colonize it? Making the connection between song and sovereignty may sound somewhat tenuous as discourses of sovereignty in the Euro-American legal tradition have taken the near iconic forms of constitutions, democratic procedures, enforcement practices, or legal opinions, with only the occasional utterance of highly structured oral argumentation. However, as I will argue, performances of song operate on multiple levels to create resonances among actors within a territory, which lend them and those who sing them authority—an authority constructed not necessarily from human agency and a presumed dominance over other, lesser life forms and other inert matter within a territory, but the engagement with the agencies of all actors within a relevant space—human and non-human. In this way, whether sound carries authoritative weight moves beyond the dimension of human cognition to questions of performativity and political power.¹⁴

In the Euro-American legal sense, expressions (spoken declarations, written documents, etc.) seem to become actionable only to the extent that they resonate with the sovereign's prerogatives or laws. Authority can be expressed by those other than the sovereign, but those expressions must be made either within the permissible scope of the sovereign's power and through a delegation of the sovereign's authority, or be recognized or permitted by the sovereign as within

14. As Austin (1962) noted, there are some utterances that can be termed “performative” because “(a) they do not ‘describe’ or ‘report’ or constatae anything at all, are not ‘true or false’; and (b) the uttering of the sentence is, or is a part of, the doing of an action”—in other words, “the issuing of the utterance is the performing of an action” (5-6). As Austin points out, for performative utterances to work there must be an existing convention that gives effect to certain words performed in a context (15). In addition, there often must be intention behind the words (8-9, 15). As Goffman (1981) points out, the crafting of the context (“front”) can be just as important to the effectiveness of the utterance as its linguistic content: the setting (spatial layout/organization of the context), appearance (indices of social status), and manner (cues in the voice or physical movement that foreshadow the utterance), when understood by those who experience the utterance, will be key to what effects if any are achieved by the performance (13-17).

an individual actor’s “fundamental” or “natural” rights.¹⁵ Ordinary citizens in the United States, recognized collectively as the sovereign, are permitted to utter words backed by the coercive power of the state, mobilizing the resources and power of the state over people and territory as they operate within its parameters. For example, when a jury foreman reads a verdict in a criminal trial, that utterance will determine the future of the one charged only to the extent that those words are authorized by the sovereign—the foreman speaking for the jurors, the jurors speaking for the court, the court speaking for the political subdivision, and the political subdivision acting on behalf of the sovereign. To accomplish the desired work of meting out justice, the foreman’s words must be spoken at a particular time and place in which the foreman has authority, and it must be done in an actionable form, so that it will resonate with others in authority who have knowledge of the forms of different kinds of verdicts, and who are employed to ensure the collective work of justice (or whatever other agreed-upon principle) is carried out. Once the verdict has been performed, all manner of materials will be mobilized for the sake of ensuring the verdict is enforced—shackles will be taken off of the body or the body will become imprisoned. The accused’s potential for work, health and/or happiness will be affected, as will

15. The United States, for example, protects certain kinds of expressive authority under the First Amendment of its Constitution, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.” U.S. Const., amend. I. James Madison, who authored the First Amendment, conceptualized these freedoms as not deriving from the Constitution itself, but as prerequisites to it. Freedom to establish and follow religious authority, which he considered to be a duty owed by all individually to the Creator, is a prerequisite to the formation of subordinate civil societies and cannot be subject to legislative governance. See JAMES MADISON, A MEMORIAL AND REMONSTRANCE *In* VINCENT BLASI, FREEDOM OF SPEECH IN THE HISTORY OF IDEAS: LANDMARK CASES, HISTORIC ESSAYS, AND RECENT DEVELOPMENTS 27 (2d. ed. 2016). And freedom of the press is the expression of public opinion, which for Madison “sets bounds to every government, and is the real sovereign in every free one.” See James Madison, *Public Opinion*, THE NATIONAL GAZETTE (Dec. 19, 1791) *In* BLASI, FREEDOM OF SPEECH, at 53. The question is how indigenous forms of expression intersect with these formations. As I will discuss in the following chapters, for indigenous song to be recognized as authoritative by the settler state, it appears that it must contribute to the settler-state’s authority, which will necessarily limit its its function to whatever is permitted by the settler-state’s existing categories (religion, speech, property), or it must be relegated to a position of otherness within a multiculturalist framework, which inevitably marks indigenous expressions of authority as inferior to that of the settler-state. See *generally* ELIZABETH POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM (2002).

his or her social networks inside and outside of the prison. Each verdict incrementally increases or decreases the demand for prison space, for taxpayer funds, for labor and raw materials, and the extraction of resources. The defense attorney will begin celebrating or will begin preparing an appeal, impacting the reputation of the attorney's office, the fees that can be charged to clients, and potentially even public opinion surrounding the effectiveness of government. The point is, once performed under the totalizing authority of the sovereign, this verdict will begin to resonate with entire networks of humans and non-humans, who will be mobilized to accomplish its directives and whose lives will be altered in some way by the words performed.

It is important to point out that the concept of totalizing sovereignty, which animates the networks implicated in the performance of jury verdicts, may be entirely foreign to indigenous performances of sovereignty. Examining the cultural politics surrounding discourses of jurisdiction on *Hopitutskwa* (Hopi lands), Justin Richland argues that, "rather than replaying Euro-American logics of sovereign totalities, Hopi cultural politics orient to the lived practices of social power as emergent and contingent, and suggest tradition as the jurisdiction of Hopi sovereignty" (Richland 2011:205). As Richland explains, both in design and in practice, Hopi sovereignty is never absolute: "no singular authority is understood as holding the whole of social power" (Richland 2011:206; 2005). While Richland explicitly avoids exploring the traditional bases from which Hopi sovereignty derives, he finds that the structure of Hopi sovereignty can be readily understood through the way jurisdiction is performed in Hopi courts. Jurisdiction is, literally, the way law "speaks to itself about itself" (2011:206). As Richland shows, Hopi people have often refused to participate in the legal processes that would typically give rise to jurisdiction under settler legal frameworks. His exploration of performances of sovereignty-- Hopi refusals in the drafting of the Hopi constitution and in courtroom proceedings where

government-appointed judges sought to identify Hopi “customary law” so they could rule on village property disputes—reveal that Hopi sovereignty exists, but that it is in some ways incommensurate with settler-imposed sovereignties (208-9). Hopi sovereign authority is not grounded in one particular individual or elected body, but is the result of numerous centers of authority (clans, ritual societies, villages, etc.) coming together for the good of all. The performance of refusal by individual Hopi tribal members to act as *the* authority in settler spaces that demand an authority formed in its likeness is an assertion that authority at Hopi is non-totalizing, and should therefore be expressed within spaces and networks that can realize the intentions of the community as a whole and not the demands of a single power holder.

As I explore here, performances of Hopi *taatawi* are another way Hopi sovereignty can be expressed. Authoritative *taatawi*, when performed in ceremony, are not unlike the expressions of jurisdiction Richland describes. This may be because, as Sheridan, et al. (2015) explain, “Hopis do not draw a distinction between politics and religion nor do they distinguish between natural and supernatural” (27). When performed, well composed *taatawi* I have heard carry significant authority for listeners—an authority that is, borrowing Richland’s words, “emergent” and “contingent.” For one, Hopi songs contain “thinking about how life should be lived” and “the principles by which the Hopi have organized themselves” (Sekaquaptewa & Washburn 2004:458). As Sekaquaptewa & Washburn explain, Hopi *katsina* songs (songs sung by spirit beings) often take the form of admonitions “prompted by their observations of Hopi who are straying from the proper way of a life . . .” (2004:468). By stating community norms and social structures, and the potential consequences for compliance or non-compliance with them, *taatawi* can provide a basis from which listeners can make choices about their behavior and gauge the actions of others. Interestingly, these admonitions are almost always made in the form of

metaphors, comparing people and their behaviors to the patterns of other phenomena in the world. *Id.*

In addition to describing social norms, performances of *taatawi* are understood to be authoritative because they tend to produce changes in human and non-human listeners and within environments throughout a given territory. In other words, “[c]eremonies are instrumental as well as symbolic” (Sheridan, et. al 2015: 27). As Peter Whiteley explains, the performance of songs in ceremony allow those holding ritual power to channel those forces for the benefit of the world, allowing for the production of rain, increased fertility, health and happiness (Whitely 1998:97). As Hopi archeologist Lyle Balenquah has explained,

When a modern Hopi person is involved in ceremonial rites and responsibilities, he or she does not simply go through the motions but actively engages the spiritual power that was first developed and handed down by the ancestors. In this way a Hopi remains connected to the time of the ancestors—many of whom, Hopis believe, still inhabit [Hopi ancestral sites]. Indeed, it was in places like these that some Hopi ceremonies, such as the Snake Dance, originated. The ceremonies reflect connections that transcend time and set participants among their ancestors in the present day. . . . The ancestors play important parts in contemporary Hopi ceremonies that ‘bring rain, fertility, and other blessings for the Hopi people and their neighbors throughout the world.’”¹⁶

In the next section, I describe how *taatawi* re-connect people with the temporalities and places that make up the cosmos by generating images of prosperity or other outcomes through collaborations between humans and non-humans. Performances of *taatawi* allow for voices of the past and present to connect and work together. By maintaining these connections through song and ceremony, those who actively listen become emplaced among our ancestors in the present. These songs are efficacious not because of any implicit or explicit exercise of a single authority’s power who exacts compliance with the words sung, but because they resonate with

16. Lyle Balenquah, *They are Still Here: Wupatki Pueblo and the Meaning of Place in Hisat’sinom: Ancient Peoples in a Land without Water* 14 (Christian E. Down, ed. 2012)

networks of actors with whom the performers have relations within a territory—actors who are motivated to work together to bring about the effects being sung into reality.

Sounding the Grand Canyon

Performances of *taatawi*, then, are not necessarily intended for personal edification or social entertainment, though they often uplift and inspire people. Rather, these songs are composed to have certain effects within territories to which Hopi people have established relations.¹⁷ In this section, I explore some of the ways *taatawi* do this, first as they express a localized sensibility through which memories of place and relations to territory can be re-experienced and felt; and second, as they resonate with human and non-human actors within those territories, who are encouraged to work together to produce the desired effects.

Lavayi and the articulation of Hopi territory

In my conversations with *yeeyewat* (composers), performers, and audiences, nearly everyone found Hopi songs to be most meaningful when they “paint a picture” for the listener. Hopi *taatawi* do their work through a spatialized aesthetics: they are designed to emplace the listener within times and spaces and in relation to other actors within a territory. As David Shaul (2002) explains, Hopi, like most Pueblo peoples, “use memory as a library; the narrated word, the sung word, the ritual word all have a special, spatial quality. Each localizes the tradition and relates it to those present” (188). For Shaul, this happens through the layering of sonic symbols in performance. When a “song-poem” is performed in context, the words acquire greater meaning

17. As Robert Rhodes (1973:19-20) has written, “Since the purpose indicated for Hopi music was not to entertain an audience or to communicate a message to an audience, the sound of a song is unimportant and is not considered by the Hopi in an analysis of the ‘goodness’ or ‘badness’ of a song. Instead, the criterion of goodness or badness is the effect of the song in bringing rain, or insuring good crops, or perpetuating the ‘Hopi way,’ or doing whatever the song is supposed to do.”

as they are enveloped with melody and rhythm, localizing the meaning of the song for those present. *Id.*

For example, the song below that Tenakhongva created for *Puhutawi* emplaces the listener by using imagery, poetics, and structure that grounds him or her on Hopi lands. The song was originally sung to me by Tenakhongva, with a rattle as accompaniment (* Denotes the rattle, Hopi words in *italics* and () denotes English gloss of the Hopi words.)

***** [Rolled]

Yoyisiwukiwtani; *Yoyihoyoyoyotani*

That there will be distant, slanted rain; there will be rainclouds moving along

//

* * * * *****[Rolled]

Naanan 'i vaq pew, Talwiptimakya

from all directions, with lighting flashing

//

* * * * * * * * * * * * * * * [even beats]

Yoi - humumumutani; *yoi - tuyuyuyutani*

That there will be distant thunder; it will reverberate through the ground

//

* * * * * * * * *

E-yah hey ne-yah; e-yah hey ne-yah; e-yah hey nay yo ho-way, ya hey, hey-nay-hey yam.

To understand what it might feel like to hear Tenakhongva's song from the perspective of someone who has lived at Hopi, it is helpful to know the character and nature of rain clouds in the high desert. During the late summer months, these graceful white clouds, rounded on the top and flat on the bottom, cross the sky. They push through the air over the valleys as they grow in size and eventually drop their moisture only on certain places below them. As they produce their moisture they begin *yoisiwukiwta*, or slanted, long-hair-like rain from the perspective of one who is in the desert observing them.

Clouds often travel in groups, and as more and more come together from different directions, they create lightning and thunder, which signal heavy rains. The experience of the arrival of rain clouds and thunder is visceral—it is not just a visual and sonic experience, but one with a palpable texture, a scent, a taste. The air cools and thickens, taking on a sweet and earthy flavor. Wind begins whirring through seams and cracks in the windows throughout a house or hissing through branches of bushes and trees. As thunder approaches, the wind stops.¹⁸ The sound rumbles the ground and, as it intensifies, vibrates the body. The word *umumumuta*, which is one of the root words in *yoyihumumutani* (literally, “it will rain-thunder”), is an onomatopoeic expression of thunder vibration. *Tuyuyuta* is also onomatopoeic for the feeling of reverberation. Sometimes when Tenakhongva would sing these words, he would stretch the onomatopoeia even further, adding additional syllables to these words.

The form of Tenakhongva's song *Yoisiwukiwtani* differs from the AABBA' form most scholars have described as the standard Hopi song form (List 1993:5; Rhodes 1977:15-16). Hopi composers would often explain this form through a mnemonic: composers would hold up their hand and point to each of their fingers. After a short introduction (*kyngwa*), Hopi songs

18. This observation was given by Clark Tenakhongva. See Chapter 1.

generally begin with the “thumb” and “index finger” sections: two verses sung in a lower tonality (*atkyaqw*), which is repeated. Like the “middle finger” and “ring finger,” a song then jumps up in range and intensity into new material (*oomi*; “upward” portion or “cry”), followed by a repeat. Finally, like the little finger, the song then concludes with a brief coda (*tootsi* or “shoe”) based on the *atkyaqw*. Often a portion of the *atkyaqw* is repeated in the *oomi*, making it possible for parts of the song to repeat four or five times. But in the case of *Yoisiwukiwtani*, the entire song is repeated four times. This follows the form of other songs I have heard that describe clouds, in which the repetitions signal clouds arriving from four of the six cardinal Hopi directions (SW, NE, NW, SE, missing only ‘below’, which is expressed in the last line of the song, and ‘above’, which is where the listener hopes the clouds will converge). Songs sung in this way emplace the listener within Hopi space, locating them at the center of much-hoped-for rain clouds.

When people would listen to this song, they often would comment on just how perfectly it described the feeling of seeing these long-haired cloud formations moving across the sky while they stood in a field or observed from the village. While these cloud formations are not necessarily unique to Hopi lands, the singer’s humble, aspirational performance, painting a hopeful picture of these clouds moving and converging, surrounding the listener with their sound by reproducing onomatopoeically the sensory experience of these clouds, and reminding the listener of their own experiences of anticipation as these kinds of clouds approach, all work together to create a Hopi sensibility of place and position within the cosmos.

Tawvö that brings actors together

Taatawi also have the power to position the listener within networks of relations, particularly in the way the *tawvö* (“sound-path,” melodic contour of the song) is constructed. The beginning

portion of a Hopi song, the *kuyngwa*, almost always contains a melodic tag that reveals the nature of the voice behind the song. It helps the audience envision the actors being brought into collaboration through the song.

For example, this introduction signifies butterfly dancers (drum using x noteheads):



This introduction signifies a ceremonial clown:



Musical elements, such as timbre, pitch, and tempo all factor into *tawvö*, articulating the identity of the human or non-human entities whose relationships with the singer and audience are being activated through the song.

Because *taatawi* are often composed to be danced, the rhythmic style, pauses in the beat, the kinds of instruments used, and other elements also help develop the relations activated through the song. Certain kinds of beings spin at regular intervals, and as they dance they or the singers who sing for them will shake rattles at the moment of a turn. Some kinds of beings dance quickly and at a higher pitch; others are slow and solemn. *Angkatsintaatawi* (long hair katsina songs) sound at a much deeper pitch, at a slower pulse, and without a drum, while *povoltaatawi* (butterfly dance songs), are sung at a faster and higher pitch with a drum. Other kinds of beings have specific sounds attached to them—the sounds of turtle shells, sea shells, bells, calls, moans, or grunts, which add additional dimensions to songs as their bodies move in response to the song and as they express their identities. Almost all Hopi songs consist of a single melodic line; the

tawvö gives the song its particular voice or voices, speaking to or from the perspectives of these beings. Importantly, each of these voices often has a specific relationship to one's own identity within a clan and village.

In sum, *Tawvö* animates the *lavayi*, making it not simply an artistic or aesthetic object—a “song-poem”—but lending it subjectivity and identity—often giving it a voice of authority.

Nukngwa/Lolmat Unangwa'yta

In order to have authority, songs must also be sung with a unified “good heart” (*nukngwa* [female speaker] or *lolmat* [male speaker] *unangwa'yta*) to be effective. Positive thoughts, hope and work toward abundant growth (*natwani*), collective-orientation (*nami'nangwa*), humility (*naa'okiwat*), are just some of the attributes of those who perform with good hearts. Hopi *taatawi* are not typically meant to depress people. Even songs that call out a particular person or behavior will often provide within it hope for a prosperous outcome if they change (Sekaquaptewa & Washburn 2004:468-470)

When layered on top of each other, the *lavayi* (speech), which paints the imagery and generates the feel of place, together with the *tawvö* (melodic contour), which establishes relations with voices from other actors within the territory, and *nukngwa/lolmat unangwa* (good hear) position the listener, singer, and other actors within the same time and space and within an encouraging, collaborative network of relations. A *tawi* that is full of meaning both in its *lavayi* and *tawvö*, which is performed with a good heart, generates materially the images that were envisioned by the *yeewa* who composed the song.

Singing Öngtupqa

I opened this chapter with the text of the first song Clark Tenakhongva performed in *Puhutawi*. As with many *taatawi* the text is deeply rooted in a Hopi sensibility of territory, and is meant to express an authoritative voice in relation to and in collaboration with actors within that territory.

When Tenakhongva sang that *Öngtupqa* is “pas himu” (literally “something of high importance and status”¹⁹) I take him as saying that the Grand Canyon is not only important, but also sacred. As John Loftin (2003) has written, for most Hopis, the substance of life is water, moisture, or breath—it is *ani’himu* (a “great something” or sacred substance) and is sacred. *Öngtupqa*’s rivers are sacred spaces in part because they circulate this water and moisture. But they are also sacred because of the relations Hopi have to places within *Öngtupqa*: “yep i’qatsi yayniwa” (here this life began), Tenakhongva says, and “yep i’qatsi ahoy tiitsotiwa,” (here life returns when we have finished our part). Tenakhongva is talking about the Canyon as the place where Hopis emerged into this world (Malotki 2011:35-36). But depending on how it is sung, this phrase may take on additional meaning. The word “i’qatsi” can mean “this life,” but, sung slightly differently as “iquatsi,” it can also mean, simply, “my life.” Certainly, *Öngtupqa* contains sacred sites where *Hopisinom* emerged into the present world; but it may not necessarily be where everyone in the audience emerged, or where they will return.²⁰ Another reason why Tenakhongva might be referring to his life has to do with the pilgrimage to *Öngtupqa* he, several others and I took in 2014, which I will discuss in greater depth in the next section. As Tenakhongva explained to the Watchtower audience, when Hopi men make their pilgrimage down into *Öngtupqa*,

¹⁹ I thank Stewart Koyiympewa for this insightful gloss.

²⁰ Hopi histories depicting the emergence of diverse ethnic groups would not be appropriate here, but it is important to note the subtle ways wordplay helps distinguish and define groups and their claims to the Grand Canyon.

that 13 days on the river changes your life. For me, going back on it was, um—I am a veteran, and I thought that was part of my healing process—going down the river.”

In making a pilgrimage to places like *Öngtupqa*, it is possible for someone to emerge again, to have his or her “eyes opened” as Tenakhongva put it. *Öngtupqa* is a place where one’s life begins (again).

Tenakhongva explains that *Öngtupqa* is where we *ahoy* (return, go back to earlier time/place) when we have *tiitsotiwa* (finished). As Tenakhongva glossed it, the word *tiitsotiwa* in this context means “when we have finished our part.” The root word, *tiitso*, has among its meanings, to finish dancing, to finish planting, the culmination of something’s purpose of being.²¹ As many Hopis believe, when we die, we return to *Öngtupqa*. But Tenakhongva reminds us that there is an element of reciprocity involved. When we have finished our part by completing a good life—including a life of *naa’ökiwa* (humility) and *kyaptsi* (respect)—we can return to *Öngtupqa*.²²

While the *lavayi* of Tenakhongva’s song is a powerful articulation of *Öngtupqa* as Hopi, there are some important aspects of the *tawvö* of Tenakhongva’s song, and the context in which it was sung, that also make it an articulation of Hopi sovereignty.

First, the song form is not a typical dance song. Rather, it is what might be called an *ökwantawi* (song of admonition).²³ These kinds of songs come in many different forms, including the genre of “owl songs” in which children are admonished to not fuss, fight or cry or else an owl will eat them (see Mesa Media 2010; Black 1973; Rhodes 1973). Like these songs,

21. See HOPI DICTIONARY (1988).

22. As Sekaquaptewa and Washburn (2004) explain, similar reciprocal language can be found in Hopi katsina songs. When the *katsinam* (spirit beings) visit Hopi villages, they often include the phrase *uma tûwati* (for your part), followed by a description of what is required for them to fulfill their part or obligation, and then a promise by the *katsinam* to bring rain, nourish crops, and help sustain a good life (Sekaquaptewa & Washburn 2004:468).

23. See HOPI DICTIONARY at 360.

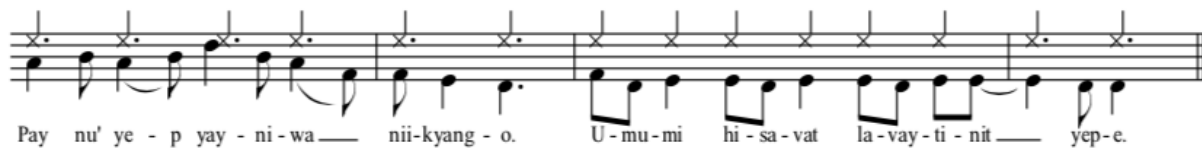
Tenakhongva's song flows along in a lulling triple meter, with brief repetitions of key phrases voiced by an authoritative being. But, unlike the owl songs where the owl provides the admonition, in Tenakhongva's song, the words are the sounds of a crying or regretful man, which are repeated several times: *ohayi, ohiye*. Also, the owl songs and Tenakhongva's song are similar in structure, in which the listener is emplaced in a space painted by the composer in sound, which is then rapidly punctuated by a clear prescription of consequences. In both the owl songs and Tenakhongva's song, admonition is through a clear promise or consequence. In owl songs, children are admonished that, if they fuss, the owls will eat them; but if they go to sleep without crying, they won't (Rhodes 1973). Tenakhongva's song is a bit more forceful, which makes sense as it is admonishing adults. The admonishing lines state "you should be careful of what is here; yet, you are disrespecting it" and then, "No, you will not disrespect it, every one of you people."

Another important aspect of Tenakhongva's *tawi* has to do with the actors whose voices are referenced in the song, and how the singer places himself in relation to those voices. In the first portion of the song, Tenakhongva sings *Hisavat nu umumi yep lavati nit yepeq* (I have something brief to tell you while I am here). There is a second-person reference in this sentence that is distinctive from the rest of the song in terms of its melodic contour. As Tenakhongva explained at the watchtower, he knew the audience might be offended if they knew how directly he was admonishing them. When Tenakhongva sang the word *umumi* (you [over there]) during the watchtower performance, at which mostly Hopis and tourists attended, he inflected *tawvö* in such a way that I didn't pick up any special meaning around the word "you over there." He sang each syllable in a steady rhythm, quickly passing over the words at a close interval (roughly a major second in western pitch relations). At the performance that was being recorded for National

Public Radio to be broadcast throughout the Southwest, however, he sang this word differently, which to me revealed his intended audience. The word *umumi* during that performance was still sung syllabically in a steady rhythm, but this time, the pitches were only microtonally away from one another, emphasizing and prolonging the *tawvö*. The following transcription gives a rough approximation.²⁴

²⁴ Note also that Tenakhongva changes the word order and rhythmic figuration slightly between the two examples. The meaning of the *lavayi* remains essentially the same.

Excerpt from First Performance



Pay nu' ye - p yay - ni - wa — nii-kyang - o. U - mu - mi hi - sa - vat la - vay - ti - nit — yep - e.

Excerpt from Second Performance



Pay nu' Yay - ni - wa — nii-kyang o. Hii - sa - vat nu_u mu - mi ye - p la - vay - ti nit yep - e.

This difference is significant, as I will discuss in the sections that follow. What Tenakhongva is singing is, to me, a figure I have heard only in connection with the *tasap* (Navajo) *katsina*. In addition to federal officials, tourists, and Hopi people in the audience, the song also appears to be addressed to the Navajo Nation.

In sum, Clark Tenakhongva's song shows us its deep linkage to a Hopi sonic sensibility of place. The *lavayi* positions the listener within a Hopi cosmology, and does so by drawing a picture of the territory—in this case *Öngtupqa*—through its *lavayi*, connecting the audience to important places of emergence and return. At the same time, its *tawvö* tells us that it is an admonishing song, one in which a statement of instruction and consequences will be given, and identifies both the singer and the listener as within a particular network of relations, particularly one in which the singer is authoritative. In the section that follows, I briefly articulate who *umumi* (you over there) might be in Tenakhongva's song and why this admonition is an expression of sonic sovereignty.

The Colonization of Hopi Territory

The world articulated by Hopi *taatawi* reflects, affirms, and enacts a temporal and spatial reality that contradicts the colonial imagination of Hopi lands. But importantly, the colonial imagination of Hopi lands is multilayered, including Spanish, American, and Navajo time and space, which have imposed themselves on Hopi territories and the actors that reside therein. While *Hopisinom* have referred to Hopilands as *Hopitutskwa* for generations, these lands have also, at times, been known as the Province of Tusayan by the Spanish, Arizona by the United States, and *Naabeehó Bináhásdzo*, by the *Dine* of the Navajo Nation. For periods of time, both the Spanish and Americans called Hopi people “Moquis,” a Spanish cognate of the Zuni word “A’mook’we’eh” or “clown” or “people who are content.”²⁵ *Nuvatukya’ovi*, the place-name for the homes of some of our Hopi *katsinam*, has been erased and replaced with the Anglicized Spanish name “San Francisco Peaks,” while *Toko’navi*, an important Hopi place, is now called “Navajo Mountain.” There are hundreds of further examples of ways Hopi geographies have become endangered or erased by colonization. Fortunately, many of these names are being actively recovered (Whiteley 2010) and rights to define, access and control these territories are continuing to be asserted by Hopis.²⁶

In addition to colonization of Hopi places, time has also been subject to colonization. Prior to colonization, Hopi time was structured by ceremonial events and agricultural cycles, both of which derived from patterns existing in the environment; now the Gregorian calendar and the Western work-week impose constraints on Hopi temporalities—a temporality imposed by the

25. See Thomas E. Sheridan, et al., *MOQUIS AND KASTIILAM: HOPIS, SPANIARDS, AND THE TRAUMA OF HISTORY, VOLUME I* 13 (2015).

26. See *Hopi Tribe v. Arizona Snowbowl Resort Limited Partnership*, No1 CA-CV 16-0521, ___ P.3d ___, 2018 WL 771809 (Feb. 8, 2018) (holding that the Hopi Tribe has standing to bring a public nuisance action against the Arizona Snowbowl for generating artificial snow made out of reclaimed sewage and placing it on *Nuva’tukya’ovi*.)

United States through government regulation and compulsory education (the days of the week in our contemporary Third Mesa Hopi dialect are ordinal numbers followed by “tutuqaywisa” or “schooling,” e.g. “first schooling,” “second schooling,” etc.). The influence of American time on Hopi society, and how Hopi people should respond to it, continue to be debated, particularly in the ways villages and families plan ceremonial events, the times when fields are planted and tended, and even people’s daily routines.²⁷

Because *taatawi* connect Hopis with places and temporalities, the actors in those places and temporalities, and the knowledges that come from our interrelationships with those actors and places, *taatawi* are critical to what we might call the (re)indigenization of time and space for Hopi people, reordering the world and reorienting power structures back toward indigenous realities. In this way, *taatawi* give rise to a sovereignty that realizes the relationship between *Hopitutskwa* (Hopi lands) and *Hopisinom* (Hopi people) despite the conquests of settler states in the region. To illustrate, I show how *Öngtupqa* (Grant Canyon) continues to be a Hopi territory through the generative and relational process of pilgrimage, this despite the conquering overlays of Spanish, American, and Navajo settlement.

Relating to Öngtupqa

Before it was known as the Grand Canyon, it was known as *Öngtupqa*. The Hopi place *Öngtupqa* literally means salt canyon, a name given for its replenishing salt deposits along the Colorado River near its confluence with the Little Colorado River. *Öngtupqa* is for Hopi a

27. In his article with archeologist Chip Colwell, Stewart B. Koyiympewa elaborated on a cartoon he had seen: “there was a dance, a Long Hair [katsina] dance, and there was a Hopi woman that went up there and asked, ‘Can you dance during Easter?’ And this Katsina has a question mark on top of its head, thinking, ‘What are you talking about?!’ It’s a really good cartoon because it’s where we are headed, all of our ceremonies, especially the Katsina dances that fall under other people’s calendar and religion, like Easter, Mother’s Day, Father’s Day, and so on. That’s where we’re headed. I take that back, we are already there.” Chip Colwell and Stewart B. Koyiympewa, *Translating Time: A Dialogue on Hopi Experiences of the Past in Born in the Blood: On Native American Translation* 76 (2011).

sacred place for a number of reasons, in addition to being the source of valuable salt and other minerals. First, as Tenakhongva explained to those at the performances of *Puhutawi*, “Hopi calls this their place of emergence here. This is where we made our first entrance into this world . . . ”

The place of emergence is known as *sipapuni*,

“a hole that led [Hopis] from a world of *koyaanisqatsi*, where moral corruption and imbalance reigned, to the present Fourth World. Here they made a covenant with *Måasaw*, lord of the Fourth World and guardian of the dead, who gave them stewardship over the earth as long as they followed *hopivötskwani*, the Hopi path of life” (Sheridan, et. al. 2015:4).

In addition to being the place of emergence, *Öngtupqa* is the place of return of the spirits of the dead. As Malotki (2011:83) records, “It is Hopi belief that *Maski*, the ‘Home of the Dead,’ is located down in the Grand Canyon. They say that there is a trail leading to it, along which all those who have passed away travel.”

In 2014, Clark Tenakhongva and I traveled down the Colorado River on a pilgrimage with several Hopi men of a wide range of ages and ceremonial experience. We traveled for nine days on a river raft with two guides from Lee’s Ferry, located on the present-day Navajo Nation, to Diamond Creek on the Hualapai Reservation. The trip was funded by the United States Bureau of Reclamation, who operates the Glen Canyon Dam near Page, Arizona, which produces 1,320 Megawatts of electricity for 5.8 million customers. The government provides funding for these trips to allow members of Native American Tribes with cultural affinity to the Grand Canyon to monitor changes to their cultural sites, local wildlife, and the environment in the Canyon as dam operators make decisions about the flow of water down the Colorado River. For Hopis, the trip

has allowed us to resume ritual pilgrimages to *Öngtupqa*, which allow us to (re)embody these territories and (re)establish relations with actors within these territories, and with one another.²⁸

We spent each day in often intense work, witnessing the land and its characteristics, learning and remembering histories, respectfully harvesting certain minerals and plants, making offerings, and singing songs. On the second day of our journey, for example, we arrived at a region in the early stages of the Grand Canyon known as Vasey’s Paradise, a lush oasis at a bend in the Colorado River where a spring that we call *Yam’taqa* spews fresh water. Just before reaching the spring, we climbed the canyon wall to a dwelling where some of our ancestors had lived. Near the dwelling was a large rock filled with familiar symbols—badger paws, children’s feet, beetle marks, and other familiar symbols. As we ascended above the rock to the dwelling, one of the men made an offering at a designated place that none of the many tourists rafting down the Canyon would have noticed. We each offered our prayers and *hooma* (ceremonial cornmeal) before we continued up the trail to the dwelling. Over the course of our pilgrimage, we visited numerous shrines, dwellings, mineral deposits, and other sites offering prayers, performing ritual smoking, and doing other specific ritual labors with and for those things that reside within the landscape.

The landscape within *Öngtupqa* is filled with what me might call “footprints.” As Hopi cultural historian Leigh Kuwanwisiwma (2004) relates, when Hopi people emerged from within *Öngtupqa* one of the first promises they (we) made was to migrate throughout the world in different directions to fulfill spiritual obligations, and then return to *tuuwanasavi* (center of the earth, Hopi lands) along with the knowledge we had obtained. With the instruction to migrate

28. There is an extensive literature on pilgrimage in anthropology that unfortunately cannot be reviewed here. However, substantial works on Hopi pilgrimages, past and present, including some by Hopi people have recently been written. See, e.g., Leigh Kuwanwisiwma, T.J. Fergusson, and Chip Colwell, eds., *FOOTPRINTS OF HOPI HISTORY | HOPIHINIWTIPUT KUKVENI’AT* (2018).

was the instruction “*kuktota*,” which literally means “along there, make footprints.” These “footprints” or *itaakuku* include ruins of former settlements, pottery, tools, petroglyphs, and artifacts left as offerings. This instruction was “given to the Hopi to demonstrate they had fulfilled their spiritual obligations.”²⁹ It provides evidence that each of our clans was ready to join the rest of the Hopi people on our three Hopi mesas, and also marks our continuing, collective relations with the land.

Hopis belong to the lands marked by our clan forebears not only because our ancestors’ footprints exist there (as historical markers), or because we claim them as a resource for our collective identity (making them sites of memory),³⁰ but because we have ongoing relations with these places--our presences and performances in relation to these footprints do something in the world. Just as our clans inhabited these spaces in the process of fulfilling their covenant with the creator, so we pass through them in process of fulfilling the same covenant. Our bodies, which are produced in part from their bodies, sense the places they lived, perhaps in many of the ways they sensed them. We remember that they continue(d) on just as we continue on. Our cornmeal, grown from the ground which they hoped their future generations would reach, is now left by us and our descendants as an offering and a fulfillment of their hopes in the sites where they lived. The kernels from which our *hooma* is made came, in part, from the seeds they carried and planted along their migrations, generation after generation. Through exchanges with these places over multiple temporalities, we personally and collectively establish relations with these lands. Our bodies perceive territory together with our ancestors and future generations as we experience

29. Leigh Kuwanwisiwma, *Ang Kuktota: Hopi Ancestral Sites and Cultural Landscapes* 46 EXPEDITION 25, 26 (2004).

30. As Pierre Nora (1989:12) describes them, sites of memory (*lieux de memoire*) are objects of history, “moments of history torn away from the movement of history, then returned; no longer quite life, not yet death, like shells on the shore when the sea of living memory has receded.”

the land that contains proof that they, we, and hopefully our descendants, will likewise accomplish our journeys.

Pilgrimage also means carrying responsibility for territory. Because few members of the Hopi Tribe could feasibly take the journey, those that do become points of memory for the community. In addition to performing ceremonies and having positive thoughts and a spirit of *unangwvasi* throughout the journey, one also takes responsibility for remembering the details of the journey, where sites are in relation to one another, observing the meanings and histories of each place along the route, and knowing which places should be respected and treated with care.

Conquista

The colonization of Hopi lands, including *Öngtupqa*, has had a profound effect on Hopi relations to territory and to one another. The first Spanish expedition arrived on Hopi lands in 1540, but it wasn't until 1629 that Franciscan missionaries (nicknamed *tota'tsi*, glossed as “dictators” or someone who wants to “have his own way all the time”) settled on Hopi lands (Sheridan, et al. 2015:122, 191). By the mid-1660s, Spanish churches were being constructed at Hopi—over the top of Hopi ceremonial spaces known as *kivas* (119). Spanish documents show that the Franciscans “baptized” roughly forty percent of the Hopi population, after which they began to extract labor from the entire population, disrupting overall agricultural and ceremonial practices. Hopis were forced to carry heavy logs, water, and other resources 90-100 miles from distant places to the Hopi mesas to build churches and provide materials for Catholic ceremonies, were forced to use their own materials to complete production of clothing items to satisfy the *encomiendas* being run by the priests, and were forced to hide their own ceremonial performances because such were considered “idolatry” by the Franciscans (120-121, 169-177).

While the Spanish viewed their work as missionization, it was much more about economic growth and conquest than beneficence and charity. While the policy of the governor of New Mexico prohibited Franciscans from using violence in their work with indigenous peoples (they were rather to “reduce[]” “obstinate spirit[s]” “with gentleness and mildness than with violence and harshness”), accounts of torture and abuse, including whipping and burning with turpentine were apparently common practice during the rule of Padre Fray Antonio de Ybargaray in the mid seventeenth century (142-145). One Hopi man, Sitkyoma (possibly Juan Cuna in Spanish documents), died after sponsoring a Hopi *Nimankatsina* ceremony, which was performed to allow his daughter to complete her marriage (170). Other accounts exist of priests commanding Hopi men to go get water from places like *yam'taqa*, only for the priests to abuse and rape their wives (189).

Spanish expeditions first encountered *Öngtupqa* in 1540 (Vercamp 1940:3). As Don Lago (2011) explains, the Spanish were intent on finding a navigable river that would allow supplies to be brought farther into the newly claimed empire, and when the Spanish conquistadors Coronado and Cardenas conquered Hopi lands, Hopis initially confirmed to them that a sizable river existed in *Öngtupqa* (42). Coronado couldn't resist, and sent a detachment of 25 men along with a six Hopi guides to check out the major water source approximately 100 miles away. As Clark Tenakhongva recounts, the Hopi men “played the game and, you know, acted like they were all into it with them and took them down into the Grand Canyon . . . And one night [the Hopi guides] all had it planned that they were going to leave that night . . . The next day the Spanish men probably awoke and found no Hopis there.” (Sheridan, et al. 2015: 33). Two of the Spanish apparently survived, and when they returned to Hopi, the guides were tortured and executed (34).

The Spanish experience in *Öngtupqa* was one of frustration—it was an impediment to the kinds of networks of capital they sought to establish in the region rather than a source of life and memory and a center of relations with the cosmos as it continues to be for *Hopisinom*. The *Rio Colorado*, though emptying into the Pacific Ocean, was replete with rapids that made navigation by ship impossible (Lago 2015:42). At 3,000 feet deep and 10 miles across, the depth and size of the Canyon impeded an overland route from California, requiring explorers to travel either to the north or south—territories occupied by substantial groups of more violent indigenous peoples. Even though the Spanish would claim the Canyon as part of their territory, no Europeans would return to the Grand Canyon for more than two centuries” (43). Ultimately, following the Mexican revolution and the United State’s War with Mexico, the Canyon became part of the United States under the Treaty of Guadeloupe Hidalgo.³¹

Conquest

The colonization of Hopi lands by American settlers began roughly two centuries after the arrival of the Spanish. The treaty of Guadeloupe Hidalgo, signed and ratified in 1848, gave the United States title to much of the present-day American Southwest, including what is now the Hopi Reservation and the Grand Canyon. In 1882, the President Chester Arthur established the Hopi Reservation, which designated a rectangular plot of land approximately 70 miles by 50 miles “for the use of the Moqui, and other such Indians as the Secretary of the Interior may see fit to settle thereon.”³² Eleven years later, the lands around *Öngtupqa* were designated the Grand Canyon Forest Reserve, the Grand Canyon National Monument in 1908, and ultimately Congress

31. 9 Stat. 922 (Feb. 2, 1848)

32 Moqui (or Hopi) Reserve, Executive Order (Dec. 16, 1882) *In* INDIAN OFFICE, EXECUTIVE ORDERS RELATING TO INDIAN RESERVES DROM MAY 14, 1855 TO JULY 1, 1902 9 (1902).

created Grand Canyon National Park in 1919.³³ Hopi lands in between Arthur's Hopi Reservation and the Grand Canyon National Park, however, became public domain, subject to mineral extraction and deforestation. Various groups of settlers, including Mormon settlers in 1858, claimed some of these lands. However, most of the land in between *Hopitutskwa* and *Öngtupqa* was assigned to the Navajo Nation through executive orders in 1900 and 1918. These designations by the United States Executive Branch and Congress effectively severed Hopi routes to *Öngtupqa*. The last documented over-land trip by Hopi men to *Öngtupqa* for ceremonial purposes occurred in 1921.³⁴

Like Spanish colonization, colonization by the United States had a significant impact on Hopi time, place, and relations within Hopi territories. The imposition of government boarding schools was among the most destructive devices American officials used to alter Hopi sovereignty and social relations in the late nineteenth and early twentieth centuries (James 1974:111). Western schooling of Hopi children was a topic that severely divided Hopis against one another. As James reports, while Hopi converts to Christianity and Hopi railroad and construction workers may have been required to send their children to boarding schools, Hopi agriculturalists and ceremonial leaders generally objected. *Id.* Objecting parents seemed especially concerned that the United States would not permit them to take their children out of school to participate in ceremonies (even though school was not held on Sunday for the sake of Christian worship customs).³⁵ An eventual compromise was made that young Hopi children

33 Grand Canyon Association, Who Owns the Grand Canyon?, nature, culture and history at the grand canyon (last visited on Apr. 3, 2018), http://grandcanyonhistory.clas.asu.edu/history_whoownsgrandcanyon.html.

34. See Ekkehart Malotki, THE ORAIBI SALT JOURNEY TO THE GRAND CANYON HOPI TRAVELS TO THE GRAND CANYON (2011).

35. For example, in December 1890, school superintendent Ralph Collins requested troops from Fort Defiance to capture 104 children from the Hopi village of Orayvi and march them 40 miles away to Keams Canyon, AZ to take

would attend schools in their villages, while high school students would attend government-run boarding schools in Nevada, Utah, California, Oklahoma, Vermont and other locations around the United States. Hopis succeeded in keeping ceremonies alive despite children being sent to federally mandated schools, in part by sending Hopi leaders to distant boarding schools to maintain cultural practices (Sakiestewa-Gilbert 2010:71-94), in part through negotiations with federal agents about school calendars and attendance policies, and in part through accommodation of ceremonies to the Western workweek. Still, the effects on language, ceremonial continuity, and even the Hopi landscape (including accelerated erosion as Hopi traditional farming diminished) have been severe.

Hopis have continued to have a presence at *Öngtupqa* despite American settlers excluding it from official designations of Hopi lands and the federal government's disruptions of Hopi ceremonial connections to it. In 1905, for example, construction began on the Hopi House located next to the newly built El Tovar Hotel on the south rim of the Grand Canyon. As with the Watchtower, architect Mary Colter designed the building in a Hopi style adding a visual Hopi

them out of their community to attend a federal boarding school. In subsequent years, as I have been told, Hopi parents began to strategically hide their children from government agents, sometimes in caves or in fields. In 1892, when the majority of Orayvi children did not return to school from their summer break, Collins—over the objections of Hopi parents—sent 8 of the children to Lawrence, Kansas for more permanent schooling. In 1893, an adobe building was constructed near the village of Orayvi at the request of the more accommodating parents, but only 30 students actually reported for school (there were probably around 200-300 children in the village). Those men who withheld their children, and who did not comply with other government mandates (e.g. land allotment), were then sent to federal prison at Alcatraz in San Francisco, CA (James 1974:110-115). By 1903, even the school teachers at Orayvi were protesting the levels of force used against Hopis to place children into school, as well as the lack of Hopi language and cultural content in the curriculum (Curtis 1907:475; Patterson 2010:98). Superintendent Burton, who was then assigned to oversee Hopi lands, was perhaps the most hated by Hopis and his white education staff. Seeing the potential for a higher salary if he could get more students to attend school, Burton sought permission to establish a boarding school *at Orayvi*. As Belle Kolp, a staff member, would later write in an activist publication some years later, “Navajo [military officers, requested by Burton], armed with rifles, were sent to surround the Hopi village [of Orayvi] in the night . . . The snow thickly covered the ground, and was still falling. . . . Men, women and children were dragged almost naked from their beds and houses. Under the eyes and the guns of the invaders they were allowed to put on a few articles of clothing, and then—many of them barefooted and without any breakfast, the parents and grandparents were forced to take upon their backs such children as were unable to walk the distance (some of the little ones entirely nude) and go down to the school building, through the ice and snow in front of the guns of the dreaded Navajos . . . That same evening a meeting of the school employees was called, and I gave in my resignation.” (125-26).

presence to the Grand Canyon Village area. But the Hopi house represented more than just Hopi architecture, it was actually built through hired Hopi labor, with materials taken from the nearby forests.³⁶ Many of the Hopi builders remained at the Grand Canyon and worked in the Hopi House as artisans and performers, including famed Hopi artist Fred Kabotie, who managed the gift shop. *Id.* Hopis regularly performed for tourists in the Canyon, including singing songs and performing dances, some of which were borrowed from other tribes. *Id.* Hopi people, however, have never owned the Hopi House, and by the 1970s, Hopis no longer have a living presence in the building that bears their name.

Like Spanish conquest, American colonization altered both Hopi space and Hopi time. The designation of an arbitrary rectangle of land as the Hopi Reservation, separated and distinguished from the Grand Canyon, effectively reduced Hopi authority in its canyons to a matter of history. While occasional recognition of Hopi cultural affiliations to the Canyon and its resources by Federal Agencies has allowed the Tribe to be represented in the Canyon in limited ways (e.g., through building names and architecture, or by funding river trips for Hopis to observe environmental changes), the Tribe's sovereignty in the Canyon has been significantly reduced. In particular, the imposition of non-Hopi modes of work and education on Hopi people have effectively imposed competing conceptions of time and space, which compete directly with temporalities and geographies established through Hopi song.

‘Áyaa ‘iisht’ aah

The effects of Navajo conquest of Hopi lands is less well known. There is little doubt that the *Dine* people of the Navajo Nation are settlers on Hopi and other Pueblo ancestral lands,

³⁶ Sarah Gerke, Hopi House. Nature, Culture and History at the Grand Canyon (2005), http://grandcanyonhistory.clas.asu.edu/sites_southrim_hopihouse.html.

(though there is substantial evidence of intermarriage between Hopi and *Dine* people since their arrival).³⁷ Not only do multiple indigenous and non-indigenous histories describe *Dine* as settlers (accounts put *Dine* people arriving on Hopi lands in approximately 1650 AD, and again in the mid 1800s), but archeological and historical evidence is clear that the major archeological sites in the region dating prior to the sixteenth century do not originate with the *Dine* people.³⁸ As Hopi oral histories I have heard explain, *Dine* arrived as refugees, having been forced by other tribes downward from their homeland in the North. When they arrived in Hopi lands, our ancestors granted them reprieve. They fed *Dine* women and taught them for a period of years, but did not permit them to join the alliance of Hopi clans due in part to the exploitative behaviors of Navajo men (Wilton Kooyahowma, personal interview, 2014). Over two centuries, *Dine* people formed alliances with the Spanish, obtaining from them their knowledge about shepherding among other things (Blackhawk 2008). But, after the American annexation of Southwest in 1848, *Dine* would suffer militarized displacement by the United States leading up to the long-walk and an eventual treaty with the Federal Government in 1868 and temporary

37. See generally, Keith Kloor, *Insider: Who were the Anasazi?* 62 *Archeology* (2009), available at <https://archive.archaeology.org/0911/etc/insider.html>; but see Michael A. Schillaci & Wendy J. Bustard, *Controversy and Conflict: NAGPRA and the Role of Biological Anthropology in Determining Cultural Affiliation* 33 *PoLAR* 352 (2010) (arguing that DNA evidence from biological anthropology reveals that there may have been intermarriage between Navajo and other Pueblo Tribes, and that Navajo people may be culturally affiliated with traditionally Hopi sacred sites.)

38. Michael A. Schillaci and Wendy J. Bustard, *Controversy and Conflict: NAGPRA and the Role of Biological Anthropology in Determining Cultural Affiliation*, 33 *PoLAR* 352, 363 (2010) (citing Linda Cordell's testimony before the NAGPRA Review Committee) (stating that there is no archaeological evidence to indicate the Navajo were present at any Chaco Canyon pueblo during its prior Pueblo occupation, and that Navajo people were likely not present in the region until the 16th century.); *Healing v. Jones*, 210 F. Supp. 125, 134 (D.Ariz. 1962) ("From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century."); Barry Goldwater, *History of Moencopi*, 125, ("The Hopi Indian Tribe historically occupied the area between the Hopi villages and the Grand Canyon. . . . A school was built in Tuba city soon after the turn of the century and many Government and Navajo families moved into the area for the first time. Prior to that time the only neighbors of the Hopis were several Paiute families.")

confinement to a reservation.³⁹ But in the decades that followed, an alliance between the Navajo Nation and the United States began to form, which enabled Navajo conquest of Hopi lands in the region.

Navajo settlers required the occupation of a significant amount of land for both grazing and religious practices.⁴⁰ In the latter part of the 19th Century, Hopis (who never signed a treaty with the U.S.) become the targets of expansive Navajo settlement as *Dine* left their federally designated lands and began occupying Hopi territory. As Wilton Kooyahoema related, *Dine* received lands from United States government agents at or near Hopi sacred sites, perhaps as a means of instigating warfare between the Hopi Tribe and the Navajo Nation (Kooyahoema 2014).

An 1882 executive order signed by United States President Chester Arthur reserved 2.5 million acres of land for the Hopi people to prevent the encroachment of Navajo settlers onto Hopi lands.⁴¹ However, other Executive Orders and congressional Acts between 1882 and 1934 allowed lands set aside for the Navajo Nation to grow from 3.5 million acres to 14 million acres,

39. Treaty with the Navajo, 1868, 15 Stat. 667 (Ratified July 25, 1908).

40. William Michael Havens, Intercultural dynamics of the Hopi-Navajo land dispute: Concepts of colonialism and manifest destiny in the Southwest 60, 160 M.A. Thesis (U. of Ariz. 1995)

41. Executive Order regarding Moqui (or Hopi) Reserve, Chester A. Arthur (Dec. 16, 1882). (“It is hereby ordered that the trace of country in the Territory of Arizona lying and being within the following-described boundaries, viz, beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36 degrees 30 minutes north, thence due east to the one hundred and tenth degree of longitude west, thence due north to place of beginning, be, and the same is hereby, withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.”); *see also Healing v. Jones*, 210 F. Supp. 125, 137, 146 (D. Ariz. 1962) (quoting Indian Affairs Commissioner Hiram Price’s telegram to Hopi Indian Agent J.H. Flemming the day after the Executive Order was signed, stating, “President issued order, dated sixteenth, setting apart land for Moquis recommended by you. Take steps at once to remove intruders,” and memorandum by R.V. Belt, Chief, Indian Division in 1888 stating “The Moquis reservation was established by Executive Order of December 16, 1882, for the Moqui and such other Indians as the Sevretary of the Interior may see fit to settler thereon. It comprises no lands set apart for the Navajoes and no Noavajoes have been settled thereon by the Department.”).

ultimately surrounding and even extending into the 1882 Hopi Reservation.⁴² The tide began to turn in the 1960s, when the Hopi Tribe brought legal action to remove Navajo settlers, asserting its continuing and exclusive ownership of the lands within its 1882 Reservation.⁴³ The United States District Court for the District of Arizona determined that only about 1/4 of the 1882 Hopi Reservation now belonged exclusively to the Hopi people (the rest having been settled by Navajo), and refused to make a determination about the remaining 3/4 of the reservation, designating it, instead, as joint use area for the two tribes. When the joint use of these lands proved unworkable, the Navajo and Hopi Tribes were forced to the bargaining table by then Bureau of Indian Affairs Commissioner Robert L. Bennett, who placed a freeze on all building and development in much of the disputed 1.5 million joint use area, which included the lands connecting the Grand Canyon and the Hopi Reservation that had been settled by the Navajo Nation. For *Dine* to make simple developments in the area, including improvements to existing settlements, the changes had to be approved by both the Hopi Tribe and Navajo Nation, which proved to be next to impossible.⁴⁴ The freeze was ultimately lifted by President Barak Obama in 2009.⁴⁵

Navajo settlement has significantly altered the geography of the Southwest in ways that have benefitted and harmed Hopi people. It is clear that *Dine* have played a vital role in the economy and politics of the Southwest. As I have been told by many people in my community, *Dine* as a people are skilled in cross-cultural exchange, political strategy, and economic development, and

42. *Havens* at 9.

43. *See Healing v. Jones*, 210 F.Supp 125 (D.Ariz. 1962).

44. Anne Minard, *The Bennett Freeze's Surreal Nightmare Should Be Ending—But It's Not* (Dec. 18, 2012), <https://indiancountrymedianetwork.com/history/events/the-bennett-freezes-surreal-nightmare-should-be-ending-but-its-not/>

45. *Id.*

have brought new enterprises and federal infrastructure to the region through their lobbying and entrepreneurial efforts. During certain periods, the Navajo language became a lingua franca for transacting certain kinds of business among various groups in the indigenous Southwest. But at the same time, many Pueblo people feel the Navajo Nation has used their position as intermediary to exploit the culture, land, water and natural resources in the region. Many Hopis I worked with believed that the Navajo Nation's willingness to exploit the land allowed it to gain favor with the United States government, which led to the granting of additional lands, resources, and political power that extended their authority in the region at the expense of indigenous groups. Examples most often cited were Navajo extraction and refinement of uranium under Federal government contracts (leading to increases in cancer rates for Navajos and Hopis working in or living downwind of uranium mills),⁴⁶ the development of Hopi aboriginal lands now located on the Navajo Reservation to build the Navajo Generating Station—the third largest carbon-emitting power plant in the United States⁴⁷—and its coal infrastructure (which some have blamed for the arsenic contamination of the Hopi water supply), and damaging Hopi sacred sites, passing them off as Navajo cultural areas or prohibiting Hopis from being able to access these sites.

Given this brief introduction to Navajo-Hopi relations, it might not be surprising that on February 21, 2012, the Navajo Nation entered into an agreement with Arizona developer Confluence Partners, LLC, to work toward the construction of a tourist destination called the

46. See Doug Brugge and Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 *Am. J. Public Health* 1410 (2002) (stating that by the mid-1950s there were four uranium milling and mining centers, including one at Kayenta, AZ, near the Hopi Reservation)

47. Brady Dennis and Steven Mufson, *The West's largest coal-fired power plant is closing. Not even Trump can save it.* *Washington Post* (Feb. 14, 2017), available at https://www.washingtonpost.com/news/energy-environment/wp/2017/02/14/the-wests-largest-coal-fired-power-plant-is-closing-not-even-trump-can-save-it/?utm_term=.bde3f34fb105

Grand Canyon Escalade on aboriginal Hopi lands (now part of the Navajo Nation) within the Bennett Freeze area near the confluence of the Colorado and Little Colorado rivers in the Grand Canyon. The proposed Escalade development comprised sixty acres of land in and around the Grand Canyon, including the construction of the “Escalade Gondola Tram, the .5 mile River Walk and the Confluence Restaurant” as well as “a destination resort hotel & spa, other hotels, RV park, commercial/retail space/opportunities and an airport.”⁴⁸ In addition to Hopi and some Navajo protests, many environmental and naturalist groups expressed fervent opposition to the development, though it would have generated Navajo jobs in the Bennett Freeze area, which had suffered economically for decades.

The years of protest over the Escalade coincided with the composition and performance of *Puhutawi*. Creating the work took on new urgency after Tenakhongva and I discovered on our pilgrimage that the construction of the Escalade overlapped significantly with the locations of Hopi shrines in the area. Upon comparing the architectural rendering with the actual landscape, we learned that one Hopi ceremonial site would have been completely destroyed, and other sensitive (*utihi'i*) places would have been harmfully disturbed. The destruction and disturbance of Hopi sacred sites would have been a clear violation of a 2006 compact the tribes entered into that required the Navajo Nation to protect Hopi religious sites and guarantee Hopi religious practitioners privacy.⁴⁹ Still, the Escalade Partners and their Navajo Nation advocate, persisted, claiming:

We have uncovered no evidence of any sacred sites within the project boundaries or that would be negatively impacted by the project. The

48. Memorandum of Understanding by and between The Navajo Nation and Confluence Partners LLC 1-2 (Sep. 21, 2012); See Grand Canyon Trust, *Escalade: The Saga*. (Mar. 3, 2018), *available at* <https://www.grandcanyontrust.org/stopping-grand-canyon-escalade>. (hereinafter “GCT Escalade”)

49. See Hopi Tribe says Escalade development violates compact Navajo-Hopi Observer (October 14, 2016), *available at* <https://www.nhnews.com/news/2016/oct/14/hopi-tribe-says-escalade-development-violates-comp/>.

National Park Service, which is required by law to identify and protect Native American sacred places within the park, does not recognize the Confluence as a Sacred Site of either the Navajo or Hopi. Final determination will be made after the project undergoes a complete archeological and cultural clearance process as required by Navajo codes and Law and submitted to the Navajo Nation Department of Historic Preservation for review, comment, and, if everything is done properly, approval. If Sacred Sites will or would be desecrated, the project won't go forward. This is how all projects on the Navajo Nation are handled.”

This, of course, was a half truth at best. The U.S. National Parks Service had in fact identified several places in and around the confluence of the two rivers as Hopi sacred sites only two years earlier.⁵⁰

Tenakhongva composed the songs for *Puhutawi*, then, at a critical time when Hopi conceptualizations of *Öngtupqa* directly collided with the colonialist visions of the Grand Canyon presented by the Spanish, the United States and the Navajo Nation, who viewed the landscape as an exploitable space outside of the relations Hopi people had already established with the territory. While the politics of the Grand Canyon were being worked out on a large scale through protests and diplomacy surrounding the building of the Grand Canyon Escalade, *Puhutawi* provided a cosmopolitical space for Hopi sovereignty to be worked out through rehearsals and performances for local, national and international audiences.⁵¹

Sounding the Third Space of Sovereignty

50. See Saul Hedquist and T.J. Ferguson, Interim Report, Ethnographic Resources in the Grand Canyon Region Prepared for Jan Balsom, Grand Canyon National Park 24-25 (May 30, 2010).

51 As Marisol de la Cadena defines it, “cosmopolitics” is a way of conceptualizing politics as having multiple ontologies, and then proceeding to negotiate between sovereigns with the existence of these ontologies as a core objective. (de la Cadena 2010:360). Indigenous modes of doing politics and the modes of the Spanish, the United States, and the Navajo Nation are certainly heterogeneous, reflecting their differing views on the world and its divisions of nature and culture. But at the same time, these worlds are undoubtedly “partially connected.” I take cosmopolitics, then, as a shared recognition of differing assumptions about animation, agency, and ownership of and within a territory, and then interconnecting these worlds “without making the diverse worlds commensurable” (361) or subsumed within one “universal” ontology. Cosmopolitical work opens up the “possibility of [all sovereigns] becoming legitimate adversaries not only within nation-states but also across the world.” *Id.*

As discussed earlier in this chapter, *taatawi* function as a mode of authority, articulating relations between Hopi people and other actors within Hopi territory. However, due to the effects of colonization, Hopi connections to our ancestral lands marked with *itaakuku* have become difficult to maintain, much less assert against the territorial claims of settler-states. As sound is a primary mode of connection between Hopi people and our territory, the ongoing, uninhibited creation of new *taatawi* to articulate these relations continues to be of central importance to Hopi people.

Clark Tenakhongva and I began work on *Puhutawi* as a way to expand the reach of *taatawi* to new audiences. I first approached Clark Tanakhongva about doing a collaborative composition after hearing about the challenges he was facing as he tried to incorporate new sounds into his songs. In a 2009 interview, Tenakhongva explained that after winning a Native American Music Award and being nominated for a GRAMMY and a Canadian Music Award for best indigenous album, he approached his record label, Canyon Records, about adding some new elements into his songs. “I tr[ie]d to tweak it up a little bit in a different way by adding other percussion music into it,” he said. Tenakhongva specifically wanted to add African rainmakers and other kinds of percussive shakers to his songs. “But Canyon won’t allow me to do it, because it’s taking away from the element of being traditional. You’re kind of going into a new genre” Unfortunately for Tenakhongva, Canyon’s interest in “working with Native American artists to develop new styles of Native American music that expand upon traditional song form and performance” excluded, at least initially, the kinds of cross-cultural innovations Tenakhongva was interested in pursuing.⁵² And, because Canyon claims both the composition and sound

52. See <http://www.canyonrecords.com/shop/index.php?app=cms&ns=display&ref=canyon-records-story>. There is a rich body of ethnomusicological literature exploring the ways certain sounds are figured into racial types, and how those types are used as boundaries of inclusion and exclusion in certain genres and social contexts, including Native American contexts. See, e.g., Meintjes, Louise, SOUND OF AFRICA!: MAKING MUSIC ZULU IN A SOUTH AFRICAN

recording copyrights to Tenakhongva's albums, Tenakhongva was forced to obtain approval from Canyon to develop any of his existing songs in new ways.

The following year, with the support of the Grand Canyon Music Festival, Tenakhongva and I started to think about what Hopi *taatawi* would sound like, and mean, if combined with European-originating instruments. There had been precursors to our work. Lois Albright had written an opera in 1954 entitled *Hopitu*, which purported to be based on Hopi legends.⁵³ Jill McManus had recorded an album of Hopi *katsina* songs in a jazz idiom called *Symbols of Hopi* in 1983. However, even though Hopis have had a strong tradition of musical composition, and many Hopis have acquired substantial skill performing on European musical instruments,⁵⁴ there are still very few examples where Hopi songs and singing styles have been joined with instruments typical to orchestras and operas, and especially with Hopi composers creating the underlying musical score.

After several initial failures (“that sounds a bit too much like Pocahontas” Tenakhongva once told me), and then a successful trial run orchestrating one of Tenakhongva's songs for a string trio in 2011 (which was initially performed at the Hopi village of Walpi), Tenakhongva and I began to think about a larger-scale work to be premiered during the Centennial of Grand Canyon National Park. Once we had received word of the proposed Escalade Development, and had taken our pilgrimage into *Öntupqa*, Tenakhongva definitively selected a few songs from his most recent album and created two new songs for the project. We began work to orchestrate them,

STUDIO (2003); Jacobsen, Kristina, *Radmilla's Voice: Music Genre, Blood Quantum and Belonging on the Navajo Nation*, 29 *Cultural Anthropology* 385 (2014); Jessica Bissett-Perea, “What Is This ‘Inuit’ In Inuit Popular Music?: An Alliance Studies Critique of Sound Quantum Ideology & Audible Indigeneity” *In MUSIC AND MODERNITY AMONG FIRST PEOPLES OF NORTH AMERICA* (forthcoming 2018).

53. *Hopitu* apparently included a cast of Hopi dances, assisted by the Lois Albright Vocal Ensemble.

54. For a discussion on the musical talents of Hopi boarding school students at the Sherman Institute in Riverside California, see Matthew Sakiestewa Gilbert, *Education Beyond the Mesas: Hopi Students at Sherman Institute 1902-1929* (2010).

connecting them together with interludes that translated the feel of the Hopi contexts painted by Tenakhongva's songs into sounds we hoped would be accessible to a non-Hopi audience. Every few months we would get together to talk about the sound of the songs, what kinds of effects he thought should go alongside the songs, the kinds of percussion and string sounds he thought would match the texts of the songs, and how Hopi youth would be involved. The result was a 40-minute work, scored for Hopi singers and percussionists, two string quartets, orchestral percussion (glockenspiel and bass drum), and flute. We were joined later by Gary Strautsos, a jazz artist who performs on flutes replicated from those found in caves at Canyon de Chelly (another Hopi ancestral site located on lands given to the Navajo Nation by the United States).

The two string quartets who eventually premiered *Puhutawi* during the Grand Canyon centennial were established ensembles with particular interests in cross-cultural performance. The Catalyst quartet, staffed by winners and alumni of the Sphinx Competition (whose goal is to “encourage, develop, and recognize classical music talent in the Black and Latino communities”⁵⁵), was particularly adept at playing new, complex and provocative compositions originating from diverse cultural contexts. The quartet had been involved in the Native American Composer Apprentice Project for several years, which gives reservation-based high school students the opportunity to compose new music and hear it performed by professional musicians.⁵⁶ The members of the Strata Quartet, based in Santa Fe, lived in close proximity to several Pueblo tribes in New Mexico, and at least one of the members had close connections to the Navajo Nation. Both groups were particularly excited to work on this piece as it represented

55 See Sphinx Competition. Sphinx Organization (2018), <http://www.sphinxmusic.org/sphinx-competition/>.

56 See Native American Composer Apprentice Project. Grand Canyon Music Festival (2017), <http://grancanyonmusicfest.org/nacap>.

a new world of sonic possibilities, and they put in substantial effort to work through the many issues that arose during its preparation and presentation.

One of the first challenges we faced had to do with the boundaries of what was considered performable music on antique instruments. In the song *Umumutatayayatani* (rolling thunder shaking the earth), Tenakhongva had asked me to include the sound of an African rainstick when the song reached the *oomi* (the upward part or climactic third section of the song). Because we didn't yet have a percussionist slated for the performance, I pitched the idea of putting seeds inside the string players' instruments and then tipping the instruments to one side to allow them to run across their wooden bodies. In addition to producing a similar sonic effect, it seemed (at least to me) like the perfect symbol for the kind of work I thought we were doing: we were effectively planting Tenakhongva's songs within these instruments in hopes that the songs would resonate with both Hopi and non-Hopi audiences. When Tenakhongva heard the idea, he was surprisingly skeptical and seemed a little uncomfortable. First, he thought the musicians wouldn't go for it. But, he also seemed concerned about the seeds. "Couldn't you use popcorn or beads or something," he asked. He had respect for the seeds, and didn't seem to find the symbolism compelling. As I came to learn, *poshumi* (kernels saved for planting), are owned by women, not men, and are given to men in accordance with women's knowledge and judgement, to be planted and grown using our traditional dry farming methods. As I attempted dry farming myself, I came to know how these seeds represent the prayers, labor, and sacrifice of Hopi people over many generations, and in hindsight it seems somewhat inappropriate to use *poshumi* solely to make an aesthetic or political statement.

But I was equally intrigued by the responses of the quartets when they read the instruction in the score to put seeds in their instruments and let them cascade over their interior structures.

“The seeds in the instruments is not going to work. It’s not safe for our instruments,” wrote one of the instrumentalists. Another instrumentalist wrote,

Seeds that have a shell on are not friendly to the inside of a wood-bodied instrument. The inside is soft wood and its unsealed. And newer instruments, like my own, have not ‘seasoned’ yet, so the wood actually still has moisture in it and the microscopic surface of the interior wood is too soft for me to feel comfortable have [sic] seeds with pointy ends of their shells moving around inside. . . . BTW, beans would be ok in my cello-dried beans are smooth all around. Just a thought...⁵⁷

Ultimately, Tenakhongva offered to let the quartets perform the sounds he wanted on a traditional *rukunpi* (rasp) and *putsik.yapi* (gourd resonator). One of the musicians nearly jumped out of his seat when offered the chance.

Once rehearsals began, there were other negotiations that had to happen between the musicians and Tenakhongva. At the beginning of our rehearsals with the musicians, I made clear that the development of the songs would have to be through a collaborative process, patterned after the way music is collaboratively owned at Hopi, where the composer is no more important than the other singers in terms of compositional authority (see Chapter 4). This meant that the musical score was simply a starting point. As it was, notating Tenakhongva’s singing into a standardized European-derived musical notation had been a challenge for me given the way Hopi music pauses and drags; and pitch contours do not easily snap to the standard grid of a musical

57. I don’t want to diminish the concerns of the classical musicians for the care of their instruments, particularly as many instrumentalists may consider their instruments as an important extension of their personhood. See Jack P. Lipton, *Stereotypes Concerning Musicians within Symphony Orchestras*, 12 J. PSYCH. 85, 89 (1987) (describing differences in self-perception by various classes of instruments); Harold F. Abeles and Susan Yank Porter, *The Sex-Stereotyping of Musical Instruments*, 26 J. RES. IN MUSIC ED. 65 (1978) (suggesting that gender stereotypes associated with instruments “may have a major effect on the musical vocational choices of individuals.”). But I was curious if these fears were grounded in scientific or professional knowledge, or some other kind of fear. As a string player myself, I had never heard of any of these concerns before, so I decided to consult a highly regarded luthier in the New York City area to ask whether or not placing seeds in an instrument would be dangerous to the instrument. The luthier responded that it was highly unlikely that any harm could come to the instrument by putting seeds inside and shaking them around.

staff. Further, it was particularly challenging to imagine what could actually be added to Tenakhongva's songs that wouldn't also detract from them.

It became challenging for many of the musicians to accept that they shared compositional authority with Tenakhongva, and could suggest innovations. The more secure way was to ask the "composer" (me) what "he meant" rather than collaboratively working together to create a sound to resonate with the audience and (re)indigenize the space. After our first performance, in which Tenakhongva ended up deviating substantially from what had been written in the score (resulting in fear on many of their faces), the quartet musicians began to concentrate more on Tenakhongva, trying to understand his style of singing, asking him questions about his songs, and making suggestions for new sounds. Instead of looking to me as the compositional authority who was responsible for the success or failure of the performance, the quartets and Tenakhongva began to treat each other as legitimate equals, and began asserting their own creativity into the sonic fabric in relation to Tenakhongva's. It was a remarkable transformation to see everyone making contributions and solving problems, and then taking ownership as the work developed.

Another challenge in bringing Hopi and non-Hopi musicians together to perform were differences in modes of aesthetic evaluation. During our rehearsals of *Yoisiwukiwtani*, the song I discussed earlier in this chapter, the musicians playing the *tawvö* were noticeably disturbed when Tenakhongva would sing along at a different pitch than what they were playing. As Gary Strautsos, our Hopi-flute player, later commented, "it's like when I play my Native flutes with classical musicians, they always say my playing its too 'pitchy'." Based on my own training in Western Art Music, I knew that there would be little tolerance for "pitchiness" or playing the same notes as another musician outside a narrow range of acceptable variation (unless, of course, that's what the composer "intended"). During rehearsals, Tenakhongva seemed to be

unintentionally singing at an interval slightly above what everyone else was playing. At first, we figured I had simply written the song in range that wasn't comfortable for Tenakhongva. I went back after our first rehearsal and spent most of the night transposing and reprinting all of the musician's parts a minor third lower to better fit Tenakhongva's range, but when we rehearsed it, it didn't seem to make a difference. It wasn't until I went back to listen to Tenakhongva's recordings and the recordings I had made during rehearsals with other Hopi singers in preparation for dances that I recognized what we had been missing:

Several Hopi singers have recently made studio recordings, and one thing they all seem to have in common is that they are overdubbed many, many times. It mimics the performance context where *taatawi* are typically sung by groups of 10-20 men. But the group aesthetic for Hopi male singing is not about creating a tightly focused pitch; Hopi singers learn to "harmonize" with other members of the group. Singers layer their voices on top of one another, each perfectly following the contour of the song, but in a rich, warm band of sound rather than insisting on a single "unison" line. This creates, in standard music theory, what is called "parallel motion" where each voice follows the same contour but are offset by a specific interval. This kind of contour was carefully avoided by the kinds of "classical" composers whose frequency is most often featured in concert halls today, thus making the sound off-putting for some. For many years, I had just assumed (along with the quartet musicians) that Hopi singers, not formally trained in Western "music," weren't attuned to pitch in the same way. What I came to realize was that *Hopisinom* who grow up in our villages *are* highly trained in vocal production, and the singing of a song in tight "harmonization" with another person is not a technical "deficiency," but a cultivated aesthetic. If *taatawi* exist within relations, you would expect that they wouldn't sound like someone singing alone.

In our performance for radio broadcast, Tenakhongva beautifully sang *Yoisiwukiwtani* at roughly a major sixth above the violinists. Some in the audience seemed disturbed by the sound, but for several of us, including the musicians, the sound took on a radiance and warmth that could really only be expressed in the way Clark had performed it in relation to them.

Perhaps the pivotal moment in the collective process of preparing *Puhutawi* came during the rehearsal of an interlude we called *Yooyangwu / Taavi*, rainstorm and sunlight. The section was sandwiched in between *Yoisiwukiwtani* (distant, slanted rain) and *Umumutatayayatani* (rolling thunder, shake the earth). I had written the interlude by tracking as closely as I could the traditional compositional process for creating *taatawi* (described in Chapter 1), spending months in my small field and orchard below Third Mesa just west of the Hopi village of Hotevilla, listening to and, somewhat awkwardly at first, occasionally singing to my plants there. It was also during the time of our pilgrimage to *Öngtupqa*, during which I became fascinated by the sound of water all around me. It remains remarkable to me that the water in *Öngtupqa* comes, in part, from rainstorms that pass through our Hopi lands, which are collected, and over time, flow into the Colorado and Little Colorado rivers that meet there.

Our rehearsals of *Yooyangwu / Taavi* were challenging at first—my attempts to sound a rainstorm via classical string instruments through prescribed symbols on a page didn't seem to be getting close to the collective sound I had hoped for. Then, it started to rain—hard.

“So, actually, I have to be with the bass drum at F, so I'll just like—after E happens for long enough time, I'll look over at you?”

“Sure.”

[The sound of the rain hitting the roof intensifies]

“What? There's real rain. We don't need—”

“Why don't we just stick with that?”

“We don't need to make rain.”

“Just record it and play it over the—”

“Or let's listen, and learn how to rain . . .”

[Everyone laughs, and then pauses.]

“This is how it should sound.”

“It sounds a lot like [the score], actually...”

[Musicians begin experimenting by tapping their instruments.]

Looking down from the stage where we were rehearsing, I noticed Tenakhongva’s wife, Ann, looking out the large windows toward the Canyon. I noticed that she was crying.

Other people were also moved by the songs Tenakhongva sang during the performance. As the applause from our second performance began to subside, two Hopi women arose in the crowd and began to speak back to Tenakhongva from the audience so that everyone in the hall could hear. They told Tenakhongva how grateful they were that he is keeping Hopi music alive. But they also said that, “regardless of comments or obstacles you will face, this is the only way some of us will ever be connected to our land.”

Conclusion

If Hopi *taatawi* are meant to resonate within Hopi spaces, giving voice to indigenous authorities within those spaces, then I argue that the creation and performance of Hopi song is an act of Hopi sovereignty. Thus, performances of Hopi *taatawi* at *Öngtupqa* are not merely the contribution of a Hopi perspective to what has become a ‘multicultural’ Grand Canyon. Rather, the sovereignty articulated through *taatawi* is in direct opposition to colonialist visions of the Southwest. Hopis have experienced the same tensions that Glen Coulthard has found at *Denedah*, in which colonizing governments have refused to abide by grounded normativities—modes of governance that emerge from the land—and instead, impose capitalist frameworks upon indigenous peoples that exploit them, their land, and their modes of creative production. As he explains, “Place is a way of knowing, of experiencing and relating to the world and with others; and sometimes these relational practices and forms of knowledge guide forms of resistance against other rationalizations of the world that threaten to erase or destroy our

senses of place” (Coulthard 2014:61). Like other indigenous performances that have asserted indigenous sovereignties (e.g., Idle No More, Standing Rock), *taatawi* performances enact Hopi space and time, directly contradicting the imagined place of the Grand Canyon and the objectives of three settler-states who have sought to dispossess, erase and/or assimilate Hopi into their own cartographies of colonization and taxonomies of creativity, while at the same time opening up spaces for generative decolonization and indigenization through negotiations in sound.

Chapter 3:

Transacting *Taatawi*:

The Circulation of Hopi Voices under Settler Law

Introduction

In the August heat of 1940, folk music collector Laura Boulton (1899-1980) travelled to the remote village of Hotevilla, Arizona, a small community of sandstone houses on the Hopi Reservation, to record our *taatawi*.⁵⁸ Boulton, while trained as a classical singer, lacked formal training in anthropology or ethnology.⁵⁹ And yet, she had achieved substantial success as a field recordist and public intellectual, trading largely on her collections of exotic ceremonial expressions.⁶⁰ During her visit to Hotevilla, Boulton met Dan Qötshongva, Hotevilla's *kikmongwi* or chief; Thomas Bahnaqya, his traditional spokesman; David Monongye, who would become an influential political leader of the "traditionalist" movement; and a few other men who we have not yet identified. The men sang a series of eleven songs for Boulton, who recorded them on her Fairchild disk recorder—a cutting-edge portable recording device of the day.

58. Boulton's thirst for ceremonial songs comes across quite explicitly in her autobiography, *The Music Hunter*. In her account of her visit to Hopi lands in 1940, Boulton explains that "Hopis have religiously guarded their ancient traditions . . . and have always been very reluctant to part with their songs Before I had been with them twenty-four hours, I was recording. By the time I left I had recorded some of their most sacred rituals, the Snake Dance and the Flute Dance." LAURA BOULTON, *THE MUSIC HUNTER: AN AUTOBIOGRAPHY OF A CAREER* 428-29 (1968). A quick inspection of her recording log reveals that she did very little recording of non-ceremonial songs, such as grinding songs or lullabies, and focused almost entirely on ceremonial songs typically sung by men. See Laura Boulton, *Southwest Indians* (Aug.–Oct. 1940) (unpublished field notes) (on file with the Columbia University Center for Ethnomusicology).

59. Carl Rahkonen, *The Real Song Catchers: American Women Pioneers of Ethnomusicology*, Music Library Association Women's Music Roundtable (Feb. 14, 2003), <https://perma.cc/Z3CY-FVL8>.

60. Prior to arriving at Hotevilla, Boulton had made at least three other music-collecting expeditions—one to Chicago's *A Century of Progress* exhibition's "Indian Village" in 1933, one to the Bahamas in 1936, and another to various indigenous groups in Africa as part of her husband's collecting work as an ornithologist. See Bronfman, Alejandra, *Sonic Colour Zones: Laura Boulton and the Hunt for Music*, 3 *SOUND STUDIES* 20, 25 (2017); BOULTON, *THE MUSIC HUNTER* at 427 (1968).

Boulton, who was usually a meticulous record-keeper, left no description of the sonic transaction she made with these men at our village, and none of the family members of the men—all of whom are now deceased—recall the men ever receiving remuneration or royalties from them.⁶¹ One of the acetate discs made from the encounter contained what is perhaps the most widely distributed Hopi ritual song ever created. It was released in an album entitled *Indian Music of the Southwest* under two record labels, RCA Victor and Folkways (later Smithsonian Folkways), selling more than 5,500 copies through 1986.⁶² The song is still available for purchase in CD form, or, more conveniently, via download on Smithsonian Folkways’s website or iTunes for \$0.99, and it is even available for on-demand streaming with an Amazon Music Unlimited subscription.

In the previous chapters I described *yeewa*, the process of generating *taatawi*, or Hopi ceremonial songs, within networks composed of human and non-human actors. I then explored how *tawi* performance enacts Hopi sovereignty by bringing people, land, and other entities in the Hopi cosmos into productive relations through its ordering of time and space. In this chapter, I explore the ways *taatawi* became transformed from a mode of relation into an object to be transacted. In particular, I seek to understand how early settler fieldworkers came to hybridize Hopi *taatawi* with their own technologies, and how these hybrid *taatawi* began to circulate through foreign networks of relations. Using Boulton’s Hopi recordings as a case study, I attempt to understand why people like Qötsongva, Monongye, and Bahnaqya, who were gifted

61. This finding is based on my fieldwork at Hopi from 2009–2015 during which I gave copies of the recordings to members of Monongye’s and Bahnaqya’s families and asked if they had any knowledge of Laura Bolton, the recordings, or any payments or royalties received from them. However, during a meeting with elders in December 2010, some of the members of the ritual societies at Second Mesa explained that had heard about instances where people had recorded ceremonial songs for visitors around that same period.

62. While I have asked for the sales totals since 1986, Smithsonian Folkways has yet to provide that information to me)

ceremonial singers, important Hopi leaders, and activists deeply invested in the Hopi anti-colonial resistance of the first part of the Twentieth Century, would agree to record for someone like Boulton—the self-proclaimed “music hunter”—who made a living exploiting indigenous voices. I show how this encounter launched one of our ceremonial songs into the intellectual property structures of the settler state, and I end the chapter by challenging the justness of the way these *taatawi* are claimed by non-Hopi institutions as *their* intellectual property under settler legal frameworks, asking whether these songs were ever Boulton’s to exploit in the first place.

A close reading of the collision of networks involved in the creation of Boulton’s recordings of Qötshongva, Bahnaqya and Monongye is important for a number of reasons. First, as an act of reclaiming (Tuhiwai-Smith 1999), this chapter seeks for a just resolution to the taking and misuse of indigenous cultural expressions, but in doing so, it also seeks to recover vital histories that show our relations to these expressions. On a broader scale, exploring how the facts of this case apply to existing cultural and intellectual property laws helps us to see just how much of a role settler-colonialism has played in determining the outcomes of disputes over ownership of indigenous voices.

Second, this reading allows us to move beyond thinking about colonialism as simply the assertion of power and the taking of rights, but also as a re-engineering of creative networks by actors who had intersecting interests and motivations. As an indigenous person, I understand how colonialist power structures operate to dispossess and erase us from our lands and our relationships one another. However, failing to recognize the motivations both on the part of individual colonizers and the colonized only further entrenches the inevitability of colonialism where it was actually—and remains—far from certain. Drawing from my own ethnographic and archival work alongside that of Hopi intellectuals, historians, political scientists and

anthropologists, I question whether Boulton's oeuvre of recordings were simply the result of settler-colonial appropriation, or, more precisely, following Bruno Latour, a material manifestation of the intersection of multiple lived trajectories—the actual joining of vastly distinct networks of people and other entities living their particular values and modes of existence (Latour 2013). Why was making these recordings the logical next step for Boulton, her Hopi informants, and the *kooyemsi* and other beings whose songs these are? Was there a meeting of the minds that created these recording, and if so, under what values or terms did they meet?

Finally, this chapter and the ones that follow seek to develop a place for *taatawi* and other kinds of indigenous sound within our global intellectual property frameworks. To arrive at these interventions, I first ask, how does the *kooyemsi* song Boulton released within the commercial music market fare under the legal frameworks of the United States as compared to the laws and protocols of the Hopi people? And, as I explore in more detail in the next chapter, are there harms involved in transforming indigenous sound into another's intellectual property beyond simply the loss of potential profits? How might the tools available through intellectual property and contract law be deployed to create indigenized legal systems through which these recordings can again circulate on the terms of indigenous peoples?

Before proceeding, I want to also make clear that my reconstruction of the events below is still incomplete, and there is more work to be done to understand these actors, particularly the Hopi ones, and their motivations for collaboration with Laura Boulton. As Stewart Koyiymptewa encouraged me during my dissertation defense, there are still opportunities to “dig deeper” by continuing to learn from the memories of our Hopi elders. It is my goal now to seek out a better understanding of the events that occurred at Orayvi at the beginning of the twentieth

century, the origins of the Traditionalists, and the way this and other similar transaction has affected (and continues to affect) the Hopi people.

The *Kooyemsi* Song

Years before Qötsongva, Monongye, and Bahnaqya would encounter Laura Boulton, a man named Siitaqpu introduced members of our village to the Hopi *kooyemsi* song they would record (Wilton Kooyahoema, interview with the Author, 2009). *Kooyemsi* are beings that mediate between humans and *katsinam* (cloud people or spirit beings) by interpreting for them and introducing them. They are known for their humor, but they are also important teachers. As I met with people to better understand the recordings, the only thing people could remember about Siitaqpu is that he lived in the Hopi village of Hotevilla, and that he was a member of the two horn ritual society—the society responsible for some of the most important ceremonies that occur annually in our village. This ritual society also happened to be the ritual society to which Qötshongva, Bahnaqya and possibly Monongye belonged. The song Siitaqpu introduced is simple and joyful, describing four of the Hopi directions, *kwiningyaq* (northwest), *taavang* (southwest), *tatkyaq* (southeast), and *hoopaq* (northeast), and the colors of the clouds that emerge from those directions. While the song may not seem sacred, embedded in the simplicity of the song is a mnemonic of Hopi relations to *Hopitutskwa* (Hopi lands) and the beings that exist within it, as well as the teachings and commitments required of those who live there. For this reason, the song has been identified by village leaders as one that should only be performed by the *kooyemsi* or those who have authority to sing their songs.

There is no doubt as to who rightfully controls the song: the *kooyemsi*. They have ultimate say over when the song is performed and who performs it. Assuming the song had been produced in a traditional manner (discussed in Chapter 1), Siitaqpu likely witnessed the

generative process that produced the song, together with other human and non-human collaborators. Then, he likely sang it to others in the *kiva* or ceremonial space, which is where Qötshongva and Bahnaqya probably learned it. As several Hopi composers have explained, singing a song in the *kiva* does something to the ownership of the song—Siitaqpu effectively transferred any personal claim he had on the song to the members of his ritual society and to the beings who would later perform it, giving them the unrestricted right to refine it, perform it, and remember it under a Hopi principle of obligated-reciprocity (*see* Chapter 4). Placed within this positive commons of ownership-obligation,⁶³ the songs could then only be used for the good of the people and the benefit of the world.

Singing “Hostile” Traditionalism

In 2008, I began an effort to return the *taatawi* Boulton recorded in 1940 back to our people, including the *kooyemsi* song she had released commercially. Whenever I played Boulton’s recordings for people at Hopi, I usually asked if they recognized the voices of the singers. Nearly everyone from my dad’s generation and older would identify the men as David Monongye, Thomas Bahnaqya, and Dan Qötshongva. Interestingly, it usually wasn’t the sound of the voices people remembered (only Neal Monongya, David’s son, positively identified his father’s voice based solely on its sound); rather it was by the relationships these men had to one another and their reputations as a collective that gave away their identities. On one section of the tape, a confident and instructive Monongye speaks—in English—to an imagined, non-indigenous audience: “This is David Honanie [sic] speaking,” he says as an introduction to a memorable *Povoltawi* (butterfly dance song). “This song is composed by an Indian Man from

63 I borrow the term “positive commons” from Marc Perlman’s recent Society for Ethnomusicology Pre-Conference paper, “Who Owns the Unowned? Protecting Traditional Music from Appropriation” (Dec. 2, 2015).

Hotevilla. It is imitating the Spanish song.” Monongye’s voice is then joined on the recordings by several other men, singing in Hopi and making the kinds of calls and other sounds one would expect to hear in the village plaza during an actual *tiikive* (ceremonial dance). The effect, as Boulton described it, was to make the song “typical” of what she imagined was *real* Hopi life—and in doing so, also make it more exciting and exotic for the intended audience. Still, I often wondered what it was about the recordings that made everyone believe that the singers were Qötshongva, Bahnaqya and Monongye, and what that might tell us about who owns their singing voices now?

As I understand it, Qötshongva self-identified as the *kikmongwi* (chief) of our village, the village of Hotevilla, at the time he recorded for Boulton. Sometime around the beginning of World War II, Bahnaqya (joined some time later by Monongye) was appointed to be a traditional spokesman for Qötshongva. In their later years, Qötshongva, Bahnaqya and Monongye became widely known as “traditionalists”—a powerful faction in Hopi politics that existed for several decades. Given the name, and Hotevilla’s reputation for resistance to the settler-colonial encroachments I will discuss below, one might think that “traditionalists” like these men would be averse to a woman like Boulton recording their village’s ceremonial songs. As Boulton would later record in her autobiography, “It was at the Hopi reservation that the local government agent told me: ‘You won’t get any songs here.’ So-and-so—he mentioned a musicologist by name—had just left and in three months he did not get a single song” (Boulton 1968:428). But to make the assumption that Hopi tradition would necessarily exclude the use of non-indigenous technology is to misunderstand an important aspect of Hopi history and society.⁶⁴ As I will argue, the willingness of the Traditionalists to record for Boulton and other

64. See MATTHEW SAKIEWSTEW A GILBERT, *EDUCATION BEYOND THE MESAS* xxiii (2012). (“Some . . . may consider

powerful individuals outside of the Hopi community played an important role in the rise and fall of the Traditionalist movement and the development of the contemporary concept of Hopi cultural property, which has been particularly influential within the international indigenous rights movement.

To understand Hopi Traditionalism and its leaders requires grappling with a still unsettling chapter of Hopi politics that led to the collapse of the largest Hopi village, Orayvi, and the creation of a new village, Hotevilla, in 1906. In the years leading to breakup of Orayvi, internal and external pressures from population growth, disease, famine, missionization, and other physical and social forms of colonial violence had caused significant division among the people of Orayvi.⁶⁵ Those resistant to settler-colonialism's reach into the community desired to live their lives without having to accommodate the kinds of sweeping changes the federal government was demanding—including mandatory government schooling for Hopi children and the implementation of Western democracy and property regimes in lieu of traditional governance and ownership by clans. In 1906, Qötshongva, Bahnaqya, and Monongye, along with others whom the federal government deemed “hostiles”, were expelled by their own village members. They then traveled six miles Northwest to an area filled with cultivated orchards known as Ho’at’vela to establish a new village. The breakup of Orayvi—after *millennia* of existence—set the stage for a new political order at Hotevilla in which traditional Hopi relations and ways of life, rather than a powerful ruling class that seemed increasingly sympathetic to American settlers, would govern. However, their political independence was short-lived. Almost

the resisting group to the more traditional of the two, but the ideas of both resisting and accommodating have always been critical aspects of Hopi history and society. In this regard, Hopis functioned according to Hopi culture when they pushed back against the U.S. government and each other, and it was equally Hopi-like for Hopi accommodators to adopt, adapt, and accept change for what they believed benefited their people.”)

65. For a more complete documentary history of the breakup of the Hopi village of Orayvi, see Whiteley, Peter (2008) *The Orayvi Split: A Hopi Transformation* New York: American Museum of Natural History.

immediately, federal government forces brutally imposed colonial order on Hotevilla. Young men like Bahnaqya and Monongya, as well as older men like Qötsongva, were forced to attend government sponsored boarding schools where they were taken from their homes and fields and required to learn trades like silver-smithing and construction in far off cities.

After learning of the violence happening at Orayvi and Hotevilla, a wide variety of activists—including musical activists—visited Hopi lands to intervene. Many of these individuals helped lobby the Federal Government to allow tribes to retain their traditional cultures and political autonomy. One prominent figure who circulated in elite East Coast music circles, Natalie Curtis-Burlin, persuaded then President Theodore Roosevelt to endorse the preservation and promotion of Hopi and other indigenous peoples' music and culture through her musical anthology *The Indians' Book*.⁶⁶ (Roosevelt would actually visit Hopi lands to experience a snake-antelope ceremony at the Hopi village of Walpi in 1913.⁶⁷) Educators at the Sherman Institute—a boarding school in Riverside California attended by many Hopis—reversed their bans on indigenous dancing, and began allowing Hopis to perform some ceremonies, albeit for promotional purposes. At the same time, Hopis themselves began visiting distant locations to demonstrate the sophistication and efficacy of their ritual performances, recording songs at the

66. Only a few months before the Orayvi split, Theodore Roosevelt penned a brief letter upon receiving the manuscript of Curtis's book. It said, "These songs cast a wholly new light on the depth and dignity of Indian thought, its simple beauty and strange charm—the charm of a vanished elder[?] world—of Indian poetry." While the allusion to social darwinism is clear, it shows a marked change from the colonial rhetoric and violence he perpetuated earlier in his life, including statements like, "I don't go so far as to think that the only good Indians are the dead Indians, but I believe nine out of every 10 are . . . And I shouldn't like to inquire too closely into the case of the tenth." 1886 speech in New York, in Landry, Alysia "Theodore Roosevelt: 'The Only Good Indians Are the Dead Indians' Indian Country Today June 28, 2016, *available at* <https://indiancountrymedianetwork.com/history/events/theodore-roosevelt-the-only-good-indians-are-the-dead-indians/>

67. The library of congress maintains film footage of the event on its website.

Berlin Phonogram Archiv in 1906,⁶⁸ performing the Hopi Snake Dance in front of the United States Capitol in 1926,⁶⁹ and participating in the *A Century of Progress Exhibition* in 1930s Chicago, to name a few. These efforts at ceremonial activism likely contributed to the reversal of public opinion regarding government policies of extermination and assimilation of indigenous peoples that had predominated in the decades prior. John Collier, who became Commissioner of Indian Affairs from 1933-1945, drew from his experiences with Pueblo tribes of the Southwest in the development of the Indian Reorganization Act (IRA) of 1934, which allowed tribes to adopt their own constitutions (albeit with the approval of the Secretary of the Interior) thereby allowing greater political autonomy for indigenous peoples living in the United States.⁷⁰ Interestingly, though Collier believed collective indigenous culture was vital connecting link that made indigenous societies successful,⁷¹ many early Tribal constitutions developed under the IRA did not contain provisions allowing tribes to protect the artistic and ceremonial traditions of the peoples they governed, Hopi being an exception to the rule.⁷² But perhaps this was because

68. See Ziegler, Susanne (2006) *DIE WACHSZYLINDER DES BERLINER PHONOGRAMM-ARCHIVS* BERLIN: ETHNOLOGISCHES MUSEUM, STAATLICHE MUSEEN ZU BERLIN.

69. The event was allegedly attended by nearly 5,000 people, including Vice President Charles Dawes, three Supreme Court Justices, House Speaker Nicholas Longworth, and many members of Congress. When the BIA attempted to ban the dance in 1927, they were criticized for interfering with Hopi religious practice. See Office of the Historian and the Clerk of the House's Office of Art and Archives, "Hopi Indians Performed Sacred Dances at the U.S. Capitol" UNITED STATES HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES (accessed on January 4, 2018), <http://history.house.gov/HistoricalHighlight/Detail/35633?ret=True>

70. See Indian Reorganization Act (Wheeler-Howard Act), 25 U.S.C. § 5101 – 5129; see E.A. Schwartz, *Red Atlantis Revisited: Community and Culture in the Writings of John Collier* 18 Am. Indian. Q. 507, 513-514 (1994) (describing the impact of Collier's visit to Taos Pueblo on what became the underlying policies of the Indian Reorganization Act).

71 See Schwartz, *Red Atlantis Revisited* at 514 (finding that in his early writings, particularly "The Red Atlantis," "Collier stressed culture as the definitive binder of the community.")

72. See Elmer Rusco, *The Indian Reorganization Act and Indian Self-Government* In Eric D. Lemont, ed., AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS (2006) (arguing that the Bureau of Indian Affairs did not use a boilerplate constitution for each Tribe, but did use an outline of core topics); Elmer Rusco, *Civil Liberties Guarantees under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions* 14 AM. INDIAN. L. REV. 269, 270-272 (1988) (finding that only a small minority of tribal constitutions

expressions of indigeneity, previously despised as backward and primitive and in some cases banned outright by federal policy,⁷³ had obtained a new political salience in modern twentieth century America.⁷⁴

Qötshongva, Bahnaqya and Monongye no doubt recognized the social, environmental, and political effects that resulted from the hybridization of Hopi and settler modes of governance. Many Hopi youth, after being sent to boarding schools, never returned home. And when students did return, they often felt ostracized from family and others in the village because of what they had learned and what they had forgotten. As Matthew Sakiestewa Gilbert explains, some students could not speak their language when they returned home, at least temporarily, and lacked the skills to feel productive on the reservation. In some cases, students preferred the training, conveniences and lifestyle they had achieved and wanted to leave the reservation behind (2010:137-161). But as young Hopis left home for school or military service to learn trades useful to the American economy, significant changes began to occur on Hopi lands. The traditional agricultural fields surrounding the Hopi villages fell into disuse, and eroded into massive washes dividing the land and washing away fertile soil.⁷⁵ The political landscape at

out of the 220 surveyed contained provisions granting cultural rights).

73. See BIA Circular 1665, Department of the Interior Office of Indian Affairs (Feb. 14, 1923), *excerpts available at* <http://www.webpages.uidaho.edu/~rfrey/PDF/329/IndianDances.pdf> (stating that “The dance *per se* is not condemned . . . however, under most primitive and pagan conditions is apt to be harmful, and when found to be so among the Indians we should control it by educational processes as far as possible, but if necessary, by punitive measures when its degrading tendencies persist. The sun-dance and other similar dances and so-called religious ceremonies are considered “Indian Offences” under existing regulations, and corrective penalties are provided.”); see Rules Governing the Court of Indian Offenses, Department of the Interior, Office of Indian Affairs (Dec. 2, 1882), *available at* <https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf>.

74. As historian Philiop Deloria has explains in his book *Playing Indian*, with the turn of the twentieth century, the figure of the noble savage became institutionalized within American society in organizations like the Boy Scouts of America and Campfire Girls (Deloria 1998:119-111). He explains that the impetus for this institutionalization of the Other came about because “American identity was increasingly tied to a search for an authentic social identity, one that had real meaning in the face of the anxious displacements of modernity.” (Deloria 1998:101).

75 I want to thank Michael Yeatts of the Hopi Cultural Preservation Office / NAU for showing me comparative photographs of Hopi fields and of the Orayvi wash area over the twentieth century.

Hopi also continued to fracture. In 1937, through a vote in which less than a third of eligible Hopi voters took part, a representative democracy was imposed on the Hopi people (Richland 2011:218). Each of the nine autonomous Hopi villages, once organized around carefully balanced clan and ceremonial systems, became subsumed into the larger, federally recognized Hopi Tribe, with decision-making authority on many fundamental issues vested in a single tribal council.⁷⁶ While a majority of the villages began to send representatives to the tribal council, Hotevilla and Songoopavi remained (and still remain) among the few villages that refused to formally recognize the sovereign authority of the Hopi Tribe.

With the Tribe divided on core issues of governance, Qötshongva, Bahnaqya, and Monongye developed a political platform and leadership style that was both strategic and charismatic. They took upon themselves the name “Traditionalists” and rigorously opposed foreign American governance and its policies of imperialism. In the early 1940s, Bahnaqya, for example, rejected his draft summons in protest of the War, and between 1940 and 1945, was repeatedly jailed (Clemmer 1995:185). During those days of imprisonment, he conducted an in-depth study of the relationships between Hopi and English, becoming “a seasoned, experienced, articulate cultural broker” (*id.*). Some traditionalists were known to have taken sacred ceremonial artifacts to groups of influential people, using them to demonstrate their authority or to describe Hopi prophecies about the end of the world (Wilton Kooyahoema, interview with author, 2009; Clemmer 1995:182). These provocative displays of Hopi culture must have resonated with an American populous trained in Christian millenarian traditions and anxious over the experience of mechanized warfare. Their presentations were used as proofs to

76. *See* Constitution and Bylaws of the Hopi Tribe, art. III, § 2; art. IV § 4 (1936).

demonstrate the importance of maintaining Hopi ceremonial culture and traditional ways of life and to advocate for an end to imposed settler-colonialism and global nuclear warfare.

The following exchange I had with the late Wilton Kooyahoema, a respected elder and leader from Hotevilla who was alive during the rise of Traditionalism, and Lee Wayne Lomayestewa, a village leader from Songoopavi, shows just how far Traditionalists were willing to go to advance their political goals:

WK: “I don’t think at the time when I, when I was still young they uh not allowed any, any recording from Songoopavi. . . . So they not allowing anything. But you know these people who were calling themselves ‘Traditionalists,’ they used to gather some men and they go down on the fields [below Hotevilla] somewhere just out in a hiding place. Then they can record a lot of those things. [He pauses.] But because it’s not allowed in the village too also, but that’s what they’ve been doing. And they found out that they were, and then I thought maybe they were, they get suspicious you know they sing something real, our religious belief songs and all those things, so . . .

TR: Right.

WK: They make us stop too. They got in a big argument over that thing. So it’s been, I was about maybe 11 . . . 11 years old. When that thing happened here.

TR: Oh?

WK: And my grandfather was the one that was against this so they, he’s one of the One-Horn Society Priests and he’s kind of worried about that their—that their songs might be the ones that they [the Traditionalists] would sing or things like that.

From most accounts, Qötshongva, Bahnaqya and Monongye’s mode of authentically performing and explaining aspects of Hopi ritual in order to defend the Hopi people from encroachments by American policymakers was not always appreciated by village members, though it was clearly attractive to many outside the Hopi community. As Kooyahoema explained, because recording of ceremonial songs wasn’t allowed in the village (and in most cases still isn’t), these men were known to go out into the fields below the village to record

ceremonial songs.⁷⁷ Paradoxically, while the Traditionalists clearly placed significant value on Hopi ceremony, it must have seemed to village members like they were utilizing ceremony to bring recognition for themselves as gatekeepers of the exotic rather than humbly performing the songs in the ways they were intended to be used—to benefit all living things. As political historian Richard Clemmer (1995:182) explains, “The more the [Traditionalist] Movement’s leaders gravitated toward charisma, the more critical Hopis became of them; the more well-known they became outside Hopiland, the more they were pushed by Euro-American cultural patters to assume charismatic roles.”

It seems then that Qötshongva, Bahnaqya and Monongye were not unlike other indigenous interlocutors who were eager to record ritual music for early fieldworkers. As Erika Brady (1999:110-13) suggests, many informants were interested in making phonograph recordings because it was new, more fun to use, and because it seemed to provide a more authentic rendition of an informant’s expressions than what an ethnographer might otherwise take away from an interaction. In addition to their interests in the technology, many early indigenous informants were on the fringe, engaging in behavior that was “at odds with the community” or who were “by nature both more adventurous and more reflective than most.” (Brady 1999:107-108). Qötshongva, Bahnaqya and Monogye share much in common with Brady’s descriptions: while they were leaders who were deeply reflective about the future of their villages and were willing to utilize new technologies to achieve positive change, they were also at odds with their community because they were willing to compromise Hopi principles regarding the circulation of *taatawi* and the knowledge contained in them. It may be that

77. As Boulton writes, “We went a long way out into the desert, and under one of those weirdly shaped cacti (protected by law as a rare plant but providing absolutely no shade), I set up the recording gear and captured melodies which had never been recorded before. The old man has now passed beyond reach of tribal retribution . . .” (1968:429)

Qötshongva, Bahnaqya and Monongye understood sound recording as a more direct medium that could accurately present what they considered to be the most valuable aspects of Hopi culture to help transform public opinion. Unfortunately, we can only speculate on their intentions regarding recording for Boulton on that August day.

Becoming the “Music Hunter”

In contrast to that of the Traditionalists, Laura Boulton’s trajectory originated with formal vocal training at Western Reserve University, and then graduate studies at the University of Chicago. By all accounts, Boulton possessed a vivacious personality and was a skilled social networker, even by today’s standards. Letters from men and occasional women praising her for her charm and wit saturate the historical record she left behind. And through her vast network of personal connections, she gained access to some of the most advanced recording devices available—devices even the Federal government apparently struggled to gain access to⁷⁸—as well as funds to travel to exotic, remote destinations.

The First World War and the rise of American imperialism in the first part of the Twentieth Century produced new markets for the exotic in the United States, which acted as the perfect leaven for growing Boulton’s career. Boulton’s craft as a music collector was in her ability to convince indigenous and ethnic minority peoples to perform large volumes of source material into her recording devices, and then use the resulting recordings to generate lectures emphasizing her interlocutors’ colorful otherness along with anecdotes gleaned from her travels. Her first major expedition to collect indigenous sound happened in her own backyard of Chicago. In 1933, Boulton attended the *A Century of Progress Exhibition*, a large-scale world’s

78. Correspondence between Boulton at BIA, 1939-1940. Archive of Traditional Music, Bloomington, IN. (hereinafter “ATM”)

fair that juxtaposed the new technological feats of the day with the traditional practices of indigenous peoples stationed in a so-called Indian Village. With her recording equipment in hand, Boulton combed through the Indian Village, recording hundreds of tracks, including some Hopi traditional songs sung by members of the village of Walpi who were working at the fair. A few years later, she made a new set of recordings while accompanying her husband on a bird-gathering expedition in Africa. These recordings provided the material for her signature lecture on the CBS lecture circuit, which she titled “Rhythm in the Jungle.” The lecture appears to have been a critical success, and CBS offered her a 5-year lecturing contract that included a staggering 66 to 75% cut of gross receipts, with a minimum fee of \$100 (\$1,677 in current dollars).⁷⁹ Soon after embarking on her lecturing career, Boulton left her husband and moved to New York City. By 1940, she was lecturing at numerous local society clubs across the East and Midwest, as well as major universities, including Harvard, and was featured on various radio programs.⁸⁰

It is not entirely clear why Boulton decided to go to the Southwest in 1940, or how she ended up at Hopi recording the Traditionalists. Boulton claims in her 1968 autobiography that her visit to the Southwest was part of a “project for the Indian Affairs Bureau,” which roughly corresponds with letters from BIA officials written to her after the fact⁸¹ and the prominent thank-you to them in the liner notes of her *Indian Music of the Southwest* LP. The historical record suggests, however, that Boulton needed a quick-and-dirty collecting trip to fulfill the recording contract she had signed with RCA. Upon learning that her grant for funding to go on a

79. Of course, she would pay her own way and do her own advertising, but her agency deal was also non-exclusive.

80. See letters from Kirtley F. Mather of Harvard University (Aug. 12, 1940); Thomas L. Stix (July 29, 1940); Gertrude G. Gort (Aug. 13, 1940); A. Moran of Audio-Scriptions (May 25, 1941) available at ATM.

81. Letter from the Office of Indian Affairs, Department of the Interior (May 11, 1941).

second African expedition had been turned down,⁸² likely due to the impending war in Europe and North Africa, Boulton targeted the multi-day Inter-Tribal Indian Ceremonial at Gallup, New Mexico--a well-known Santa Fe Railroad outpost and Route 66 tourist destination located on the edges of several Indian reservations.⁸³ The potential similarities to her earlier collecting work at the *A Century of Progress Exhibition* are uncanny.

A few days before she would leave for Gallup, Boulton would receive a concerned telegram from W.L. Woodward, secretary for the Gallup Ceremonial.⁸⁴ In it, Woodward raised a critical question: would Laura Boulton pay her indigenous informants for their time? Prior to that time, there is no evidence that anyone had ever questioned Boulton's right to the music of the people singing on her recordings. Boulton clearly believed there were rights in the music: her manager at RCA informed one of Boulton's covetous colleagues that Boulton was having "the music of [her Southwest Indians] recordings copyrighted *in her name*."⁸⁵ At that time, only "compositions"—not sound recordings—needed to be intentionally "copyrighted"; the common-law right to reproduce, publish or sell a sound recording attached from the moment of creation. This suggests that Boulton and her record label believed the songs she was recording belonged to her simply by capturing them. In any case, I have not yet found a response to Woodward's telegrammed question from Boulton that would help us clarify whether she ultimately paid her informants for their creative work and performances.

While Boulton spent her first week in the Southwest at the Gallup Inter-Tribal Indian Ceremonial, her correspondence during this time shows that she may not have been having the

82. Letter from Carnegie Corporation of New York, ATM (Dec. 11, 1939).

83. Letter from W.L. Woodward to Laura Boulton, ATM (Jul. 9, 1940).

84. *See* Telegram from W.L. Woodward to Laura Boulton, ATM (Aug. 6, 1940).

85. Letter from RP Wetherald to EP Hunt, ATM (Dec. 20, 1940).

success she was hoping for. To get to authentic reservation Indians, Boulton needed transportation to make the 130-mile trip from Gallup to Hopi lands over dirt and gravel roads. Three Bureau of Indian Affairs Officials from Washington, DC happened to be making a trip to Orayvi, and they invited her to join them. As she recalls, after the officials would go about their business, she would set up shop and begin recording. At Orayvi, Boulton may have briefly met with and recorded Don Talayesva, a well-educated Hopi man who had returned home to take up his ceremonial responsibilities again. Talayesva would later write in his 1941 autobiography *Sun Chief* about wishing he had a Victrola (made exclusively by RCA) to listen to the recordings he had made (Talayesva 2013:392). Boulton then traveled to the Hopi village of Hotevilla where she would meet Qötshongva, Bahnaqya, and Monongye, and then on to Toreva, a government outpost, and then to Mishungnavi, and then on to other tribal lands around the Southwest.

The presence of the Bureau of Indian Affairs officials from Washington, D.C. must have been something out of the ordinary for those at Hotevilla, because the Traditionalists decided to allow certain ceremonial performances to happen out of season. While it wasn't unusual for tourists to visit Hopi lands in the Spring to watch a *katsintikive* (katsina dance) during the roughly six months that the *katsinam* reside in the village for the winter and spring, Boulton reports that the Hopi leaders authorized a *katsina* dance in late August—something unheard of after the *katsinam* have already departed. Boulton recalled that this performance, though permitted by her “Hopi friends,” was heavily protested by other members of the village who scolded them for keeping the *katsinam* from their Summer home in the San Francisco mountains.

While she succeeded in recording Hopi people where others had failed, Boulton's tactics seem to have been met with tricksterism. Boulton believed she had captured something never

before recorded.⁸⁶ At Mishunghnavi, Boulton writes in her notes that she had recorded sacred Snake and Flute songs, and later recalled that her informant “would be killed if it became known that he had performed” them for her. In reality, nearly all of the songs she recorded at Mishunghnavi were actually Supai, Hualapai, and other songs of neighboring tribes, or else songs like “Baiwali”—a song about going to the outhouse.⁸⁷ In fact, the number of Hopi-appropriated songs from other tribes that were sung for Boulton during her visits to the Hopi villages is quite remarkable. The collection of songs from Hotevilla and Orayvi, however, is the exception, because those recordings seem to be completely devoid of tricksterism—the songs listed in her field notes correspond with the actual songs as performed on her recordings. It appears that her Hopi informants at Hotevilla were taking this opportunity seriously.

While we don’t know exactly what agreement Boulton made with the Traditionalists at Hotevilla, to say that Qötshongva, Monongye and Bahnaqya were duped or beguiled by the smooth-talking Boulton would be utterly inconsistent with who they were becoming in 1940. While not claiming Boulton was on even footing with her informants in terms of power, it seems that some meeting of the minds—an intersection of networks and of values—must have materialized in order for this recording to come into existence. But what were the terms? And, what does the historical record’s silence on these terms mean for those who seek to understand the effects of these transactions in sound today?

Latour (2013) has suggested that understanding the intersections of seemingly distinct domains—perhaps indigenous sound and commercial recording, for example—requires that we look not just to a specific event, but to entire trajectories surrounding events--“antecedents and

86. Quote from LB Music Hunter: “By the time I left, I had recorded songs from their most sacred rituals”

87 I thank Alph Secakuku for listening to these recordings and identifying the contents of these tracks.

consequences,” “precursors and heirs” or “inputs and outputs.” In looking at intersections in this way, we begin to see how each participant within a creative network coped with discontinuities as they continued along their lived trajectory. In other words, as we read the performers’ and the recordist’s biographies, and see how each framed the exchange within their larger projects—we begin to see overlaps in the networks and values within which each party lived.

In reflecting on these accounts, I can envision many possible scenarios of what happened on that August day. While the presence of powerful BIA officials may have been one reason the Traditionalists were willing to share the village’s *taatawi* with Boulton, it may be that Boulton simply deceived the men as to her identity and intentions. In her visit to Canada the year after her Hopi trip, for example, Boulton apparently traveled around with anthropologists, recording their informants under the guise of making archival specimens for the Canadian Film Board. After allowing Boulton to collect their “one good [song]” out of years of “comb[ing] a district thoroughly,” Boulton let it slip that she was actually planning to release a Canadian record for RCA/Victor, infuriating the local anthropologists.⁸⁸ It’s plausible that during her visit to Hotevilla, Boulton appeared to be a representative for the Bureau of Indian Affairs, someone responsible for taking their voices back to Washington and sharing them with key leaders. Just as Hopi performances of the Snake Dance in front of the Nation’s capital in 1926 led to the reversal of the anti-dance policy established under the BIA’s Circular 1665, perhaps the performance of Hopi ceremony for BIA Officials could likewise alter government policy toward the Hopi people.

It is also entirely possible that Boulton and the Traditionalists did in fact reach an agreement granting Boulton the right to publish and commercially exploit the recordings. The

88 See Letter from Hellen Creighton to Mr. McInnes, ATM (Oct. 14, 1941).

Hopi Traditionalists may have had a strong desire to amplify their voices for the sake of securing greater public influence. At this early stage in the Traditionalist movement, Qötshongva, Bahnaqya and Monongye sought to establish themselves not only as Hopi ritual leaders, but also hoped to show the American public that Hopi cosmology was a relevant view on a world heading back into war. The Traditionalists recognized that authority in the Hopi world was becoming increasingly contingent on the exercise of power in Washington, and perhaps found in Boulton the capacity to reach this new political power center and beyond. Boulton's capacity to record and distribute ceremonial songs meant Hopi traditional principles, temporalities, geographies, and prophetic teachings embedded in the songs they sang could have an audience with the American populous. It also meant that Traditionalists would be the voice for Hopis across the world. Perhaps the potential to preserve Hopi autonomy by amplifying Hopi voices through record distribution outweighed the potential harms of giving a non-Hopi control over a *kooyemsi's* voice.

Reclaiming our Ancestors' Voices

We may never know what really happened at Hotevilla on that August day. And in fact, the exact details of any agreement involving the production of early field recordings as to their future use is usually unclear and almost never in the form of a written contract.⁸⁹ Questions about ownership and use of these kinds of materials remain unsettled, even after decades have passed;

89. Ethics and practice surrounding work with indigenous peoples prior to the 1970s generally did not take into account copyright law, and often proceeded without written transfers of ownership. See, e.g., Anthony Seeger, *Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property*, 28 YEARBOOK FOR TRADITIONAL MUSIC 87, 92 (1996) ("When I recorded the Suya Indians of Brazil in the 1970s, it was so obvious that I did so with their consent that I did not bother to get even verbal clearances. None of them could read or write, which made written contracts impossible."). As a result, many institutions possess collections of field recordings containing Native American or other indigenous peoples' ritual songs or other sensitive forms of cultural expression, but without a clearly documented chain of title from the indigenous performers.

and yet, even with these ambiguities, the voices of indigenous peoples continued to be circulated through distant networks, detached from the individuals and communities who produced them. But is this really a just ending to this story? Who *should* own our ancestors' voices? And what can be done now to remedy past, and sometimes illicit, transactions in sound?

The after-life of Boulton's Hopi recordings raises just these sorts of questions. Following her departure from Hopi, Boulton selected the *kooyemsi* song she recorded during her visit to Hotevilla for inclusion in her album *Indian Music of the Southwest*, which is now widely available through a variety sources, including Amazon, iTunes, GooglePlay, and educational services like Alexander Street Press. Victor records, and now Smithsonian Folkways, distribute *Indian Music of the Southwest* through a copyright license it obtained from Boulton, which perhaps unsurprisingly mentions nothing about any rights of the indigenous creators or performers to the expressive material contained in the album.⁹⁰ Nearing the end of her career, Boulton entered into an agreement with Columbia University to sell the master tapes and the reproduction rights to her entire collection of 30,000 recordings (including the ten remaining recordings she made at Hotevilla) to Columbia University in exchange for \$10,000, an annuity and a named professorship.⁹¹ The agreements Boulton made imply that she, independent of the Hopi singers, the Village of Hotevilla, or the Hopi Tribe, could allow others to reproduce, publish, and sell the recordings.

But what if these contracts are wrong—egregiously wrong. What if Laura Boulton never obtained any rights to the recordings, and simply published them without permission? And, what

90. Contract between Laura Boulton and Folkways Records (1956), available at ATM. In response to early drafts this Note, Smithsonian Folkways has expressed its willingness to work with the Hopi Tribe and Hopi village and ceremonial leaders to take down infringing content from its website.

91. See Fox, *Archive of the Archive*. The \$10,000 figure, however, does not include the funds contributed by a wealthy Columbia alumnus who endowed a chair out of affection for Ms. Boulton, to the tune of roughly \$250,000 (\$2 million, accounting for inflation).

if Qötshongva, Bahnaqya, and Monongye had no right to convey these songs to Boulton in the first place? For the remainder of this chapter, I look at the justness of Boulton's actions under settler and Hopi laws governing the ownership and circulation of sound recordings made on Tribal lands. I first apply existing copyright law to destabilize the underlying assumption, codified in Boulton's agreements with the Columbia, Victor, and Folkways labels, that Boulton ever owned the right to control the recordings made at Hotevilla. As with many areas of Native American law, there are few precedents in which the ownership of field recordings have been challenged on the basis of copyright or other kinds of intellectual or cultural property law. Yet, given the state of the law, it probably would not be a stretch for a court could find that neither Boulton, Columbia University, nor Smithsonian Folkways currently holds a valid right to reproduce the *kooyemsi* and other *taatawi* Boulton and the Hopi singers recorded at Hotevilla. In addition, there are other property-based legal regimes, such as the Native American Graves Protection and Repatriation Act and the doctrine of aboriginal title that could likewise be relied on to challenge Boulton's claimed interest. My arguments is that, absent a valid claim to ownership by Boulton, the recordings would likely be owned by the singers' (or their successors) or by the Hopi Tribe under tribal law, and any unauthorized uses of the recordings could constitute copyright infringement, misappropriation, unfair competition, and/or conversion.

Ownership of the Indigenous Voice under Settler Law

In Chapters 1 and 2, I explored the ways *taatawi* establish Hopi authority within territory, forming relations between Hopi people, the land and other actors in the cosmos. Settler law, as I will now explore, has significantly altered the functionality of *taatawi*, converting them in some instances into objects to be owned and transacted. In the following sections, I explore the way

ownership of indigenous voices is treated under settler law, and how indigenous peoples might strategically use settler law to reclaim our ancestors voices. I examine (1) the doctrine of common-law copyright, (2) the Native American Graves Protection and Repatriation Act, and (3) the enforcement of Tribal cultural or intellectual property laws on non-tribal-members, and apply each of these legal formulations to the Hotevilla recordings.

Before delving into these three legal doctrines, though, it is important to look at how United States courts decide what law to apply to events occurring on tribal lands, whether it be federal statutes passed by Congress, laws passed by tribal counsels, or judge-made law. In deciding which law to apply to determine ownership interests in sound recordings made on reservation lands under the legal systems of the United States, a court must first grapple with the complex overlay of tribal and federal sovereignty the United States has constructed. From the point of view of the United States, tribes possess inherent sovereignty over their membership and territory,⁹² including the power to legislate and adjudicate in civil matters such as contract, tort, and property ownership claims that arise between tribal members and, in some cases, between members of the tribe and non-members.⁹³ United States federal law, when directed at Tribes, is considered supreme, even over Tribal laws. For example, Tribal laws can be preempted by acts of Congress or the Executive, or overturned by federal judicial review.⁹⁴ Resolving an

92. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are a separate people possessing the power of regulating their internal and social relations . . .”) (internal citations omitted).

93. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-23 (1959) (finding that when a contract’s cause of action arises on an Indian reservation, and the defendant is a tribal member, adjudicative authority lies in the tribal court); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140-41 (2006) (“The Tribes’ system of tort is an important means by which the Tribes regulate the domestic and commercial relations of its members”); *Jones v. Meehan*, 175 U.S. 1, 61 (1899) (property inheritance dispute involving tribal lands subject to the “laws, usages and customs of the tribe, and not by the law of the State of Minnesota”).

94. State law may be preempted under the Supremacy Clause of the Constitution, U.S. Const. art. VI, § 2, but because tribes exist outside of the Constitution, *United States v. Lara*, 541 U.S. 193, 212 (2004), tribal laws are

ownership dispute arising on tribal lands, then, requires looking first to federal statutes. Where no federal statute applies, a court would then look to federal common law (judicial precedent) on the subject.⁹⁵ In the absence of a federal statute or existing federal common law, courts may apply tribal law, particularly if it determines that “the issue in controversy is one that federal law recognizes as within the purview of tribal governance.”⁹⁶ Tribal law may include tribal statutes, customary principles, or common law derived from its own or other jurisdictions.⁹⁷ Alternatively, where an issue in controversy is not recognized as pertinent to tribal governance, a federal court may create a general rule based on principles generally accepted in other courts.⁹⁸

Copyright and Ownership of the Indigenous Voice

When a performing artist records a song in a recording studio, the result is a work called a “sound recording” under copyright law. Sound recordings are defined by the United States Copyright Act as “works that result from the fixation of a series of musical, spoken or other sounds.”⁹⁹ They are a kind of creative work that results from impressions of sound waves in material—typically a recorded performance that is captured via microphone on disk, tape, or in

typically preempted by federal power under the “plenary power” doctrine. *See* United States v. Kagama, 118 U.S. 375 (1886).

95. Despite the Supreme Court’s assertion in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) that “[t]here is no federal general common law,” federal Indian law is one specific area of federal common law that persists. *See* *Nat’l Farmers Union Ins. Companies v. Crow Tribe*, 471 U.S. 845, 851-52 (1985).

96. 1-7 Cohen’s Handbook of Federal Indian Law § 7.06[2] (2015).

97. 1-4 Cohen’s Handbook of Federal Indian Law § 4.05[8] (2015).

98. *See, e.g.,* *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 336-37 (2008), where the Supreme Court fashioned a new rule preventing the enforcement of tribal laws that restrain the alienation of reservation lands held in fee simple by non-members in a case where tribal customary non-discrimination laws had been asserted as an important aspect of tribal sovereignty.

99. 17 U.S.C. § 101 (2012).

memory chips.¹⁰⁰ “Sound recordings” are different from “musical works” or “songs,” which are essentially the instructions for a performance (e.g., a musical score or a “lead sheet”). This distinction is easy enough for most musicians to accept. What is difficult to conceptualize is how sound recordings, like all copyrightable works, are considered to be “intangible”—in other words, copyright law doesn’t protect the physical objects produced in a recording session (e.g., the “master recording” or “audio tapes”); it protects the “expression” that is contained in physical objects. The consequences of this conceptual separation between physical copies and intangible “works” for indigenous song will be taken up in greater detail in Chapter 4.

Because “sound recordings” are a relatively new kind of creative work, and sound recording technologies have changed rapidly over the last century, American lawmakers and judges have struggled to define how this new category of creative work should be owned. While federal copyright statutes pre-dated the invention of sound recording technologies, state court judges actually performed most of the work of determining ownership and protecting sound recording rights. They drew on the common law right of first publication, unfair competition, and conversion to protect works from unjust exploitation.¹⁰¹ In some states, legislators enacted criminal and civil statutes providing criteria for ownership rights in sound recordings and penalties for violating those rights.¹⁰² However, the need for more comprehensive national protection of sound recordings, particularly after the arrival of the cassette recorder, led to the

100. See 17 U.S.C. § 102 (2012). Interestingly, for works that are not generally written down, an audio tape or digital file may actually contain the musical work (i.e., the instructions for how the work is to be performed) and the sound recording (the rendering of the musical work). However, streaming audio may contain only the sound recording copyright. *United States v. Am. Soc. of Composers, Authors & Publishers*, 627 F.3d 64, 74 (2d Cir. 2010) (holding that “streaming” audio is not a musical work, but a performance “that renders the musical work audible”).

101. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS, 25–28 (2011).

102. Copyright Office, State Law Texts (July 5, 2011), <https://perma.cc/B7D2-WTEH>; Copyright Office, Survey of State Criminal Laws (Dec. 12, 2012), <https://perma.cc/QC5S-937S>.

passage of the 1971 Sound Recording Amendment to the 1909 Copyright Act—nearly a century after the invention of the phonograph.¹⁰³ This Amendment added sound recordings to the list of works eligible for federal copyright while also substantially limiting the scope of protection in these works.¹⁰⁴ Importantly, the Sound Recording Amendment applied only to future recordings: “No sound recording fixed before February 15, 1972, shall be subject to [federal] copyright” until at least 2067.¹⁰⁵ Even today, only those sound recordings created after February 15, 1972, are entitled to federal copyright protection.

The problem for Tribes like the Hopi Tribe, which became sites of substantial recording activity prior to the 1970s, is that there is essentially a gap in copyright law when it comes to recordings made on tribal lands. The Copyright Act makes clear that, in absence of federal copyright protection for pre-1972 sound recordings, “any rights or remedies under the common law or statutes of any *State*” continue to apply.¹⁰⁶ For recordings made on state lands, state common law or statutes, if any, are still relied on to determine ownership interests. However, federally recognized Indian tribes are not states, nor are tribal members generally subject to state property laws or to the jurisdiction of state courts for their activities on tribal lands.¹⁰⁷ Because

103. Sound Recording Amendment, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (emphasis added); *see also* LIBRARY OF CONGRESS, *History of the Cylinder Phonograph*, <https://perma.cc/QSS5-27S4> (last visited Oct. 5, 2016). Even though members of Congress had for nearly fifty years introduced bills to add sound recordings to the list of protectable works under the 1909 Copyright Act, Congress—likely influenced by the Radio Broadcast industry—failed to do so. A central issue preventing such an amendment was disagreement over whether sound recordings represented a creative work of authorship under the Constitution’s Intellectual Property Clause. COPYRIGHT OFFICE, *supra* note 5, at 10–13.

104. *See generally* 17 U.S.C. §§ 102(a), 114 (2012); COPYRIGHT OFFICE, *supra* note 5.

105. 17 U.S.C. § 301(c).

106. 17 U.S.C. § 301(c) (2012).

107. *In re Kansas Indians*, 72 U.S. 737, 757 (1866) (“As long as the United States recognizes [a tribe’s] national character they are under the protection of treaties and the laws of Congress, and *their property is withdrawn from the operation of State laws*”) (emphasis added). *See generally* *Worcester v. Georgia*, 31 U.S. 515 (1832); 1-6 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (LexisNexis 2015) (explaining that “[w]ithin Indian

the Copyright Act is silent on what law, if any, applies to pre-1972 sound recordings created on reservation lands, it remains uncertain what protections indigenous performers, like Qötshongva, Bahnaqya, and Monongye would have for their pre-1972 recorded works.¹⁰⁸

How Common-Law Copyright Affects Ownership of the Boulton Hopi Recordings

In the case of the Hotevilla recordings, the Hopi Tribe could potentially assert ownership in pre-1972 sound recordings by claiming rights under the doctrine of common law copyright.¹⁰⁹ While no federal precedents currently exist applying common law copyright to sound recordings created on Tribal lands, the United States Supreme Court has held conclusively that in situations where it is inappropriate to rely on state law, federal common law should apply.¹¹⁰ Because federally recognized Indian tribes are located outside the jurisdictional boundaries of states, where the majority of common law copyright rules have been fashioned, a federal court would, absent existing precedents of the particular tribe or rulings in other related areas of federal common law (admiralty, bankruptcy, antitrust, etc.), generate its own common law doctrine to

country, generally speaking, primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States[.]” (internal citations omitted). Even in “P.L. 280” States, where State civil jurisdiction has been extended onto tribal lands, States still lack jurisdiction to determine ownership and interests in real and personal property. 25 U.S.C. § 1360(b) (2012).

108. When the Copyright Revision Act was passed in 1976, Congress specifically wanted to eliminate state copyright laws, except in the case of sound recordings made prior to 1972. *See* H.R. REP. NO. 94-1476, at 131 (1976) (“the preemptive effect of section 301 is limited to State laws”). There is no indication that the amendment sought to eliminate tribal laws governing sound recordings.

109. In addition to common law copyright (sometimes called the right of first publication), unfair competition and misappropriation are two additional common law claims typically asserted in infringement cases involving pre-1972 sound recordings. As this Note specifically deals with ownership, these other common law claims are not explored here.

110. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Hotevilla just ch otherson to early anthropological encounters between Native Americans and researchers in the early twentieth Nat’l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) (holding that questions relating to aspects of tribal sovereignty are matters of federal common law); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

protect these kinds of recordings, likely drawing upon the persuasive authority that already exists in state court decisions.¹¹¹

The general rule in state courts has been that sound recording rights vest in the performer of a recording—not the recordist.¹¹² Typically, when a record label wants to obtain the rights to an artist’s recording, it has to receive those rights via transfer—through either an explicit or implicit agreement. The challenge comes when, as with the Boulton Hopi recordings, no agreement exists over the future reproduction and publication of a recording and the only copy of a performance remains with the recordist. Courts and commentators have disagreed about whether ownership of common law copyright in a sound recording follows the holder of the physical master recording, absent explicit contractual language between the performer and recordist or other evidence indicating intent to assign or retain the copyright.¹¹³ In situations where contracts are silent as to

111. 1-7 Cohen’s Handbook of Federal Indian Law § 7.06[2] (2015) (“Federal courts will apply tribal law to adjudicate a dispute when the issue in controversy is one that federal law recognizes as within the purview of tribal governance.”) For example, federal courts have often looked to tribal law in contract, tort, and matters involving tribal membership, but have not looked to federal and state law when making choice of law determinations involving issues like banking or malpractice. *See Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 340 (2008) (finding that a tribal law regulating lender discrimination could not be applied against non tribal members, while suggesting similar state and federal banking laws could be); *LaFromboise v. Leavitt*, 439 F.3d 792 (8th Cir. 2006) (finding that a medical malpractice suit against a government hospital brought under the Federal Tort Claims Act was governed by North Dakota malpractice law rather than the malpractice laws of the Turtle Mountain Band of Chippewa Indians, even though the tort occurred on tribal lands). An extensive search of these areas has revealed no existing federal precedents on the application of common law principles to pre-1972 sound recordings absent reliance on a particular state’s common law.

112. *See Forward v. Thorogood*, 985 F.2d 604, 605 (1st Cir. 1993) (“The performer of a musical work is the author, as it were, of the [recorded] performance.”); *Waring v. WDAS Broad. Station*, 194 A. 631, 635 (Pa. 1937); *R.C.A. Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939) (copyright vests in performer despite extensive labor on the part of the recording engineer); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 496-97 (3d Cir. 1956) (Hastie, J., dissenting); *see also Capitol Records, Inc. v. Naxos of Am., Inc.*, 820 N.E.2d 250, 259 (N.Y. 2005).

113. . As Robert Clarida has argued, ownership in “pre-1972 sound recordings can thus be established much more informally than ownership of a federal copyright, which is independent of the tangible object in which it is embodied, [17 U.S.C. § 202], and which cannot be transferred without a signed writing, [17 U.S.C. § 204].” Robert Clarida, *Who Owns Pre-1972 Sound Recordings?*, *The Intell. Prop. Strategist* (Nov. 13, 2000), <https://perma.cc/RRT5-Y52L>. *See also Bertolino v. Line*, 414 F. Supp. 279, 285 (S.D.N.Y. 1976) (“Under common law [a recording] artist who agrees to sell his work contracts away his common law rights unless he reserves them by the terms of the contract.”). However, the First Circuit has stated that, while courts “did in a number of cases infer from an unconditional sale of a manuscript or painting an intent to transfer the copyright . . . even under the doctrine this physical transfer merely created a presumption and the ultimate question was one of intent.” *Forward*

the intention of the author to transfer his or her ownership interest, judges have looked to whether or not the performer had the clear opportunity to negotiate for control over the common law rights in the recording.¹¹⁴ If the artist passed on the opportunity to reserve his or her rights, they are implicitly transferred to the recordist.

But, where there is no agreement whatsoever between the recordist and the performer, as in the Boulton Hopi recordings, courts are hard pressed to say that the performer has passed on the opportunity to reserve their rights to a recording. In circumstances where there is no evidence that the parties negotiated over the rights to a sound recording, some courts have found that the sound recording remains the common law property of the performer, even if the recordist walked off with the physical media. In *Baez v. Fantasy Record, Inc.*, for example, a folk singer sued a record label for copyright infringement when it sought to commercially release a demo tape it had recorded for her six years previous.¹¹⁵ The producer of the demo had sold the recording to RCA, who began producing records from it. By the time RCA had started production on the album, the folk singer had gained popularity and signed with another label. The California Superior Court concluded that the plaintiff held “common law copyright in her musical interpretations, renditions and performances as recorded;” the defendants held “no right, title or

v. Thorogood, 985 F.2d 605 (1st Cir. 1993).

114 *Ingram v. Bowers*, a case decided the year before Boulton recorded her first Hopi song (and actually involving her first record label), provides one such example. In that case, the widow of famed Italian singer Enrico Caruso sought to establish her late husband’s common law property right in sound recordings he made with the Victor Company. *Ingram v. Bowers*, 57 F.2d 65, 65 (2d Cir. 1932). The contract Caruso signed with Victor made no reference to who would own the common law rights in the initial recording, though it did state that payment would be made to Caruso as a royalty. Judge Learned Hand opined that, because the contract simply required Caruso “to make these records,” and made no mention of his future control over them, the Victor Company owned the master recordings and the records produced from them. *Id.* at 65. Because Caruso had failed to reserve the right to control the future uses of the recording when he executed the contract with Victor, he held “no proprietary interest in the profits arising out of the records.” *Id.*

115. *Baez v. Fantasy Records, Inc.*, No. 543152, 1964 WL 8158, *6 (Cal. Super. Oct. 30, 1964).

interest in” the demo tape; and the Court ordered the destruction of all records produced by RCA and the transfer of the physical tape to the singer.¹¹⁶

Are the facts in *Baez* case distinguishable from the case of the Boulton Hopi recordings? Because Boulton made no written agreements with Qötshongva, Bahnaqya, and Monongye, and no evidence suggests that the performers had the opportunity to reserve any rights in the recordings she made,¹¹⁷ it would appear that the common law default rule—that the sound recording copyright remains with the performer—would be applicable to the songs Boulton recorded.¹¹⁸ If the doctrine of common-law copyright is determined to be applicable on Hopi lands, the holder of the common law right in the recordings could enjoin—and, if an exploitation has already occurred, potentially receive damages from—the unauthorized reproduction, distribution, public performance,¹¹⁹ or creation of derivative works from the recordings, so long as the claim is not barred by laches or some other tribal or equitable defense.¹²⁰ The holder could potentially recover, for example, the profits and royalties from Boulton’s licensing of the recordings to Victor and Folkways Records, and recover profits from their use by Alexander Street Press. The holder could also foreseeably bring an action for injunctive relief and unjust

116. . . *Id.* at *5.

117. *See* *Ingram v. Bowers*, 57 F.2d 65 (2d Cir. 1932).

118. *See* *Baez v. Fantasy Records, Inc.*, No. 543152, 1964 WL 8158, *6 (Cal. Super. Oct. 30, 1964); *see also* *Waring v. WDAS Broadcasting Station*, 194 A. 631, 635 (Pa. 1937), and *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 259 (N.Y. 2005).

119. *But see* *Flo & Eddie v. Sirius XM Radio*, 70 N.E.3d. 926 (N.Y. 2017)

120. David and Melville Nimmer, *Nimmer on Copyright* § 8C.02 (rev. Ed. 2015). A common law public performance right pertaining to sound recordings is a recent innovation, found only in a handful of cases.

enrichment against those who derive income (research grants, access fees) by making them available to the public.¹²¹

The Problems of Applying Common-Law Copyright to Indigenous Sound Recordings

Despite its potential to remedy unauthorized uses of the Hotevilla recordings, common law copyright may not be a perfect and enduring solution to prevent misappropriation of Hopi ceremonial songs. First, the scope of the exclusive rights in sound recordings is quite thin, only preventing the actual duplication of the recordings themselves, not the underlying musical works or even sound-alike performances.¹²² Because some of the most insensitive misappropriations of Hopi ceremonial performances have occurred through imitation performances, common-law copyright unfortunately provides little protection in the areas of most urgent concern.¹²³ Second, common law copyrights in pre-1972 sound recordings last only until they are preempted by the Copyright Act, which is slated for 2067, after which such recordings will enter the public domain and can be used, without restriction, by anyone for virtually any purpose.¹²⁴ Third, even if the Hopi Tribe were to sue the Boulton's estate, Smithsonian-Folkways, Columbia University, or any other user of the Hopi song recordings for infringement, those potential defendants may assert common law defenses or appeal to the First Amendment to enable them to use the material

121. For more on how the Boulton archive was leveraged for grant and institutional funds, see Fox, *The Archive of the Archive* (2017). Additionally, the notice and takedown provisions of the Copyright Act may be applicable to pre-1972 sound recordings. See *Capitol Records v. Vimeo*, 826 F.3d 78, 87-93 (2d Cir. 2016) (“We conclude that the safe harbor established by § 512(c) protects a qualifying service provider from liability for infringement of copyright under state law.”).

122. See NIMMER ON COPYRIGHT § 2.10(A)(2) (2015). The copyright in pre-1972 sound recordings is thin enough that the Copyright Office has allowed “remixes” of these works to justify a copyright in the new version. *Id.* at n.41.

123. See Angela Riley and Kristen Carpenter, *Owning Red: A Theory of Indian Cultural Appropriation* 94 Tex. L. Rev. 859, 918 (2016) (describing how a Boy Scout Troop who conducted dances mimicking Hopi-Tewa rituals); Peter Whiteley, *The End of Anthropology (At Hopi)* 35 *Journal of the Southwest* 125 (1993) (describing an ersatz performance of the Hopi snake dance by the *Smoki* fraternal organization).

124. 17 U.S.C. § 301(c) (2012).

without tribal authorization.¹²⁵ Such arguments may be appealing to courts accustomed to adjudicating cases under the Copyright Act, where the stated policy goal is “[t]o promote the Progress of Science and the useful Arts” and not necessarily to protect individual or tribal ownership interests.¹²⁶

Federal Cultural Property Laws and the Protection of the Indigenous Voice

In the preceding section, I made the argument that an action for common-law copyright infringement could potentially stop Smithsonian Folkways, Columbia University, and the Boulton estate from reproducing and distributing the recordings Laura Boulton made with Qötshongva, Bahnaqya, Monongye, and other Hopi singers during her 1940s visit. But that argument was based on the shaky premise that common-law copyright—a nearly defunct intellectual property framework of the settler-state—applied, and still applies on Hopi lands where other protocols for owning and circulating sound had already existed. The Native American Graves Protection and Repatriation Act of 1990 may be a potential alternative for federally recognized Indian tribes, like the Hopi Tribe, seeking to reclaim recordings of sacred materials or materials vital to the perpetuation of Tribal culture, because it recognizes to some degree collective indigenous ownership interests.

How the Native American Graves Protection and Repatriation Act might apply to Recordings

The United States Congress has in recent decades recognized the inherent rights of tribes to possess and control aspects of tribal culture, and to allow enforcement of those rights through

125. While § 117 of the 1976 Copyright Act established the fair use doctrine in federal law, the doctrine was actually developed under state and federal common law, *see generally*, *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841, and would likely be available as a defense to a common law copyright infringement claim.

126. U.S. CONST. art. I, § 8, cl. 8; *see Feist Publ’ns v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) (“The Primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’”).

various tribal and federal mechanisms. Congress has given national recognition to tribes' and tribal members' ownership interests in sacred objects or objects of cultural patrimony under the Native American Graves Protection and Repatriation Act (NAGPRA).¹²⁷ The Act allows tribes and, in certain circumstances, tribal members and their descendants, to demand the “expeditious[] return[]” of certain categories of items once “owned or controlled” by them from a museum or federal agency which does not hold proper “right of possession.”¹²⁸ Because the statute requires the full, physical return of these objects rather than simply requiring holding institutions to provide tribes access to these materials, some archivists and legal scholars have argued that NAGPRA could potentially allow tribes to reclaim intellectual property interests in certain types of sound recordings in addition to the physical media on which they were originally recorded.¹²⁹

While there is no indication that Congress meant to include pre-1972 sound recordings in its consideration of repatriable objects under NAGPRA, some recordings may reasonably come under the Act if they meet the definitions of “sacred objects” or “objects of cultural patrimony.” “Sacred objects” are narrowly defined as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”¹³⁰ Objects of “cultural patrimony” are those “having ongoing historical, traditional, or cultural importance central to the Native American group or

127. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (1990).

128. 25 U.S.C. §§ 3005(a)(5), (c) (2012).

129. See interviews with James Nason and Karen Underhill in Trevor Reed, *Returning Hopi Voices: Toward a Model for Repatriation of the Archived Traditional Voice* 30–32 (Feb. 2010) (unpublished M.A. thesis, Teachers College, Columbia University) (on file with Teachers College, Columbia University); see also First Archivists Circle, *Copying and Repatriation of Records to Native American Communities*, *Protocols for Native American Archival Materials* (2007), <https://perma.cc/6YJB-YKR2>.

130. 25 U.S.C. § 3001(3)(C) (2012).

culture itself” and, according to tribal law or custom, “cannot be alienated, appropriated, or conveyed by any individual.”¹³¹

When applied to sound recordings, these definitions make enforcement of NAGPRA’s provisions strangely arbitrary. In some cases, a sound recording may be “needed” to perform a given traditional ceremony, thus qualifying as a “sacred object.” In others—e.g., where the ceremony has been recorded multiple times or has been memorized by tribal members—perhaps the recording is not “needed” enough to be a sacred object.¹³² The words “traditional” and “religion” also add to the complexity of applying NAGPRA’s definition of “sacred objects.” Can one define the boundary of “traditional” without resorting to antiquated binaries (Latour 1993)? And how might one define “religion” for some indigenous communities where there is no demarcation between religious practice and everyday reality? NAGPRA’s definition of “cultural patrimony” raises similar concerns. Certainly some recordings of cultural performances may be considered inalienable from a tribe due to their historical, traditional, or cultural importance to present-day tribal culture and thus be considered “objects of cultural patrimony.” Others, however—e.g. recordings of songs specific to an individual or songs with only a cursory relationship to tribal history, tradition or culture—would not meet the definition. The use of the term “culture” as a bright-line standard is especially troubling, as there is no generally accepted definition for the term (Eagleton 2000; Williams 1977).¹³³ Additionally, NAGPRA only applies to Native American objects held by federal agencies, museums, and other federally funded

131. 25 U.S.C. § 3001(3)(D) (2012).

132. But, what about tribes that “need” to have exclusive control over ceremonial recordings to maintain their sense of identity and sovereignty? This question is discussed in the following section.

133. See generally, Terry Eagleton, *The idea of Culture* Oxford, UK: Blackwell; Williams, Raymond (1977) *Marxism and Literature*. New York: Oxford, 11-20.

institutions,¹³⁴ or to objects “which are excavated or discovered on federal or tribal lands after November 16, 1990.”¹³⁵ Tribes could not utilize NAGPRA to reclaim sound recordings from privately owned collections.

Finally, even if NAGPRA could be successfully applied to pre-1972 tape recordings, wax cylinders, and other media containing sacred ceremonies or culturally significant performances, it is not yet clear whether the statute is a feasible means through which tribes may reclaim American intellectual property or tribally generated access or circulation rights pertaining to these objects.¹³⁶ On one hand, the focus of the statute is explicitly on *objects* pertaining to religion or patrimony, posing questions of statutory construction that may weigh against tribes’ ability to reclaim anything more than the master recordings themselves. Even if a tribe could successfully secure the return of the physical recording, nothing in NAGPRA directly suggests that tribes would be able to assert control over the duplication, creation of derivative works, performance, or distribution and display of existing and future copies of that a particular media recording. Further, tribes may not actually need exclusive control over all copies of sound recordings to fulfill NAGPRA’s implied goals—to perpetuate tribal culture or to practice tribal religions.¹³⁷ On the other hand, it is clear that Congress’ purpose in passing NAGPRA was to remedy prior instances of trespass, conversion, and misappropriation, which stripped tribes of

134. 25 U.S.C. § 3001 (2012). “Museums” is broadly defined to include all federally funded institutions including museums, archives, colleges and universities, and even State or local governments. The Smithsonian Institution is exempt from NAGPRA’s provisions, although the National Museum of the American Indian Act, as amended, regulates repatriation activities involving its collections. See 20 U.S.C. § 80q-9a(b) (2012).

135. 25 U.S.C. § 3002 (2012).

136. See First Archivists Circle, *supra* note 24.

137. This argument, however, sidesteps the ontological considerations at stake in tribes’ claims to intellectual property ownership, which will be discussed more in Chapter 4.

control over their ancestors' remains, their culture, and their religious practices.¹³⁸ It would seem counter to such a policy to require federally funded institutions to return physical objects, like ceremonial altars or audio tapes of Native American voices, but then allow these institutions to continue to duplicate and sell copies, publicly display replicas of such items, or give public demonstrations of them without the consent of and consultation with the respective tribes or the original creators' descendants.

How NAGPRA Could Affect Ownership of the Boulton Hopi Recordings

As with the application of copyright law to the Boulton Hopi recordings, the application of NAGPRA falls within a legal grey area. Laura Boulton's collection is currently held by Columbia University, an institution that regularly receives federal funds, fulfilling one element of the statute. And, the Hopi Tribe is a federally recognized Indian tribe, which can claim "sacred objects" and "objects of cultural patrimony," fulfilling another. Further, because there was no contract between Boulton and the Tribe, there is no indication that Smithsonian, Columbia, or the Boulton Estate could claim a valid "right of possession" from the original cultural authorities who could alienate these recordings from the Hopi villages.¹³⁹

It seems likely that some of Boulton's Hopi recordings could be eligible for repatriation as "sacred objects": Hopi ceremonial leaders have indicated that a number of the recordings in the Laura Boulton collection are the only source of information about certain parts of sacred ceremonies—the recordings "fill in the gaps" where key liturgical knowledge has been

138. See 101 Cong. Rec. H10985–91 (daily ed. Oct. 22, 1990) (statements of Reps. Campbell and Collins).

139. 25 U.S.C. § 3005(c) (2012). The standard of proof required to show a right of possession is whether "standing alone before the introduction of evidence to the contrary," the Tribe's evidence "would support a finding that the [f]ederal agency or museum [including federally funded institutions] did not have the right of possession[.]" *Id.* Laura Boulton no doubt held an exclusive chattel property right in the blank acetate disks that she brought with her to Hotevilla in August 1940. But, as both common law and Hopi statutory law (as will be discussed later) recognize that once a recordist allows recording media to be transformed by the imprint of a (ceremonial) performer's voice, an additional property right is created which implies a right to control the physical media.

forgotten¹⁴⁰ and are needed by ceremonial practitioners.¹⁴¹ However, many of the recordings are of non-ceremonial performances or are interchangeable with existing Hopi ceremonial songs, and might not be necessary for the performance of Hopi religion.¹⁴² And, even if a particular recording were necessary to perform a ritual, it is not clear that—in the eyes of a Federal District Court judge (the one authorized to make such decisions about ownership under the statute)—the Tribe would need to have exclusive control over the recording (or even the exclusive right to exploit it) in order to make the ritual efficacious.¹⁴³

Alternatively, many of the Hotevilla recordings might be reclaimed under NAGPRA as “objects of cultural patrimony” as they are collectively owned works containing historical and cultural information about Hopi ways of life that are vital to the community’s perpetuation. For example, some of these recordings contain performances detailing historical figures and events, ceremonial sites, resource conservation and distribution methods, agricultural knowledge, meteorological practices and others.¹⁴⁴ However, other sound recordings are more artistic in nature, evoking landscapes or describing the composers’ experiences, or simply expressing melodic phrases and vocables, which might not be considered “cultural patrimony” under NAGPRA’s definition.¹⁴⁵ Even if the recordings could be considered “cultural patrimony” and

140. . . *Returning Hopi Song—A Hopi Perspective*, HOPI MUSIC REPATRIATION PROJECT (Feb. 5, 2011), <https://perma.cc/722Z-835Z>.

141. *See, e.g.*, Leewayne Lomayestewa, *Returning Hopi Songs—A Hopi Perspective*. Hopi Music Project Podcast (Feb. 5, 2011), available at https://hopimusic.files.wordpress.com/2011/02/03-podcast_leewayne-final.mp3.

142. Reed, *supra* note 76.

143. The counterargument here is that the Hopi Tribe may need to exercise complete control over ceremonial recordings to effectively prevent inappropriate or unauthorized uses of ceremonies outside of established protocols, which is believed to be causing harm to the Hopi social structure and knowledge economy. *See* Richland, *Talking Tradition*, *infra* note 97.

144. *Id.*

145. On the other hand, even songs made from vocables or “nonsense syllables” may convey cultural meaning in

otherwise eligible for repatriation, it may be difficult for the Tribe to argue that it needs exclusive control over the recordings (not to mention the intellectual property rights), rather than just receiving copies of or access to the recordings, in order to maintain cultural continuity.¹⁴⁶ Further, as a practical matter, establishing proof of religious necessity or status as cultural patrimony would be quite difficult in the Hopi context because it would no doubt require furnishing evidence that would be either extremely invasive or inappropriate to disclose to the uninitiated.¹⁴⁷

Applying Tribal Law to Non-Member Recordists and Holding Institutions

In addition to potentially relying on NAGPRA's protections for indigenous sacred objects and objects of cultural patrimony, a tribe may also be able to rely on its own laws to reclaim these items against those who misappropriate them. While I have not yet found a case where tribal laws governing sound recordings have been used to remedy unauthorized uses of them, this kind of action may be possible given the developments in case law presented by *Chilkat Indian Village v. Johnson*.

Chilkat v. Johnson and Tribal Cultural Property Laws

In *Chilkat*, the United States Court of Appeals for the Ninth Circuit examined whether a a tribe's cultural property law forbidding the removal of "traditional Indian artifacts, clan crests,

Native American contexts. As Charlotte Frisbee has argued in her landmark study of vocables in Navajo ritual songs, "If one considers all the possibilities identified thus far when studying Navajo vocables, the end result can only be a confirmation . . . that there are no meaningless syllables in Navajo ceremonial music." Charlotte Frisbee, *Vocables in Navajo Ceremonial Music*, 24 *ETHNOMUSICOLOGY* 347, 372 (1980). Vocables in Hopi songs, for example, are known to provide listeners with a sense of culturally-specific places or demonstrate attributes of characters in traditional stories. See Kathleen Sands & Emory Sekaquaptewa, *Four Hopi Lullabies: A Study in Method and Meaning*, 4 *AM. INDIAN Q.* 195, 196 (1978).

146. The counterargument is that Hopi culture cannot perpetuate itself along established social structures and maintain established protocols if the exclusive right to reproduce, distribute, publicly perform, stream, or license the recordings to others is held by an institution that is not subject to tribal laws.

147. See Justin B. Richland, "What Are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 *LAW & SOC'Y REV.* 235, 264-65 (2005).

or other Indian art work . . . without the prior notification of and approval by, the Chilkat Indian Village Council”¹⁴⁸ could be enforced against someone who was not a tribal member. The case involved the taking of four carved wooden posts and a screen covered with a Tlingit village’s traditional designs by a Native Art dealer, who had allegedly purchased them from a Village member without the tribe’s consent.¹⁴⁹ The Ninth Circuit in *Chilkat* held that the Village’s claim demanding the return of the tribally recognized cultural properties was potentially enforceable in federal court.¹⁵⁰ Addressing the case as a mixed question of tribal and federal law,¹⁵¹ the court held first that, “[w]hatever proprietary interest the Village has in the artifacts is a creature of tribal law or tradition wholly unconnected with federal law. *No construction of federal law is necessary to adjudicate title.*”¹⁵² This means that tribes can effectively determine ownership in cultural properties through their own legal systems, and not through federal law. It then explained that “the heart of the controversy over the claim will be the Village’s power, *under federal law*, to . . . apply [its cultural property law] to non-Indians.”¹⁵³ Applying tribal laws to non-members had become much more difficult to do after the Supreme Court’s decisions in *Montana v. United States* in 1981, which established the rule that the inherent sovereignty of a Tribe only extends to non-members of the tribe in narrow sets of circumstances (such as when the non-member’s actions threaten or have some direct effect on the economic security, health or

148. Chilkat Indian Village, Alaska, Ordinance of May 12, 1976.

149. See Christopher S. Byrne, *Chikat Indian Tribe v. Johnson and NAGPRA: Have We Finally Recognized Communal Property Rights in Cultural Objects?* 8 J. Env’tl. L. & Litig. 109, 114 (1993).

150. Chilkat Indian Vill. v. Johnson, 870 F.2d 1469 (9th Cir. 1989).

151. Chilkat Indian Vill. v. Johnson, 870 F.2d 1469 (9th Cir. 1989).

152. *Id.* at 1474 (emphasis added).

153. *Id.* (emphasis added).

welfare of the tribe or when the non-member enters into an agreement with the tribe touching on the law implicated).¹⁵⁴

The Ninth Circuit remanded the case to the United States District Court for the District of Alaska to determine whether the tribe had “sufficient attributes of sovereignty” to impose its laws on a non-tribal-member and to adjudicate the case. On remand, the District Court held that “it would appear that under its constitutional power, Chilkat Indian Village had the power to prevent the sale or disposition of any assets of the Village without the consent of the Council,”¹⁵⁵ and that it could enforce the provision against Johnson, a non-member of the Tribe, owing to the potential of his behavior to impact the welfare of the tribe, thus falling within the scope of *Montana*. Following the Tribal Court’s determination that Johnson had violated tribal law and its order for Johnson to return the objects,¹⁵⁶ Johnson agreed to a settlement that included the return the artifacts to the Tribe.

Application of Chilkat to the Boulton Hopi Recordings

The Hopi Tribe might also secure and enforce its interests in the Boulton Hopi recordings by seeking to enforce its own laws governing ceremonial recordings against the Boulton estate, Smithsonian Folkways and Columbia University. As in *Chilkat*, where the Ninth Circuit found

154. The Supreme Court actually articulated the limits to tribal civil jurisdiction over nonmembers in two major cases: *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Montana v. United States*, 540 U.S. 544 (1981), but only *Montana* has received considerable elaboration by the Court. Under *Merrion*, nonmembers can become subject to tribal regulations governing a tribe’s property and resources when they conduct economic activity on tribal trust lands. 455 U.S. at 137, 144-45. Under *Montana*, a tribe can also regulate the activities of nonmembers on tribal lands held in fee when they (1) enter into contractual relationships with the tribe or its members in such a way that the activity has a nexus with tribal interests, or (2) when nonmember activities on an Indian reservation “threaten or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 540 U.S. at 566.

155. *Chikat Indian Village, IRA v. Johnson*, et al., No. 90-01, 20 ILR 6127, 6128 (Chilkat Tr. Ct., Nov. 3, 1993) (quoting *Chilkat Indian Village v. Johnson*, No. J84-024-CIV at 13-14 (D. Alaska Oct. 9, 1990).

156. *Id.* at 6142.

the Village’s ownership of cultural property to be “a creature of tribal law or tradition,”¹⁵⁷ the Hopi Tribe, as will be discussed in the next chapter, has similarly passed its own laws establishing ownership over audio recordings depicting Hopi esoteric and ritual knowledge. But enforcing its laws on non-members, like Boulton’s Estate, Columbia University, or Smithsonian-Folkways, may be increasingly difficult. Recent U.S. Supreme Court cases has been unclear about the conditions necessary for a tribe to assert its legislative and adjudicatory jurisdiction over non-members. In two initial cases in 1982 and 1983, the Court held that when a non-member’s conduct occurs on a tribe’s trust lands—lands on which a tribe has the power to control entry and exit—tribal laws implicated by that conduct may be enforceable on the non-member simply because the non-member entered the land.¹⁵⁸ But, the Supreme Court has slowly walked back from these decisions, finding that in some contexts, a tribe may be required to meet the *Montana* test to enforce its laws on non-members even if it controls the territory where the action occurred under its own sovereignty.¹⁵⁹ In other words, before the Hopi Tribe can enforce its laws on Boulton’s estate and others, it may need to show that the unauthorized use of the Hotevilla recordings (or the unauthorized use of recordings in general) directly affects the economic security, the health or welfare of the tribe. This may seem like a tough sell. Unlike in *Chilkat* where the law being violated by the art dealer meant that the tribe would be completely deprived of these important physical objects, the Hopi Tribe would have to show some form of

157. See *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1473 (9th Cir. 1989).

158. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (recognizing the power of tribes to exclude people from tribal lands, and thus the power to condition entry on compliance with regulations); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982) (recognizing the inherent power of tribes to tax non-members on tribal trust lands as “part of its power to govern and to pay for the costs of self-government” and that “[a] nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.”)

159 See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (“The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of non-members is ‘necessary to protect tribal self-government or to control internal relations.’”).

harm or economic/political impact from the reproduction, publication, or sale of these recordings by others—something that may be challenging to prove without evidence of lost sales or profits, physical or emotional harm, or some other established basis for a judicial remedy.¹⁶⁰

Conclusion

Who owns the voices of Qötshongva, Bahnaqya and Monongye? The answer remains uncertain, even with the variety of legal pathways provided under settler law for indigenous peoples to reclaim control over such materials. First, while copyright may provide an author protection against unauthorized reproduction, publication, sale, and the creation of derivative works, it remains unclear whether copyright actually applies to works created on tribal lands. Second, while the Native American Graves Protection and Repatriation Act allows tribes to reclaim ownership of “sacred objects” and “objects of cultural patrimony,” those protections appear arbitrary in the context of sound recordings, protecting only the expressions of indigenous “religions” and those communally owned artifacts that appear to establish a tribe’s “essence.” And finally, even where tribes have existing laws governing the circulation of recorded voices, settler law has made it difficult or impossible to enforce those laws absent establishing conditions of harm or negative economic or political impact on the tribe.

If settler law demands evidence of harm or direct impact on indigenous economies or political stability, where might we find such evidence in the context of recorded indigenous voices? In

160 . There have been few recent cases where judges have held that the actions of non-tribal-members on tribal lands rose to the level of harm sufficient to allow the tribe to enforce its laws on the non-member. *DolgenCorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided court*, *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (holding that the tribe had jurisdiction over a non-member corporation where a tribal member was allegedly molested by an employee of the corporation); *Attorney’s Process & Investigation Serv. V. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010) (holding that a tribe had jurisdiction over a non-member contractor who stormed and raided the tribe’s government offices); *Elliott v. White Mountain Apache Tribal court*, 566 F. 3d 842, 850 (9th Cir. 2009) (holding that a tribal court had jurisdiction in a case to enforce its regulations on a nonmember who allegedly trespassed on tribal lands and set fire to millions of acres of forest notwithstanding the Supreme Court’s determination in *Hicks*, because the tribe could both control entry onto its lands and because “the regulations at issue [were] intended to secure the tribe’s political and economic well-being.”)

the next chapter, I examine the impact of unauthorized uses of recorded Hopi voices. As part of this exploration, I examine the harms that may arise from selling and publishing these voices without permission, converting them into property and holding them in settler archives.

Chapter 4:

Indigenous Voices as Embodied Memory

Introduction

Nearing the end of one of my first fieldwork experiences out home, I was able to locate two of the descendants of one of the performers on the recordings Laura Boulton made of Hopi performers at the *A Century of Progress Exposition* in 1933. I traveled to one of their homes in Tuba City, Arizona to learn more about the performer and the songs he sang on the recordings, and to find out how his descendants thought the recordings might be used going forward.¹⁶¹ As I played the tracks, the men immediately recognized the voice as that of their grandfather and great uncle, respectively, and confirmed that the song was one he regularly performed. One of the men pulled out a leather suit with fringe from an old trunk, and showed me pictures of the performer wearing a war bonnet. As they explained, he was a traveling musician at the turn of the Twentieth Century, sailing to remote parts of the world to perform his songs and the songs of other tribes.

After listening to five or six songs, most of them social dance and *katsina* songs, the conversation went in a direction I hadn't anticipated. I had been asking the men if it would be appropriate to use these songs for educational purposes to help people learn about Hopi culture. Knowing that my family came from his same village, and sensing my own limited knowledge of Hopi culture, one of the men responded,

If you come out [here], you'll get to recognize which *katsinas* are that these songs belong to . . . You just have to spend a lot of time out here. You need to do that because it's your culture. That's what we tell you

¹⁶¹ This is an expanded and re-transcribed account of my initial interview described in Trevor Reed, *Reclaiming Hopi Voices: Toward a Model for Community-Partnered Repatriation of Archived Traditional Music*. MA Thesis (Teachers College, Columbia University 2010).

guys all the time: “Come out.” Because you’re the ones that will carry it along. We’re just going to teach you guys and show you guys and everything else. If you lose it, what are you guys going to do? You can’t do anything because its lost. That’s why I’m telling you, come out here once and a while, and do things out there.”

I told him that I had begun to listen to the songs while I traveled to and from the University on the New York City subway, and I was really starting to enjoy the songs. I somewhat tentatively agreed that I would start coming out home more often, but he clearly sensed the conflict I was having between living a *pahaana* or settler lifestyle and a Hopi one.

I want you guys to come home and learn your tradition. You’ve recorded this thing, you’ve listened. Now I want you to understand, what is that song telling you? . . . [As you listen] you’ll have a broad picture. You can probably even see—when they are singing you probably can see yourself walking among the plants, singing. Because with our tradition, you go over there and you talk to them and you sing among the plants and that’s what they grow with. They know. I do that, and I still do that . . . It’s like that throughout the whole images. Everything is tied into it. . . . Listen to it good, and try to sing along with it. You’d be surprised, one of these days you’ll pick it up. It’ll come to you. If you play this over and over, it will get into your head. Your feet will just go right along with it, when it has that pause. That’s what I would do.

In this chapter, I want to explore the way Hopi *taatawi* are circulated and preserved within bodies and collectives, and the harms that arise when they become disembodied, abstracted, severed from their relations, or transformed in to objects of property. As this performer’s descendants expressed, *taatawi* reside not in disks, tape, or CDs but *in* people who are present on Hopi lands. *Taatawi* are remembered and transferred through collective performances that follow established protocols deeply tied to village, clan, ceremonial and gendered modes of relation. These relations ensure that members of each community are cared for, both spiritually and physically, which includes preservation of ancestral voices and the production of new, generative *taatawi*. The preservation of *taatawi* in collectively embodied memory preserves not

only the formal elements of a song—*lavayi* (speech) and melody (*tawvö*)—it also seems to preserve the networks of actors that animate each song.

In contrast, when *taatawi* are preserved in disembodied forms and circulated outside of existing protocols, there is significant potential for harm to individuals, to the Hopi creative economy, and ultimately to Hopi sovereignty. As I hope to show in the sections that follow, some *taatawi* are harmful by nature if used improperly, and converting them into recorded media may put those who have not been appropriately prepared through practices of initiation or *wiimi* in danger as they come into contact with them. Second, converting *taatawi* into forms of property may sever Hopi relations to our voices and those of our ancestors, replacing them with forms of relations derived from Enlightenment thinking, which may be detrimental to the way Hopi creativity has historically functioned. Finally, preserving disembodied indigenous voices within the archival apparatus of the settler state, while potentially making them available for future generations of indigenous people, may also subject these voices to “anonymous care” and servitude to support the settler state, further eroding indigenous sovereignty. These harms provide the backdrop for three proposals I explore in Chapter 6 for indigenizing intellectual property going forward.

Circulating *Taatawi*

Over the course of my work to return our ancestors voices back to the Hopi people, I have come to the conclusion that *taatawi* are meant to circulate within relationships. This is because *taatawi* are not simply aesthetic objects, which have the same function as objects of a similar form (e.g., music, literature, dance, etc.). Rather, as discussed in Chapter 2, each *tawi* contains embodied connections between individuals, families, clans, land, and territory.

As I described in Chapter 1, when a *yeewa* composes a song, he or she does so by cultivating a close, sonic relationship with the plants in his or her field—plants whose own genetic material has traveled a parallel lineage to the *yeewa* or his or her children.¹⁶² The *yeewa* and the plants collaboratively make aesthetic choices that produce each *tawi*. Then, when a song is nearing completion, the *yeewa* often shares the song with a close member of his or her family, a father figure by clan (“dad”), or a ceremonial mentor (“godfather”), any of whom may offer guidance or suggest changes. The next people to hear and refine the song are other men in the *kiva*, who typically include people from one’s own clan, a closely related clan, or other neighbors who affiliate with the *kiva* and share responsibilities for its maintenance and the ceremonies that happen there (*see* Parsons 1939:9-10). In the weeks prior to ceremonial performances, these men will rehearse the songs, working them into the memories of everyone present. In the case of social dances, ceremonial dancers will then rehearse with the singers, working the words, the melodic content, the form, and other aspects of the song into their bodies and kinesthetic memory. When the ceremony is carried out for the members of the village, songs are often performed in repetition, so that members of the village who are present can listen and work the songs into their memory. Throughout their creation and circulation, *taatawi* always seem to exist within bodies—bodies connected through closely held networks of responsibility and obligation.

Based on my experiences out home, it seems that the working of songs and sound into interconnected bodies accomplishes two important things: first, collective embodiment of

162. There are a number of ways a Hopi farmer receives seeds, but when most people I talked to discussed how people get seeds for planting they would describe it in one of two ways. First, prior to marriage, the farmer may receive seeds from his or her mother or maternal relatives who own the tangible material of the clan. The farmer may also plant fields for his or her paternal relations, especially those who provided the farmer with a name. After marriage, the husband may receive seeds from his wife and her relations who own fields. At the end of the harvest, the corn or other *natwani* is given back to the mother or the wife, and carefully stored for the next year’s planting. There are also times when seeds are shared (for example, seed runs where ritual runners are given a handful of seeds in repayment for their labor), but in general the seeds a *yeewa* plants will often have traveled a similar genealogical path as his or her own. In fact, many farmers refer to their plants as children.

taatawi preserves them over time *along with* their connections to the networks which animate them. Second, embodied circulation of *taatawi* prevents the songs from becoming static sonic objects. This is because embodied circulation requires the presence of those who know the songs each time they are performed or shared with another person. Presence is a vital part of the circulation of *taatawi* and other forms of Hopi knowledge.

Embodied Circulation as Preservation

Anthony Seeger, in his 1996 article on the ethics of sound archives in a decolonizing world, points out the relative frailty of recorded sound. Individual humans can remember sound (at best) only about 90 years, while the prognosis for most other modes of preserving sound is much worse. Physical recording media, on average, has a shelf-life of about 15 years. Even the most stable media—magnetic tape—has a life expectancy of only about 50 years. One can increase the lifespan of sound by notating it onto more permanent media, but the reproduction of sound from notation also requires someone or something that can make the appropriate transformations from the recording context into what is likely a substantially different performance and listening environment. Experience with digital media, for example, has shown that it requires conversion into newer formats at short, regular intervals, as compression technologies, bandwidth, and social expectations around the quality of sound change.¹⁶³ Technologies that reproduce sound, or that transform notation into sound are also limited in that they do not necessarily produce the networks from which the sounds originated.

The embodiment of song, not only by individuals, but by entire networks, has allowed Hopi *taatawi* to be preserved for long periods of time and with many of these songs' networks of relations still intact. This became clear to me one summer while I sat eating a bowl of my

163. See JONATHAN STERNE, *MP3: THE MEANING OF A FORMAT* (2012)

favorite Hopi food—*nöqwivi*—in our clan’s house on the Hotevilla village plaza. From our dining room table, I regularly hear *taatawi* being sung just outside our door as a *tiikive* takes place in the village plaza. On some nights, I can also hear the voices of the singers in the three *kivas* that are out our front door. During a *povoltiikive* (butterfly dance), I recall being completely taken aback as the singers entered the plaza. To my surprise, I heard the sounds I had so often heard while in New York listening to the voices of David Monongye, Thomas Bahnaqya and Dan Qötshongva on one of the recordings they made with Laura Boulton in 1940. But this time I was hearing their *taatawi* in fully fleshed-out form:

Buenos Tardas [sic] Amigo
Buenos Tardas [sic] Amoqüe,
Yan [haqam?] Kastilam inumi lavaytiq’e, oovi pas nu halayi.

Good Afternoon, My Friend [in Spanish]
Good Afternoon, Hopi person [in Spanish]
This is how the Spanish speak to me, because I’m so happy.

There are a number of remarkable things about this song, but the one I want to emphasize here has to do with the length and scope of its preservation. Beyond the three copies of this song held by Columbia University, Indiana University, and the Library of Congress, to my knowledge, the only other source for this song is the memories of Hotevilla village members, who, having performed it last in the 1940s, have remembered it until it was again performed in the plaza in 2010. While I wasn’t able to record the most recent rendition by the butterfly dancers in the plaza, my recollection of the version of the song sung in the plaza was that it was practically identical to what Monongye, Bahnaqya and Qötshongva sang for Boulton 70 years earlier. Perhaps even more impressive is that, as one elder told me, the song actually contained words appropriated from the Spanish missionaries, dating back to when they occupied Hopi lands from 1628 - 1680.

Admittedly, the sound recording does little justice to this *tawi*. In Boulton's rendering of the song, we are limited to a brief clip. We hear the singers performing the *kuyngwa* (introduction with stylized tag), the *atkyaqw* ("lower" part), and to *oomi* ("upward" part), and some occasional shouts from others imitating typical sounds from the plaza. But, we get only a truncated, four-minute version of what would likely be a 10-15 minute song. We get a general feel for the contour of the song, but we miss the texture and thickness of 30-40 voices singing in harmony (*suukye*). We hear the drum faintly in the background of Boulton's recordings but miss its pitch and massive presence in the plaza and in the kiva. We miss the sounds of the instruments the dancers wear on their bodies, and the noise of the audience. We can't see the bodies of the dancers as they carefully time their movements just behind the pulsing drum—and its sudden pauses. We miss the hot, dry wind with the occasional shade of clouds as they pass over head; we miss the smell of *nöqwivi* cooking on the stove. We miss the fact that, though there are male voices on the recording, this dance typically involves teenage couples, one male and one female, dancing together. We miss the intricately cut and painted *kopatsotskit* (tablita headdress) the women wear, which were given by each male dancer to his female companion; we miss the payback the dancer makes via his family to his partner's family over the course of the dance, as baskets of food weave in and out of the line of dancers in the plaza. As I was often told, remembering *taatawi* involves not only remembering words and melody; it often means remembering the movements of bodies in time and space, the relationships that are animated in its performance, the histories embedded in the *lavayi*, and the places—things that always seem to disappear from a sound recording over time. It is not surprising, then, that the ability to remember *taatawi* is highly valued in Hopi society.

I fully admit that the picture I paint of embodied memory is the ideal rather than everyone's reality. I myself struggle to learn and remember *taatawi*, because I didn't grow up with *hopilavayi* as my primary language, and because I am not always present at Hopi. I rely on recordings to help me recall events and songs, as do many others. One night I was invited to go into the kiva for a rehearsal, and I took out my sound recorder inconspicuously, hoping not to bring attention to the fact that I was recording the songs. (A friend of mine had told me it was okay because we were only rehearsing social dance songs, but I was still nervous.) Much to my surprise, as I looked around at the other 20-30 men, there was a sea of small LED lights. I wasn't the only one recording. In fact, as I came to realize, many Hopi men make recordings of rehearsals and then play these back in the evenings or in the car on their way to work as a way to keep these songs present in their mind during the day as they attempt to memorize them. These recordings also allow others to experience the songs out of time, usually privately, in ways they might not be able to unless they lived in the village and could hear the singers rehearse night after night. Since 2000, KUYI Hopi Radio has also become a repository for *taatawi*, making space for people to record the songs they remember, and then regularly broadcasting those songs, when appropriate, over the airwaves. As Stewart Koyiympewa has pointed out, memory in Hopi society seems to be changing (Colwell & Koyiympewa 2011:68). It seems like memory is gradually becoming externalized from the body. This may be one reason why elders like the performer's grandson from the beginning of this chapter express anxiety over the displacement of *taatawi*, *lavayi*, and ritual performances from the body and of the social shift from embodied networks to disembodied forms.

The Importance of Presence

The second benefit to the embodied circulation of *taatawi* is that, because songs are preserved in people, Hopi songs need not be conceptualized as discrete objects attached to a single moment in time and space or to a single authorial point of view. Rather, in the collaborative process of creating *taatawi*, each *tawi* eventually comes to resonate with multiple points of view as the *lavayi* and *tawvö* are reworked by those who remember and perform them. During one rehearsal prior to a butterfly dance in the Summer of 2012, I had the chance to see this kind of collaborative authorship at work. In the dim light in the center of the kiva, the drummer and the sponsor of the dance—two older men—were quietly singing from their own memory, accompanied by the soft, yet penetrating kiva drum. Every once and a while, the drummer would stop while the men worked out the melodic contour of the song collectively, each listening carefully for one another until the right sound emerged. There was no need to go back to an objective source for reference, the song existed as a combination of the kiva members memories and voices. What was necessary was consensus at a particular moment in time—collective understanding that the meanings produced by the song would resonate with those for whom the songs would be sung.

As I mentioned, singers have begun to rely on sound recording to aid their memory. As economic demands continue to drive people's daily routines, many Hopi people are forced to live away from Hopi lands and must commute back home to the Hopi reservation on the weekends to participate in rehearsals and to take care of their obligations to others and to the land. For those who must make the 92 mile trip from Flagstaff, or the 250 mile trip from Phoenix, recordings made during a rehearsal can give participants a feeling of presence at a particular time or within a place during the long hours of travel back and forth from the reservation to the city or during the work day.

The move away from embodied presence isn't always comfortable, though. For example, I remember seeing the men of a kiva get a bit frustrated when one of the composers failed to show up to the rehearsal to share his *taatawi* with the group. In lieu of his presence, he had sent a recording of his songs to them. The drummer and the sponsor of the dance were trying to match their voices to the recording, but it was clear that something was being lost in the process. The dynamic process of refining the song, repetition after repetition, night after night; the slight change in words, teaching about the meaning of the *tawi* by those holding *navoti*; these seemed to be missing. I recall hearing someone suggest not using the song if the composer wasn't able to attend.

Taatawi circulate through bodies and relations, and in doing so allow for the preservation not only of words and melodies, but of connections to people and to territories. Circulating *taatawi* requires presence. While recorded *taatawi* can help one feel present when they are distant from Hopi land and relations, recordings of indigenous voices cannot fully substitute for the presence of indigenous peoples and our modes of relation.

The Toxicity of Colonized Memory

While Hopis have begun regularly recording their own *taatawi* only in the last few decades, the systematic documentation of Hopi culture by European settlers has been going on almost since the beginning of audio recording. These settlers generated a massive amount of collected specimens, documents, photographs, field recordings, and scholarly writings that occupy significant amounts of space on museums', libraries' and archives' shelves around the world.¹⁶⁴ As discussed in Chapter 3, in the mid-1990s, after the passage of the Native American

164. In 1977, David Laird produced a 3,500-entry bibliography of scholarly writings on Hopi alone. The number of Hopi ritual artifacts, human remains, photographs, and other cultural items is impossible to calculate given that they exist in both public and private collections around the world. Hopi sound recording collections are numerous, including scholarly recordings made by Jesse Walter Fewkes, Natalie Curtis Burlin, Samuel Barrett, Helen Roberts,

Graves Protection and Repatriation Act (NAGPRA), the Hopi Tribe developed a strategy to reclaim these materials from the institutions that continued to hold them without the Tribe's permission. It began by passing its own laws demanding the return of Hopi remains, artifacts and recordings of "esoteric knowledge," deeming them to be the "cultural property of the Hopi people."¹⁶⁵ (Brown 2003:14; Leigh Kuwanwisiwma, interview with the author, 2009). As several government workers explained to me, soon thereafter, much to their surprise, package after package arrived at the Tribal Office complex filling their cubicles to overflowing with items ranging from human remains to photographs to compact discs.

On one occasion, the Tribe received some particularly important ritual objects that ceremonial leaders from one of the Hopi villages were eager to use in an upcoming dance. It seemed like the Tribe was finally receiving the restitution it deserved after centuries of taking; that holding institutions were now providing opportunities to revitalize aspects of Hopi culture that had been absent for many years, rather than being complicit in extinguishing it. But soon after the ceremonial performers began using the repatriated items, they became sick, with rashes and sores appearing where the items had come in contact with their bodies. Medical professionals soon discovered, much to everyone's horror, that the items had been preserved with arsenic.¹⁶⁶ Arsenic, while effectively preserving the life of the ritual items as museum objects, had poisoned the very people for whom the objects had been created.

Earnest and Pearl Beaglehole, Willard Rhodes, Robert Black, George List, and Robert Rhodes. Recordings made by tourists, missionaries, and Hopis or other indigenous peoples are also numerous.

165. Hopi Tribe Resolution H-70-94 (1994).

166. Arsenic was apparently a common substance used in preserving specimens gathered during expeditions, particularly those processed into "natural history" collections. See Lisa Goldberg, *A History of Pest Control Measures in the Anthropology Collections, National Museum of Natural History, Smithsonian Institution*. 35 J. Am. Institute for Conservation 23, 29-30 (1996). Some objects in the Smithsonian collection are actually labeled "Poisoned" and provide a date.

Why tell a story about toxic artifacts in a discussion about recorded ceremonial songs? At first glance, the risks of reusing preserved ritual artifacts seem completely distinct from problems associated with recorded sound. One might argue that sound is merely air vibrations which can't poison anyone, or that using a sound recording for one purpose can't affect the experience of it for another person. And yet, as I will argue here, there may be real harms involved in uncritically recirculating and reincorporating preserved indigenous voices into a community's social fabric. As hybrids of settler modes of preservation and indigenous generative power, recorded indigenous voices, in some contexts, may take on a heightened degree of toxicity.

As Mel Chen (2011) explains, toxicity operates as both a powerful metaphor and as a physically or viscerally experienced condition. Toxicity can become a metaphor for an attribute which is feared, which can pollute, or which invades; in Chen's reading of childrens' lead poisoning from toy train cars made in China, toxicity takes on a dimension of otherness in relation to the white, the heteronormative, and the firm-minded. But for Chen, who suffers from a toxin sensitivity disorder, toxicity also describes a state of living with contamination (intoxicated) or of being stuck with the consequences of failed investments (toxic assets). In theorizing the intersection between metaphorical toxicity and toxicity as experience, Chen reminds us that toxins are easily assigned to containers, to boundaries, and to racialized or gendered stereotypes, rather than being understood as actually animating relationships by being "conditions with effects, bringing their own affects and animacies to bear on lives and nonlives" (282). In viewing the toxicity of preserved Hopi voices, I too, like Chen, seek to examine both the metaphorical toxicity of Hopi recordings—fears surrounding their capacity to invade and contaminate bodies and collectives—as well as the experienced condition of living with recorded and preserved voices which, while critically emptied of the "scholarly value" once imagined by

their collectors, are something of a toxic asset being rapidly sifted back onto indigenous communities.¹⁶⁷

The preservation of Hopi *taatawi* outside their networks of relations has the potential to make them toxic in at least three ways: (1) it makes dangerous songs more readily available for circulation, (2) it disrupts Hopi modes of song circulation, converting songs into intellectual property primed for the global information economy, and (3) it transforms Hopi voices into archival objects of the settler-state, subject to its anonymous care rather than the care of indigenous communities.

Harms from Songs that are *Utih'i*

The conversion of some Hopi songs into easily circulating media formats increases the chance that someone will be harmed by them. Of course not all *taatawi* have the potential to harm; Hopi protocols exist to prevent people from misusing songs that are more than “music” or “art.” These songs may contain forms of knowledge or practices that are restricted or otherwise safeguarded so that they circulate only through specific kinds of embodied relations. Failure to recognize the ontological differences between songs that contain knowledge or practice that are restricted and those that do not may expose the hearer to adverse consequences.

Taatawi can contain several different kinds of knowledge. Some of that knowledge might be considered *tuwi*: practical knowledge or social norms. Some songs, for example, teach valuable information about weather patterns, planting, locations of ancestral or ceremonial sites,

167. In his paper *The Archive of the Archive*, Aaron Fox (*in press*) shows how Laura Boulton’s collection of 30,000 indigenous and “traditional” songs from around the world currently housed at Columbia University is quite literally a toxic asset as currently separated from indigenous communities. Used in a transaction between Columbia and an wealthy octogenarian infatuated with Boulton to buy her affection, the disorganized and deeply problematic collection of “hunted” indigenous voices was touted by the University as a prized work of scholarship and a pillar of the Columbia music department, despite everyone’s knowledge that its existence was merely a front for a multimillion dollar donation. The collection is, in Fox’s assessment, entirely useless and worthless absent the indigenous communities from whom the recordings originated.

etc. Other songs contain elements of social practices that are specific to village or Hopi culture. For example, one song contained in the Laura Boulton recordings was described to me as a *suspaltawi* or a “begging song” that hadn’t been sung in decades. As I came to learn, teenage boys and girls used to sing these *suspaltaatawi* in late August as they would go around from house to house, snaking through the village, looking for an open door or window where they could call out to the person inside asking them to share something tasty to eat—usually *piiki* (a roll of the paper-thin Hopi cornbread) if the ones calling were boys, or melons and fresh corn if girls were the ones asking. When I played these songs, most people would usually smile quietly to themselves, thinking about the song and the kind of happiness (*haalayi*) that comes from knowing how to do traditional things and having fun while doing them.

Interestingly, songs that overtly contain *tuwi* often implicitly carry more profound concepts and knowledge that only those who are initiated have the right or ability to know. For example, when I played Boulton’s recording of the *suspaltawi* I just described for Wilton Kooyahoema, an elder from Hotevilla, he first spoke to me about how the songs worked for the youth, but he then went on to explain their connection to other bodies of knowledge:

WK: . . . it means a lot of things too that, it’s that it happened way, way back down there somewhere where the starvation came up.

TR: Hmm.

WK: So that’s what this is representing is starvation so they could gather some stuff for the elders and stuff like that. . . .

WK: . . . It’s part of the religious belief too this uh, Wuwtsim [Men’s ritual society] and the Maraw [Women’s ritual society] they go do the same thing as the kids do . . . so it’s kind of like this but then its, the songs are a little different. . . .

...I know some of the Maraw songs and some of these that are Wuwtsim songs that they sing. But I’m not gonna record ‘em. (Everyone laughs)

Most Hopis know that there are some songs that belong to ceremonial societies, like the *Maraw* or women's society, and the *Wuwtsim* or men's society, that simply should never be recorded, even if some of them are heard in public. A few years ago during a *Nimankatsintiikive* (home dance), I saw one of our village priests looking up at the second-story of a house overlooking the plaza. In a matter of minutes, the activity in the plaza subsided and all eyes turned as the priest demanded a camera from a young woman who had apparently been recording the ceremony using a small, and probably very expensive device. Initially, the young woman pretended like she hadn't understood. But those in the house encouraged her to do what the priest said. She handed the device down, the priest inspected it and took it with him, and the ceremony continued.¹⁶⁸ Contrast this with another recent ceremony, a *povoltiikive* (butterfly dance) I recently attended at the Village of Kykotsmovi. Cameras were plainly visible from the rooftops and chairs in the plaza as people were recording the dance. iPhone videos of *povoltiikive* and other dances make up a significant body of Hopi recordings currently available on YouTube, which sometimes have extensive discussions in the comments about whether or not these kinds of events should be publicly circulated through social media.¹⁶⁹

168 Compare similar experiences recounted by John Loftin, *Religion and Hopi Life* (2003) and by Hopi youth in Ritva Ievo-Henriksson, *Media and Ethnic Identity: Hopi Views on Media, Identity, and Communication* 85-85 (2007).

169 See, e.g., Comment by Todd Troxell, *Bacavi's Butterfly Dance I*, YouTube (Sept. 16, 2011), <https://www.youtube.com/watch?v=ndG7yByhRlk> ("Our elders have told us to not record these dances in the villages. We should respect this request. When I go home to the dances, I take my children and they learn what it means to be Hopi by being there. I can't imagine being Hopi and disobeying my elders. Please remove."); Comments by John Doe and Bobbi Seechoma, *Hopi Buffalos 2015 @ Shungopavi*, YouTube (Jan. 24, 2015), <https://www.youtube.com/watch?v=cDDcTNIPkOM> (JD: "Why is this dance allowed to be filmed but the katsina dances are not allowed to be filmed? . . ." BS: "I'm full blooded Hopi and this is my village. Kachina dances are not allowed to be filmed and people are not allowed to take pictures because they are sacred to us. They are our spirits and they take care of us. It's disrespectful to do such actions are [sic] recording videos and taking pictures.")

Why do people react so differently to recordings of *nimankatsintaatawi* and *povoltaatawi*? Most people gloss the distinction as being between ceremonial performances that are “sacred” and those that are “social.” But what does this mean?

When people use the terms “sacred” and “social,” it seems like what they are describing is the extent to which the knowledge or practices being expressed or performed can circulate. *Tuwi* can essentially be known by anyone who wants to put forth effort to learn it. Whenever I ask for information about farming or orchard keeping, or where to get the right clay to repair our clan house, people have always been generous with me. But knowledge about the performance of rituals and their meanings is understood to be *meewanpi*,¹⁷⁰ or restricted to those who are initiated into the particular ceremonial order involved or who receive a leadership role or have other obligations to possess that knowledge in the village. Those who receive *meewanpi* often do so in combination with *wiimi*—restricted ceremonial practices or initiations. Initiation is an embodied mode of learning that is meant to cause a fundamental transformation in people;¹⁷¹ many of my family, friends and colleagues have spent years contemplating their decision to receive this knowledge because of the heavy responsibilities (*tsöptangwu*) that come with holding and using this knowledge.

While I wasn’t able to ask the priest why he chose to disrupt the filming of the *nimankatsinam* during the *nimankatsintiikive* I just described, my sense is that his purpose was to

170. The definition of *meewanpi* provided by the Hopi Dictionary is “restricted knowledge” or something that shouldn’t be divulged. See Hopi Dictionary Project, HOPI DICTIONARY/HOPIKWA LAVAYTUTUVENI: A HOPI-ENGLISH DICTIONARY OF THE THIRD MESA DIALECT (1997).

171. An exploration of initiation by me would be inappropriate, though other scholars have made the decision to do so. What is important is that initiation transforms people through embodied action that can’t be done solely in the abstract or without being present. See John Loftin, Religion and Hopi Life 58 (2003) (“The practical expression of Hopi ceremonies embodies fundamental religious significance since the Hopi experience the sacred through the concrete forms and rhythms of their world. The concrete practicality of their world manifests itself as sacred, for it is the sacred that creates and sustains the world’s life and forms.”) See generally, Victor Turner’s discussion of liminality in ritual performance in From Ritual to Theatre (1983).

teach all of us, including the young woman, to show respect to those who hold *meewanpi* and to prevent those who are not initiated from having the ability to possess and facilely distribute that knowledge. On the other hand, many people say that ceremonies like the *povoltiikive* are fair game for recording because they are just “social dances” that are more “cultural” than “sacred.” Not everyone agrees, as even with “social dances,” *meewanpi* lies very close to the surface.

Those who hold *meewanpi* are often respected for the personal sacrifices they are required to make to obtain and hold this knowledge, but they may also be subject to greater scrutiny.¹⁷² As Peter Whiteley (1998:3) has written, “[r]itual knowledge serves as the scheme of value, the ‘currency,’ perhaps, of power.”¹⁷³ By keeping their knowledge secret, ritual specialists can distinguish themselves from those without ritual knowledge.¹⁷⁴ In my experience, though, I have found that most people who hold *meewanpi* don’t tout it or use it as a means of self-aggrandizement. More often I have seen these knowledge holders actively use that knowledge to benefit others, which in some cases requires being protective and assertive when this knowledge is used without permission or implicated in the conversations or actions of those who do not hold it.

Because holding *meewanpi* requires the transformation of bodies before it can be internalized and received, the ingestion and incorporation of *meewanpi* into the body without the necessary *wiimi* may cause serious problems, both physical and social. In a recent Hopi Food and Agriculture Symposium session on the use of *taatawi* in Hopi farming practices, Hopi elder

172. As Hotevilla elder Wilton Kooyahoema once explained to me, what was often the most difficult part of being a village leader holding a significant amount of ritual knowledge was the criticism village members of made of his decisions.

173. Peter Whiteley, RETHINKING HOPI ETHNOGRAPHY 93 (1998).

174. *Id.* at 92.

Leonard Talaswaima from the Second Mesa village of lower Sipaulovi explained the risks of using *taatawi* containing *meewanpi* outside of their ritual context:

“Some of the songs that people sometimes sing without knowledge of the sacredness of the songs may run into difficulties in their lives, so we have to be very respectful about it, and advisable that we listen very carefully. . . . We refer to these songs as being *utihi’i*—they should be handled with care; only people that should handle them need to handle them. They have a *wuvaapi*—a whip. Anything that may happen to you is part of that. Even though they [authorized people] sing them in public, you shouldn’t sing it. Your stomach will swell up.”

As Talaswaima explains, just as acquiring *meewanpi* requires the transformation of the body, using restricted knowledge without having undergone such a transformation can have corporeal affects. He uses the metaphor of the whip with the Hopi audience to explain the cause-and-effect relationship of knowingly violating Hopi protocols surrounding *meewanpi*. Certain *katsinam* who visit the Hopi villages are known to carry a whip (made of yucca), one purpose of which is to correct intentionally wrong behaviors. Similarly, using or disclosing songs that are *utihi’i* may also bring about discomfort and pain in someone’s life.

Hopis are not alone in making causal connections between embodying ritual songs without the appropriate authority and personal sickness. Toelken (1998), for example, who made numerous recordings with late Navajo storyteller Yellowman, described just how dangerous certain kinds of Navajo cultural expressions can be when used outside of their ceremonial context. When Toelken approached Yellowman’s widow about potentially giving the tapes containing Yellowman’s words to a repository for safekeeping, she expressed substantial fear: “[W]hat if someone hears the stories at the wrong time of the year, or what if someone says some of those words out loud in the wrong situation. They could be injured. You better send them to me. I will destroy them” (385). Toelken did eventually send the tapes.

In addition to the physical dangers associated with embodying and performing songs that are *utihi'i*, there may be social harms that may befall those who come in contact with these materials without the proper authority. In some cases, contact with a ritual society member while they are conducting ritual labor requires one to join that ritual society,¹⁷⁵ or requires the intervention of clan relatives to make a substantial offering to the society to repay them. As I've been warned, people could be required to join the clown society when they laugh at or pointed fingers at the way ritual clowns are dressed.

In addition to containing knowledge that is considered *meewanpi* or *utihi'i*, Hopi *taatawi* also often contain *navoti*--another category of knowledge that is accumulated over time and passed to others. As Justin Richland explains, many anthropologists believe *navoti* originated with each of the individual clans that make up a Hopi village, carried with them through time and space, and that this knowledge is closely held by its owners as a source of political power in relation to other clans (Richland 2009:98).¹⁷⁶ The word contains the same root as the word *navota*, which means to notice or be aware of through the senses.¹⁷⁷ Acquiring *navoti* requires actively listening to those who are willing to share things like historical knowledge, prophecies of the future, and their understanding of the way the world works.¹⁷⁸ Some *navoti* is shared only within a family line or within a clan to preserve or perpetuate it. Other times, it is shared when

175. As Parsons (1969) notes, at Hopi, contact with individuals who are performing their ceremonial duties can subject the individual to certain obligations to society. "Any Hopi falling in with Snake society men on their snake hunt must join the society" (1969: 1:112-113, fn *).

176. Justin Richland, *Hopi Sovereignty as Epistemological Limit*, 24 *Wicazo Sa Rev.* 89, 98 (2009).

177. HOPI DICTIONARY, at 309 (defining *navota* as "notice (by means of any of the senses), perceive, be aware of").

178 As Stewart Koyiyumptewa explains it, *navoti* is a kind of knowledge that is "passed down from generation to generation," which can include things like "farming techniques," "cooking and traditional food gathering," as well as "ceremonial knowledge." *Chip Colwell and Stewart Koyiyumptewa*, *Translating Time: A Dialogue on Hopi Experiences of the Past* *In BORN IN THE BLOOD: ON NATIVE AMERICAN TRANSLATION* 71 (2011). As Koyiyumptewa explains, what sets *navoti* apart from other kinds of knowledge is the way it is conveyed—within relationships—and how it is produced as it is conveyed—through "tracing the past." *Id.*

someone shows responsibility and a willingness to offer something in reciprocity: whenever I visited someone seeking an answer to a difficult question about Hopi life, I was told that I should always bring traditional foods for the knowledge holder. *Navoti* is often remarkable in its scope and depth, and tends to be closely tied to places and genealogies. *Navoti* may also be *meewanpi*, because the knowledge conveyed can only be transferred along with the corresponding *wiimi*.¹⁷⁹

As I described in Chapter 1, *taatawi* contain both human language (*lavayi*) and melodic material (*tawvö*). Both *lavayi* and *tawvö* can express practical knowledge or *tuwi*, restricted knowledge or *meewanpi*, or accumulated experience or *navoti*. *Taatawi* are not simply generic aesthetic objects—they exist within networks of living, agentic entities with diverse points of view. For example, I recently heard a song performed in public that briefly contained the melodic contour of a kind of song that I knew was *meewanpi*. The careful weaving of portions of that restricted song into the *tawvö* being sung made it all the more powerful for those who heard it and recognized it. While *meewanpi* may be harmful to those who use it or consume it without the necessary *wiimi*, it can also be shared skillfully to the uninitiated by embedding it subtly in other kinds of *taatawi*. In this way, the potential for harm is lessened as the restricted knowledge is mediated by those who are responsible for safeguarding it.

Harms from Converting Songs into Property

Second, preservation of indigenous voices outside of the body and outside of indigenous networks of care may allow them to be more easily claimed as someone's or some entity's

179 To further clarify the difference between *navoti* and *wiimi*, Micah Loma'omvaya and T.J. Ferguson explain, "Navoti is a historical understanding derived from experiences handed down by ancestors to their descendants. Wiimi includes sacred artifacts and the knowledge of how to use them properly in religious ceremonies and rituals. Together, navoti and wiimi provide both the means to know the past and the ability to invoke the power of the ancestors in the present through ritual offerings and ceremonies." Quoted in Lyle Balenquah, "They are Still Here: Wupatki Pueblo and the Meaning of Place" *In HISAT'SINOM: ANCIENT PEOPLES IN A LAND WITHOUT WATER*, (Christian E. Downum, ed. 2012).

“property.” Under settler copyright law, upon being transferred from the body to a physical object, a song will typically become owned, to the exclusion of all others, by an “author,” which could be the singer, the composer, the recordist, or all three.¹⁸⁰ What is the harm in recognizing Hopi songs as ownable property? In this section, I explore the tension between “property” and indigenous ownership frameworks in the context of debates among Hopi ceremonial leaders and government authorities about whose modes of ownership should apply to the Boulton recordings I described in Chapter 3. As I will argue, applying foreign ownership frameworks like copyright to songs created and circulated within indigenous modes of ownership and care pose significant challenges for indigenous groups. Siding with settler modes of ownership over indigenous ones risks potentially disrupting not only indigenous creative economies, but potentially destabilizing their political sovereignty as well. And yet, sometimes property frameworks are the only ways tribes can assert authority against the settler-state to care for their ancestors’ voices.

In December 2010, I nervously arrived at my first meeting with the Hopi Cultural Preservation Office (HPCO) and its Cultural Resources Advisory Task Team (CRATT) to begin the return of Boulton’s 121 Hopi sound recordings, which I introduced in Chapter 3. Staffed by Hopi elders, ritual society leaders, educators, cultural activists, ceremonial practitioners, and others who are particularly sensitive to the needs of the Hopi community,¹⁸¹ these two entities regularly provide guidance and direction to the Hopi Tribe, federal agencies, and researchers on issues of cultural significance to the Hopi people. At any given meeting, you might hear HCPO and CRATT learning about and giving advice on a remarkably broad range of issues, like what

180. See 17U.S.C. § 101 (defining “fixed”); see *generally* the discussion on Copyright in Chapter 4.

181. It is important to point out that the Hopi public doesn’t always agree with the positions of the HCPO or CRATT. Recent efforts have been launched to circumvent the authority of the HCPO, who currently controls whether and how research takes place on Hopi lands.

to do with newly discovered human remains on Hopi lands, how changes in water levels in the Grand Canyon could harm animals and plants, and whether objects found at archeological sites hundreds of miles away are those of our ancestors. They approach their work with respect and humor while actively defending the interests of the communities they represent.

Even though there were other critical issues affecting the Tribe in December of 2010,¹⁸² I was given an hour on the meeting agenda to present a few songs from the Boulton collection. I brought with me a sample of four songs, including the ones Boulton recorded with Qötshongva, Monongye and Bahnaqya. Given the sensitivity of the songs in the collection, and the complex questions over ownership and access these recordings presented, then HCPO Director Leigh Kuwanwisiwma had invited ceremonial leaders from across the Reservation to help us better understand how these recordings, and their associated intellectual and cultural property rights, should be returned to the Hopi people.

I came into the meeting under the naive presumption that CRATT would be able to definitively say who really owned the recordings, and what we should do with them. I was looking for a unanimous, “tradition”-based directive that would “express the sovereign will of the autochthonous Hopi sociopolitical organization” (Richland 2011:223)—an unrealistic and, as I now know, a somewhat un-Hopi request. What I actually witnessed was a contentious debate in which competing narratives of ownership and access emerged. One narrative viewed ownership of the indigenous voice as a function of political sovereignty grounded in the democratic ideals and property structures of the settler state. The other viewed ownership of these voices as an obligation toward networks of relations that create, remember, and perform

182. One key cultural issue facing the Hopi Tribe at the time was the use of reclaimed sewage water on Nuva'tukya'ovi—the San Francisco Peaks near Flagstaff Arizona—for the purpose of generating artificial snow. Nuva'tukya'ovi is the home of our *katsinam*, and pumping sewage onto this sacred place was untenable for most Hopis. For a brief history, visit <https://www.crossingworlds.org/hopis-protect-water-sacred-mountain/>

these songs. As I will explore, these narratives in many ways echo debates originally discussed in Chapter 3, and help us to better understand how colonization of indigenous ownership structures affects Hopi lives and political sovereignty in the 21st Century.

Narrating Songs as Tribal Property

Within the United States, claims to ownership are generally narrated through the legal discourses of property. This narrative typically derives from frameworks established by constitutions, statutes, judicial decisions, regulations, and other forms of law which we believe articulate our ability to control, use, and to exclude others from controlling and using, things of actual or potential value. An explicit statement of rights by the sovereign, such as a statute, provides an efficient, consistent narrative of ownership which can be used to adjudicate disputes over the control and use of things in a shared world.

The Hopi Tribe is known to be at the forefront of efforts to establish ownership interests to cultural expressions through the language of cultural property. The Tribe established a specific tribal statute in 1994 that sought to proclaim the law on who owns things like ethnographic field recordings made on Hopi lands which contain ceremonial knowledge:

NOW THEREFORE BE IT RESOLVED by the Hopi Tribal Council that it hereby reiterates its constitutional resolve to protect the cultural interests of the villages, clans, and societies on matters related to the intent of [the Native American Graves Protection and Repatriation Act] . . .

BE IT FURTHER RESOLVED by the Hopi Tribal Council that archival records, including field notes, audio tapes, video tapes, photographs, which describe and depict esoteric ritual, ceremonial and religious knowledge, be placed under restriction by museums and other repositories for public access *and hereby are declared to be the cultural property of the Hopi people.*¹⁸³

183. Hopi Tribal Resolution H-70-94 (emphasis added).

A straightforward reading of the Resolution would seem to designate materials like Boulton's Hopi recordings as "cultural property" owned and managed by the Hopi Tribe. And for some advocates of tribal sovereignty, this statement, presumably voicing the will of the Hopi people, would end any dispute over who owns recorded Hopi voices.¹⁸⁴ When I asked those present at the December 2010 meeting who should own the Boulton recordings, HCPO Director Leigh Kuwanwisiwma and a number of the elders said we should simply apply the Resolution, viewing it as authoritative on matters of cultural ownership:

LK: And that's basically one of your questions. Who [should own these]? *Noo* [right]? And we have our authorizing resolution that establishes, really a legal authority by the Council, a delegated authority to CPO on behalf of the clans, *noo* [right]? We need to work out how we're going to deal with it, too. You know. *Ason putwat itam pay hin aw naato wuuwantotani*. [We are still continuing to think about that very thing.] *Pay pi pam oovi pi pay su'anta, himu Owen pay, uh, pam resolution pay an'i itam piw ura it pas yua'aykuyat aw antoti Council epeq*, [Now actually that is because what Owen (one of the the elders attending), said is very similar to that resolution, the very same way we also, you recall, made a similar statement there to Council about doing it this way,] and Council unanimously approved that resolution. . . .

Niikyangw pay imuy ngamuy pu' imuy wiiwimkyamuy angq pay qatuvosti i' pas aapi pay Council aw ökiwtani. [But for our clans, our religious society members, that will be difficult to be present in groups before the Tribal Council.] . . .

So that was a compromise there. *Noq oovi* [So], that's a pretty serious responsibility that all of us have. *Me' uma piw, CRATT hooyam pu' itam pi uma pi it itamumi it aw hintsatskya*. [Look everyone, CRATT team, there is a lot for us to get done.] So that resolution is an important resolution. *Noq oovi* [So] Jerry is right, there is a delegated authority vested in CPO and our CRATT team here, but how to work out, *noo* [right], and protect it. That's all of our job here yet to do.

As Kuwanwisiwma points out, the Hopi Tribe has every right, under its Constitution and Bylaws, "[t]o protect the arts, crafts, traditions, and ceremonies of the Hopi Indians."¹⁸⁵ As one

184. See First Archivists Circle; See also Trevor Reed, *Decolonizing Ownership: The Hopi Music Repatriation Project* in *The Oxford Handbook of Musical Repatriation* (in press) (referencing an interview with a prominent university archivist who claimed that the tribal government was equivalent to the sovereign, and dealing with tribal politics was not "terribly bright")

185. Constitution and Bylaws of the Hopi Tribe art VI, § 1(k).

elder went on to say, by passing the resolution “[t]he Council was just exercising their authority given to the Council by the people.” But Kuwanwisiwma also seems to concede that recognizing the Tribe as *the* owner of cultural expressions on behalf of Hopi villages, clans, ceremonial societies, and others, may not satisfactorily resolve the question of who should control recorded Hopi ancestral voices singing ceremonial songs.

There were also others who believed the Resolution should be followed, but not necessarily because of its statutory form, its constitutionality, or its democratic method of adoption. For them, the resolution seemed to make sense for practical reasons—it designates an ultimate authority to resolve difficult disputes over ownership of and access to objects that are ontologically and politically complex, without making ownership a zero-sum game. At one point during the meeting, for example, two village leaders began to debate who would own some highly sensitive *tsu’tiikive* (snake dance) songs Boulton recorded, given that her incomplete field notes designated the songs as belonging to both of their villages. (To exacerbate matters, *tsu’taatawi* [snake songs] are often considered *meewanpi*, and are typically safeguarded so as to prevent appropriation and misuse by those who are not initiated into each village’s *tsu* society—including members of other villages). After going back and forth, one of the elders conceded, “So, yeah, you can give it to the villages; but I think a central location [i.e., the Tribe] should be where it’s at.” The debate reinforced why, from a pragmatic standpoint, treating these ceremonial song recordings as tribal property (rather than owned by particular villages, clans, ritual societies, etc.) and vesting ultimately authority to control them in the Hopi Tribe, may be the best way keep things that are *utih’i* (sacred, restricted) from those outside the tribe, while leaving the door open for diplomacy between villages, clans, and ceremonial societies for a later time.

Arguing against Culture as Tribal Property

While many supported the notion of the tribe claiming the Boulton recordings as its cultural property, some disagreed. This is because vesting ownership and control of “culture” in a federally recognized Tribe, to the exclusion of all other individuals or entities, requires making several important intermediary assumptions. First, it assumes that the Hopi Tribe, as a settler-imposed government—one that in some ways competes with (or at the very least is impartial to) Hopi ceremonial authority—is a legitimate holder of this kind of knowledge. Second, it also presumes that Hopi political leaders have acquired the practices (*wiimi*) and the diverse kinds of knowledge (*navoti*) necessary to make decisions about the circulation of ritual songs and the knowledge they contain. Third, it presumes that “property” is an appropriate framework whereby these forms of ritual creativity, knowledge, and expression can be controlled. As I came to see, several elders at our meeting refused to accept these assumptions, advocating instead for following long-established Hopi ownership frameworks governing the circulation of *taatawi* and the kinds knowledge these songs contain.

Some elders were clearly unwilling to accept that the Tribe could own ceremonial knowledge. One elder explained that giving the Tribe possession over ceremonial song recordings would be fine as long as “it stays on the pile all the time” and wouldn’t be made available to the Tribal Council for their use. “We don’t deal with the Council. Because, I would say, none of these Council members down there are required to get in part with of the different ideas of what these clans, songs and stuff like that belongs to. None of them are members of societies or anything.” As he pointed out, the Tribal Council is not a ceremonial society or a village—it has no knowledge or legitimate authority from which it can make decisions in the area of Hopi ritual life. Conceived by its settler drafters as a limited, representational democracy

under the procedures Congress set forward in the Indian Reorganization Act of 1934, the Tribe was voted into existence in a convention where well over a majority of eligible Hopis refused to participate as a protest against the encroachments it represented to traditional governance (Richland 2011; see Chapter 3). As a result, some still question its legitimacy as a democratic governing entity.

The second assumption these ceremonial leaders rejected is that a federally recognized Tribal government has the power to own and control things like *taatawi*. One feature of Tribal governments is that they have the authority, in the eyes of the settler-state, to declare their own laws and enforce them. However, when a tribal government uses settler-imposed power structures to regulate culture, such a power structure often directly competes with the existing socio-political apparatus, which is based on networks of relations and the legitimate ownership of *navoti* and use of *wiimi*. As Justin Richland (2011) has explained in the context of the Hopi Tribal Courts, the Hopi Tribe's articulation of its boundaries of governance—what is called jurisdiction in Euro-American legal discourse—can be inconsistent with village, clan, and ceremonial society authority over the same subject matters. As he explains, Hopi jurisdiction is more aptly located in the way people embody and strategically circulate *navoti* (and *meewanpi*), rather than through overt declarations of power contained in constitutions and statutes. The Tribe's claiming of ceremonial song knowledge as its property essentially sidesteps the existing governance structures for these kinds of materials, potentially impacting the nature of Hopi sovereignty.

The Problem of Taatawi as Property

The third assumption, one that was only indirectly discussed, was that recorded *taatawi* could be treated as intellectual or cultural “property” without posing a risk of harm to the Hopi

community. While most of the conversation between the ceremonial leaders at the December 2010 meeting was about *who* would own the songs going forward, many of the concerns expressed by those who were against tribal ownership had to do with *how* these materials would be owned and used.

As a gloss, “property” often means a thing that is owned or possessed. But the potency of the word is made possible in large part because of its special place in settler law: property is a kind of ownership of a thing—tangible or intangible—that can be enforced against others through some coercive means.¹⁸⁶ As several scholars have recently observed, intellectual property carries with it an ontological specificity that may or may not fit comfortably within indigenous modes of owning or circulating music and sound.¹⁸⁷ First, intellectual property operates as a device of exclusion, which may be contrary to the ways sound is circulated within indigenous networks of exchange. And second, the application of copyright and other intellectual property forms to songs, ritual expressions, or other forms of the indigenous voice (i.e. to create “intellectual property”) requires certain transformations to occur in order for these rights to be claimed under the authority of the state. This kind of ontological transformation significantly alters the structures through which *taatawi* and other forms of Hopi knowledge are held and transferred, with important implications for Hopi creativity and sovereignty.

First, the circulation of sound in Hopi society operates under different economic assumptions from that of Euro-American intellectual property principles, which have become the foundation for global regimes that govern the circulation of many types of cultural expression.

186. See, e.g., Cal Civ. Code § 654 (“The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.”)

187. See, e.g., Elizabeth Burns Coleman, Rosemary J. Coombe, and Fiona MacAraill, *A broken Record: Subjecting ‘Music’ to Cultural Rights* in *The Ethics of Cultural Appropriation* (James O. Young and Conrad G. Brunk, eds. 2009).

See Figure 1: Comparison of Hopi and Euro-American Creative Models. Copyright, at least in the United States, has historically operated under the assumption that creativity is best stimulated by giving individual creators a monopoly on the ability to use the works they create. Under this model, [1] as individuals exert their labor to create new works, [2] they are likely to produce original material that may benefit society. Therefore, copyright law rewards the laborer who produces original work with [3] the right to prevent others from being able to use that work without the creator's permission. Essentially, the owner of a music or sound recording copyright can draw on the coercive power of the state (i.e., courts, police, customs agents, etc.) to control the circulation (albeit in a limited way) of the work's sound. The creators can then [4] grant permission for specific uses of the work to others in exchange for capital. As the creator accumulates capital from the work, he or she is incentivized to develop new markets for the work, to continue to develop new works, and to further refine his or her capacities in light of shifts in market demand.

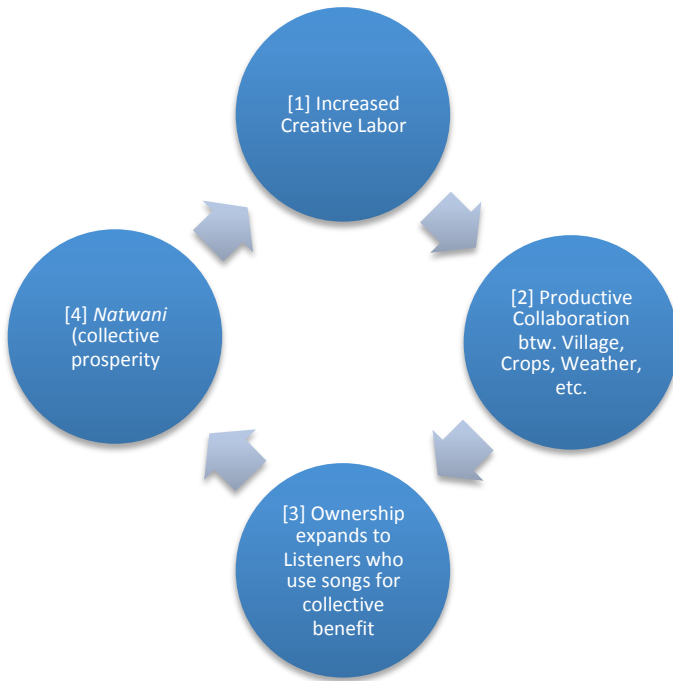
Taatawi ideally circulate under different economic assumptions. Members of Hopi society are supported not only by our own work to accumulate resources for ourselves, but through our relationships to members of our clan, related clans, members of our villages, and the ceremonial societies to which we belong. If you were to map all the relationships each person in a village has to others, you would see a densely packed web of reciprocity, where no one is supposed to go hungry or lack necessary resources because each person's welfare becomes the responsibility of others.¹⁸⁸ While accumulating personal capital to benefit one's family is important for our modern lives, this strong desire to share with others continues to be a fundamental aspect of being Hopi.

188. For a more detailed review of the literature on Hopi kinship structures, see Peter Whiteley, *RETHINKING HOPI ETHNOGRAPHY* 49-79 (1998).

Figure 1: Comparison of Hopi and Euro-American Creative Models

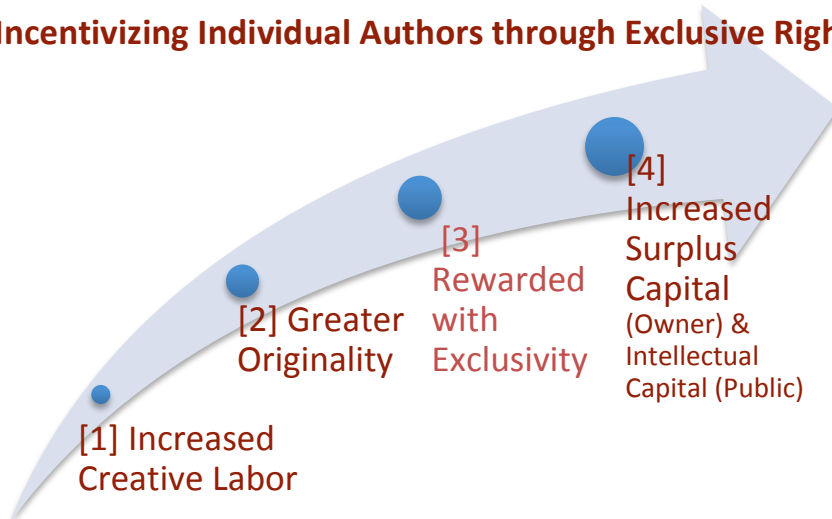
Hopi Creative Model:

Incentivizing Collective-oriented Creativity through Reciprocal Obligations



Euro-American IP Creative Model:

Incentivizing Individual Authors through Exclusive Rights



Yeewa, the compositional process for *taatawi*, plays an important role within this economic model because it is a catalyst for bringing networks of people, environmental actors, and other entities into productive relations in ways that benefit the whole. As discussed in Chapter 1, as a *yeewa* raises plants in his or her field, he or she encourages the plants to grow by metaphorically “feeding” them with his or her voice, and they respond to him or her by their movements and growth, thus helping the *yeewa* to generate the right “feeling” for the song. The sensitivity required in this exchange is such that some people won’t be able to create songs: one shouldn’t create if you are easily angered, for example.¹⁸⁹ Through the dialogue between the farmer and his or her plants, the songs become a fusion of human and non-human *lavayi* (speech) and *tawvö* (melody). The farmer will craft his songs in response to his or her plants, and the resulting *taatawi* resonate within both human and non-human aesthetic domains.

Once a *yeewa* has [1] created a good *tawi*, one that is full of meaning and produces positive effects on his or her plants, the *yeewa* will share his or her good songs with others in the village without compensation in the weeks leading up to a ceremonial performance. These shared songs, when feelingfully performed in ceremony will [2] bring humans, weather systems, plants, animals and other actors into productive relations. In the process of learning and performing the songs, [3] the composer gives ownership of his or her songs to members of the village who hear them, which not only brings the composer prestige as members of the composer’s village or *kiva* come to depend on him or her to increase the welfare of the community; the composer benefits directly when good songs are sung by the village, because [4] the village as a whole, including the composer, experiences greater prosperity as good songs sung with a good heart tend to produce rain, good crops, and happiness (*natwani*). As a result, the composer is incentivized to continue to produce more songs and to share them without need

189. I thank Stewart B. Koyiympetewa for this observation.

of personal remuneration. Others in the village are sometimes motivated to “out-do” him or her by composing their own songs.¹⁹⁰

The sharing of *taatawi* within the Hopi creative economy follows a principle of obligated reciprocity on the part of the listener. Some have described this as *nasimokyaata*, “to borrow” or “to adorn oneself,” though in some Hopi villages this term is not used with intangible things. Some suggest the term *no 'i 'yta*, or “to share” or “give the right to use.” Finally, some have suggested the phrase *tuuwat akw mongvistoti* (to benefit when complete), which explains how *taatawi* will become beneficial to those that use them or listen to them when they are wholly realized through sincere, complete ceremonial performance. While villages seem to differ in the words they use for the principle, several composers I interviewed from a cross section of villages essentially described the same principle whereby a listener acquires the ability to use a song from one’s village—sometimes even without asking—as long as the user gives benefit to the community or the world (and not him or herself), and/or the user provides some reciprocal benefit to the owner(s) of the song.

In the process of transferring ownership from a *yeewa* to the village (or a ceremonial society, if the song is *meewanpi*), the village (or the ceremonial society) becomes the owner of the song, and the *yeewa* will often “forget” the song.¹⁹¹ The *yeewa* knows as he or she composes in his or her field that the song ultimately will not be his or her own. In fact, as several older composers have told me, in the moment the composer shares his or her songs, he or she detaches them from him or herself, so that they can be used freely by other members of the village without

190. As Shaul (2002:190-91) explains it, “There are several successive contexts in which a songpoem may exist. First of all, there is the composer’s mind. Second of all, there is the rehearsal-editing context of the kiva. Thirdly, there are one or more public performances; and finally a songpoem may stick in anyone’s mind for future use and savoring.”

191. This is not always the case, though, particularly for younger composers. One composer I spoke with was quick to point out his songs that had been sung in a *tiikive* the week prior to our interview.

his or her permission. While this may sound a lot like copyright law's "fair use" doctrine, there are subtle differences. Unlike the fair use of copyrighted works, the circulation of shared *taatawi* implicitly carries an obligation of reciprocity coinciding with the song's original purposes: either to be returned with a reciprocal gift or to be remembered and performed for the good of the world. This principle of obligated-ownership can be instructively contrasted with another Hopi term, *sokopta*, or "to steal with intent to take advantage of," a term whose most salient definitions include the clandestine taking of Hopi sacred ceremony for selfish purposes, adultery, and rape.¹⁹²

In comparing both of these ownership frameworks, it becomes clear that ownership of Hopi songs is not necessarily based on a logic of exclusion. Under copyright, a copyright owner is allowed to stop others from using *his* or *her* songs so as to leverage benefits for the individual. Instead, the circulation of *taatawi* has historically operated under a logic of inclusion, where these songs are protected against "selfish" uses, to accumulate benefits to entire networks of actors. Therefore, when indigenous communities adopt copyright and other property-based frameworks as the basis for ownership and circulation of songs and other forms of knowledge and cultural expression, they run the risk of espousing "capitalism's commodifying logic" in the name of cultural protection, which may make upholding indigenous economic principles more complex (Brown 2003:287; see Chapter 6).

Second, intellectual property law—particularly copyright—requires certain kinds of transformations to indigenous voices before they can be eligible for protection against unauthorized uses. Copyright establishes as prerequisites to ownership both a physical and a conceptual separation of indigenous voices from the networks of relations that generate them.

192. See "Sokopta," HOPI DICTIONARY 517 (1998).

Through this separation, the voice is transformed into an alienable object rather than remaining a node of social relations between bodies. Indeed, intellectual property law has been engineered to purify¹⁹³ sonic creativity of its rich networks of social relations, transforming it into an abstract “work”—what is presumed to be the product of an individual or corporate mind.¹⁹⁴ These transformations allow voices to be transacted efficiently within the marketplace, thereby permitting ownership and control over them regardless of the end-user’s relationship to the networks that created them and benefit from them.

Copyright’s law’s requirement that works be disembodied to receive copyright protection has most recently been codified in the 1976 Copyright Revision Act’s “fixation” requirement. The United States Copyright Act requires that all works, including “musical works,” be “fixed in any tangible medium of expression”¹⁹⁵ for copyright protection to attach. Copyright law’s insistence that the voice be embedded in lifeless media rather than in the body—a vibrant, agentive entity—effectively subjugates the voice, making it vulnerable to external control. When contained by physical media, the voice is preserved in form, but also becomes easily removed from the domain of the social—it is transformed into an aesthetic object that can be pinned down in time and space. The logic behind this requirement appears to be that works

193 Here I draw upon the terminology of Bruno Latour describing the processes of purifying works of their social attachments in Modernity. See Bruno Latour, *WE HAVE NEVER BEEN MODERN* (Catherine Porter, trans. 1993).

194. See Jane Anderson, *Anxieties of Authorship in the Colonial Archive* In *MEDIA AUTHORSHIP* (Cynthia Chris & David A. Gerstner, eds. 2012). As Anderson argues, authorship is the root of authority within archives, and is a fundamental component of contemporary copyright law. “Defining the category of the ‘author’ was the means for establishing the legitimacy of property in a ‘work.’” (6). As Anderson explains, the formation of the author as “men with letters” who *write* the circumstances and knowledge of others, thereby receiving a property right in those writings or “works,” was part of a broader project to “legally and socially reduce and exclude other cultural forms of articulation, expression and association with cultural knowledge products.” (7) This construction of the “author” has allowed archives to “maintain[] very specific exclusions and relations of power” over knowledge, thereby “maintaining hierarchies of knowledge production by reducing Indigenous and non-European subjectivity and legitimating the (ongoing) appropriation of Indigenous cultural material by non-indigenous authors.” (1).

195. 17 U.S.C. § 102(a)

which have not been embedded in an object outside the body cannot be fully transacted from one individual owner to another because they do not have verifiable boundaries and endpoints.¹⁹⁶

In addition to requiring the physical disembodiment of voices as a prerequisite for copyright protection, the Copyright Act also imposes a conceptual separation of the voice from its material reality. Even though copyright law requires “works” to be physically fixed in a tangible medium, the works themselves are presumed to have no material existence; they are different from “copies,” which are “material objects . . . in which a work is fixed.”¹⁹⁷ Through this conceptual separation, the paper and ink of a letter, for example, are considered a property that can be transacted separately from the abstract work of literature one reads in the words on the page.¹⁹⁸ To secure its protection for our ancestors’ voices, copyright law would require the reification of a *tawi*’s internal relations (protecting only the sound of the voice), while conceptually purifying it of its material networks (the relations that connect the sound of the voice to people and other actors within the territory)—*taatawi* can no longer exist with their own presence in the world; they must be hollowed out; they are protected only inasmuch as they are formulas or calculations that describe the relations between internal sonic points, not as nodes within networks of relations of which they are a vital part.¹⁹⁹

196. It is important to note that there have been some legal innovations that have attempted to counteract these problems. For example, unrecorded music performances may be protected from unauthorized recording, reproduction, and distribution under the anti-bootlegging statute contained in the Copyright Act. *See* 17 U.S.C. § 1101.

197. 17 U.S.C. § 101 (defining “copies”).

198. *See Baker v. Libbie*, 97 M.E. 109 (1912) (holding that transferring ownership of a written letter does not transfer the copyright to the underlying literary work). In *Baker*, the court described Baker’s right to her work as “an interest in the intangible and impalpable thought and the particular verbal garments in which it has been clothed.” *Id.* at 112.

199 For some, including many jurists, the disembodiment, abstraction, and separation of created works from their material reality and their networks of relations is a major philosophical stretch: as Justice Story once said, “patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and,

The disembodiment and conceptual abstraction of song and sound from their material relations in order to receive copyright protection is a fundamental part of settler intellectual property frameworks and, on a broader scale, the project of settler-colonialism. As such, these transformations continue to be a pre-requisite for obtaining the protections afforded to intellectual property under settler law.²⁰⁰ But, by imposing settler philosophies of intellectual property on our ancestors' voices, we may be required to sacrifice what matters most: the material connection between vibrant, sonic knowledge and the embodied networks within which this knowledge is generated and is meant to circulate. It is true that a copyright holder can lawfully control certain acts that convert a reified, abstracted, disembodied "work" back into material—its reproduction, distribution, public performance or display, and the creation of

sometimes, almost evanescent." *Folsom v. Marsh*, 9 F.Cas. 342, 344 (C.C.D. Mass. 1841).

200 The philosophical underpinnings for the desocialization and abstraction of sound from embodied social relations are deeply rooted in Enlightenment thought, which often used indigenous peoples as its foil. As James Leach (2007) has explained, the detachment of copyrightable expression from the body was a pivotal move in the development of intellectual property law and of enlightenment notions of personhood:

The relation that defines the self as a person is a subjective intervention within the world, which makes a difference to that world. This recreates the self in the same movement by which it objectifies something beyond the self. One knows one's capacity and one's 'self' through what one sees of oneself in the world. Each time a novel object is realized, as an element externalized from the person, the distinction between the self and the world is recreated. It is the very materiality of the expression that recreates the person as a locus of intelligence and agency. (Leach 2007:108)

Under the labor theory of property attributed to John Locke, one comes to own property by appropriating common material and adding one's labor to it to create something of value. The acquisition of personal property by labor is, for Locke, a natural right, existing for both "wild Indians of north America" and in civil society. See *John Locke*, SECOND TREATISE ON GOVERNMENT (1690) at § 26. In doing so, the laborer mixes his or her labor with objects existing in a state of nature, theoretically annexing those objects to the person in such a way "that excludes the common right of other men." *Id.* at § 27. Locke gives as a fundamental principle that a person has property in his or her own body. But what about property in creativity or innovations?

As Leach argues, the Lockean frameworks has been applied to intellectual property by making some important leaps. When one adds his or her creative labor to existing knowledge or cultural material, the resulting thoughts and expressions become property—but only if there is a way to "annex" something to those thoughts or expressions that could both differentiate them from "nature" and exclude others from their use. Requiring disembodiment and abstraction accomplishes both of these. Because material can be possessed by an individual, the fusion of idea and physical material provides a means for ideas to be transacted as property. By requiring abstraction of ideas from the material reality of the creation, the intellectual labor of the creator becomes distinguishable from that which exists in the "state of nature."

derivative works. However, as is made clear in copyright's "first sale doctrine," the copyright holder can't control the new relations that develop around a hollowed-out voice after it is embedded in new material objects and sold.²⁰¹ At that point, our ancestors' voices can be transacted, possessed, experienced, consumed, shared, or discarded completely outside the control of the copyright holder.

Still, asserting property rights may be a powerful move within a colonial structure that, as of right now, is unlikely to recognize indigenous ownership systems as superior to its own system of property rights outside of reservation boundaries. In an era of globalization, there is a strong impulse for tribes and other marginalized groups to use culture as what George Yudice (2003) has called an "expedient," a resource to be managed, developed, and converted into property so that the group has the exclusive ability to perform its differences in ways that empower the group under frameworks salient to a colonizing nation-state or the international capital economy. Yudice argues that as growing world economies increasingly turn to the production of easily circulating, immaterial goods like digital music, movies, or software, minority groups are leveraging their "cultural resources" in like manner as they fight for greater political autonomy. Negotiations over cultural "rights" between indigenous groups and settler-states (and now, cultural institutions) create economic, political, and social fields of force, which act to secure and traditionalize culture while at the same time restricting or privileging certain forms of its circulation for the sake of meeting these groups' political needs. In other words, by reclaiming Hopi voices as property, the Tribe may be able to assert its authority much more

201. See 17 U.S.C. § 109. Note, however, that in the case of works of visual art in the United States, Congress has granted a limited form of moral rights (*droit moral*) by which an author controls certain rights of attribution of his or her identity to a work he or she created, and also has limited control over the integrity of the work, including "intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation" or the "destruction of a work of recognized stature," including by intentional or gross negligence. 17 U.S.C. § 106A(a)(3)(A), (B).

deeply and powerfully into the infrastructure of the settler-state, which may send a strong message to both the music industry, holding institutions, and to leaders within the global information economy, that indigenous rights must be respected.

But converting *taatawi* into a property resource to assert or reinforce political sovereignty may have some negative implications. When tribes assert restitutionist claims to what they deem cultural property (Handler 1991), they may be re-deploying the settler-state's logics (70–71). As political moves, these claims may reverse the tide of colonial power in a language power understands (*ibid.*). However, dependence on property logics as a basis for reclaiming ancestral voices may reinforce the legitimacy of the settler-state (70). As James Leach has warned, treating ritual songs as property may enact a modern conceptual colonialism over Indigenous groups, requiring them to rely on Enlightenment divisions of what is “natural” and inanimate, and what is “cultural” or agentive in the world, in order to assert their rights, while ignoring the diverse kinds of actors, landscapes, and networks that contributed to their creation and development (Leach 2007:99).

Harms from Anonymous Care

Finally, preservation of indigenous voices outside of indigenous modes of care may prove harmful, and potentially toxic, to indigenous communities. As I explore in this section, when Hopi voices are converted into disembodied archival objects, they become subject to a kind of biopolitics that preserves them for the purpose of perpetually serving the needs the settler-state rather than having the kind of lifespan and care which are accorded to voices in our communities.

The Right to Let Culture Die

In the summer of 2016, my dad by clan was in the final stages of prostate cancer and kidney failure when he told me about his decision not to pass along a portion of his ceremonial knowledge. He was the last fully initiated man from our village, the last person authorized to carry out certain vital ceremonies. Over the last few years of his life, he had told me stories of several leaders from across the Hopi reservation visiting him, asking him questions, and seeking knowledge that would allow these important aspects of our community to continue. However, he also told me that the decision to pass along ceremonial knowledge and authority was not his alone to make. In effect, by not passing along this knowledge, the ceremonies would die with him.

My dad's choice follows in the footsteps of other leaders of my village who have each faced the decision of whether or not to silence aspects of our village ceremonial culture. These decisions often had to be made during periods of coerced cultural forgetting, ranging from harshly enforced prohibitions on Hopi ceremonial performances (which in some cases were perpetuated secretly²⁰²), the kidnapping and relocation of Hopi children to boarding schools, and the imposition of non-Hopi ways of living on Hopi lands.²⁰³ Given the rapid pace of change, many Hopis have told me that our culture is “dying out”—that modernization, globalization, and acculturation have displaced people's attachments to Hopi lands, our language, and the

202. As Leigh Kuwanwisiwma explains about the role of memory in the Spanish occupation of Hopi lands, “So inasmuch as the [Hopi] ceremonies were now publicly forbidden to be performed [by the Spanish], some of the people talk about how the knowledge was still being rehearsed and then also passed on to coming generations so that at least the knowledge would survive and then the physical end of it, meaning perhaps the altars and the types of ritual objects, would also be re-created and subsequently used if they ever had an opportunity to come back with their ceremonies.” (Sheridan, et al. 2015:173). As Elgean Joshevama recounts, Hopis took great risks to remember ceremonies—particularly songs. They “had to steal themselves away in secrecy . . . there were times when, when somebody might, individual, one individual might maybe get away from the village to go somewhere, maybe to go hunting or maybe go to the field, and they might, by accident, find a group of men, Hopi men, somewhere. Maybe in a circle singing songs, probably rehearsing these ceremonial songs that they didn't want to forget” (238).

203. See Chapter 2.

ceremonial performances that should happen there. Thus, the world is progressing rapidly toward its prophesied end.

Many anthropologists, folklorists, ethnomusicologists, tourists, and missionaries from 1540 to the present also believed Hopi and other indigenous cultures were dying.²⁰⁴ Their writings and later, field recordings, collected under that pretext fill archives around the world. However, some of these recordings contain aspects of ceremonies which have or will soon be extinguished, setting up an uncomfortable conflict between the institutional impetus to preserve, and the decisions of indigenous authorities, like my dad, to let parts of our culture die.

Anonymous Care and the Archive

In her recent book *Life Beside Itself*, Lisa Stevenson (2014) explores the disjuncture between Inuit modes of care and the serialized, “anonymous” way of caring espoused by the Canadian bureaucracy. From governmental health programs that took great care to number and organize Inuit people sick with tuberculosis before disappearing them into distant sanatoria, to suicide prevention hotlines that instruct their volunteers to listen with curiosity to Inuit people’s grim suicide plans but not develop personal relationships with them, Stevenson reveals the irony of Canada’s efforts to impersonally “care” about Inuit as an exercise in population management. As she points out, Canada cares only to the extent that it can maintain its power over indigenous lives: “[w]hen life becomes an indifferent value it no longer matters who you are, only that you cooperate in the project of staying alive” (82). In other words, Canadian care for ‘its’ First

204. Spanish priests demonstrated their belief that Hopi culture would die through violent disciplinization aimed at saving Hopis from their “slavery” to “idolatry,” making them worthy of Heaven (Sheridan, et al 2015:132, 238). Many early American anthropologists corroborated the fatalistic intentions of colonization through their work, claiming that Hopi and other indigenous cultural practices needed documentation and preservation because they were inevitably dying out (Brady 1999:75-80; Sterne 2003:331-32). And, ethnomusicologists from only a generation ago were proclaiming the death of Hopi culture (List 1962; Boulton 1968), though more recently some anthropologists are finding that anthropology is what is actually dying out due to lack of diversity, lack of action, and irrelevance to the real world (Whiteley 1993:148).

Nations is a manifestation of a biopolitics that determines who is made to live and who it lets die.²⁰⁵ In stark contrast, Stephenson compares a number of Inuit modes of care, including traditional Inuit name transfer practices, which allow members of the community to care for and be comforted by one another, including those lost to illness and suicide.

Archives of fieldwork materials are notoriously sites of anonymous care, sites where perpetual preservation of indigenous voices in particular forms is privileged over the temporalities and forms of the voice established by the communities who generated them. Jonathan Sterne (2003) explains that the desire to preserve the indigenous voice which drove early fieldwork was not necessarily to give indigenous voices immortality, but was instead an outgrowth of settler desires to preserve the functionality of the indigenous body despite its (anticipated) death. He writes, “sound recording preserved the exteriority of the voice while completely transforming its interiority, its insides” (Sterne 2003:298). Sterne frames field recording as an illusion of liveness, at best the preservation of what the recordist wanted to hear (323-24). At its worst, as Erika Brady reveals, recordings of indigenous peoples were a mechanical means for “bronzing” or “freezing” indigenous voices into discrete, aesthetic facts that could substitute for indigenous peoples themselves (1999:59-60). Once accessioned to an archive, the priority for recorded indigenous voices continues to be their logical organization to support the anticipated ear of the researcher and his or her funders, and the perpetual prevention of decay, destruction, or non-transferability to newer media. As Aaron Fox (2017) has pointed out, rather than looking to indigenous communities for direction on the appropriate lives of archived indigenous voices, decisions about care of indigenous recordings all too easily hinged

205. “[Biopolitics] is, in a word, a matter of taking control of life and the biological processes of man-as-species and of ensuring that they are not disciplined, but regularized. . . . Sovereignty took life and let live. And now we have the emergence of a power that I would call the power of regularization, and it, in contrast, consists in making live and letting die.” (Foucault 1976:246-47)

(and still hinge) on the needs of institutions to demonstrate their power and legitimacy by amassing more and more sonic facts. As with the sanatoria and suicide prevention centers of Canada, biopolitics is at work in the archival care of indigenous voices, collecting them, organizing them, and deciding which voices are made to live (and made to speak/represent) and which it will let die (edited out, discarded or allowed to decay), irrespective of indigenous modes of care.²⁰⁶

My argument here is that the care of indigenous voices should be guided by more than a desire to permanently “save the lore” (Harrington of the U.S. Bureau of American Ethnology in Sterne 2003:314). Instead, those who work with recorded indigenous voices should look to indigenous temporalities and modes of care for the appropriate lives and after-lives of indigenous archival materials. More specifically to the case at hand, I want to argue that making Hopi voices live in a preserved state runs counter to the kind of agentive existences voices have in our community.

The Lives of Hopi Voices

In the Hopi context, for example, death doesn’t necessarily mark one’s existence from a present to a past temporality. As Mary Black (1984) has written, Hopi conceptions of life and death are often analogized to the growth and decay of corn plants. After ears of corn are harvested, the corn stalk eventually dies—it is *qatungwu* (lifeless) and without *soona* (substance

206. Intellectual property and critical museum studies scholar Jane Anderson (2013) has critiqued the ways archival practices and intellectual property laws continue to make indigenous peoples the “subjects” of archival materials, while displacing them from positions of care and ownership over them. “[Archival] material comes encoded with relations of power and specific entitlements, and continues to position Indigenous peoples, cultures, lifestyles and practices within a Eurocentric locus of enunciation” (232). The mere fact that archives house so many indigenous voices *in one place* and *without any kind of obligation or reciprocation to indigenous communities* clearly bespeaks a Euro-American centered ontology of the voice rather than indigenous ones. And this repurposing of the indigenous voice likewise resonates with Stoler’s view that colonial archives are not so much about care for the histories of the colonized, but about “factual production” or the narration of “factual stories” in which “the colonial state affirmed its fictions to itself” (Stoler 2002:98).

or “that which makes life viable”). For humans, the substance of life is the breath, or *hikwsi*, and in death, our *hikwsi* continues; it is *aniwiti*, or “becoming perfected.” While seeds contained in the mature ear will go on to generate new plants in different times and places, the corn stalks remain in the ground; they are laid down and allowed to decay. But even their decay has a purpose: they are not uprooted or plowed under, but they collectively become a guide for where to plant the next year and they serve as the mulch that keeps the water and nutrients in the ground for years into the future.²⁰⁷ In comparison to human lives, the bodies of the dead are traditionally not preserved but are allowed to decay, and we generally burn our dead’s belongings; we don’t speak their names after a certain period of time; other members of the clan take on the titles and obligations of the deceased (*so’o, kwa’a; kya’a, taha*); and we free them from their bindings to this world so that they can continue their work in other times and places; we are supposed to let them go.

Remembered Hopi songs occupy a unique, in-between place between *qatungwu* and *soona*. Hopi *taatawi*, are not simply entertainment, art or cultural texts, but actively encourage clouds, people, animals, crops, and other entities to come into meaningful relation. As discussed, *taatawi* are then shared and refined collectively with other members of our villages, worked incrementally into the memories of those in the community, and then selected for performance in subsequent years depending on a variety of factors. As Stewart B. Koyiympewa explains, remembering and forgetting the relationships between people and songs is a natural part of the way generations grow and assume their leadership role and then decay—some *taatawi* continue

207. The notion of previous lives as slowly decaying guideposts is vital in the perpetuation of agentive indigenous cultures. As Lauren Amsterdam (2013) has written about heritage in Native hip-hop, “Examining performances of (ab)originality in terms of heritage does not presupposed the perfection of enactment, but rather accentuates the slippages that emerge as one realizes their agency within a web of larger commitments” She goes on to quote Tlingit hip-hop artist D-Script, who explains, “It is necessary first of all to know and to know how to *reaffirm* what comes ‘before us, which we therefore receive even before choosing, and to behave in this respect as a free subject” (57).

to link contemporary generations with the people and places who helped create them, while others begin to fall out of people's memory (Colwell & Koyiyumptewa 2011:68-69).

The act of recording, then, does something more than extend memory. When recorded, Hopi songs exist as a physical manifestation of the singer—who may no longer exist here—and the transmission of the song—the substantive connection of the composer, his or her plants, and others entities within the composer's creative network, with those who perform the song, hear it, and remember, which produces the desired effects. In this way, Hopi song recordings exist in at least two temporalities—one in the past and one perpetually in the present. This was pointed out to me by DJ DawaTiyo, a Hopi elder who runs a morning traditional music show on KUYI Hopi Radio. DawaTiyo regularly airs about 25 of Laura Boulton's 1933 and 1940 recordings of Hopi performers which the Hopi Cultural Preservation Office and I have been working to return to the Hopi community. (There are also a number of repatriated songs he doesn't air because "they are traditional cultural songs" that he doesn't feel comfortable circulating.) After one broadcast, I asked DawaTiyo whether or not he thought people would actually be interested in these "old songs." He explained to me, "you know, some people might say these are just old songs. But that's not really how they are for us; *they are always present.*" When old recordings are played, he said, they may have someone's voice from the past on them—and that might make them interesting historically—but to listeners, the songs themselves continue do what they are meant to do. DawaTiyo's work to reanimate them by careful selection and recontextualization helps them fulfill the community-building and encouraging functions for which these songs exist.

When Songs Should Be Forgotten

While there are times when Hopi ceremonial songs should be remembered and may be recorded, there are also times when Hopi songs are supposed to be forgotten, and perhaps even

destroyed. Sometimes this is the result of selective filtering—as just discussed, sometimes songs simply didn't resonate with the current generation or the local environment or are too complex and they are soon forgotten. Songs can also be forgotten as an act of transferring ownership and demonstrating humility. For example, several older composers told me that when they give their songs to fellow village members for ceremonial performances, they forget the song in the process. And, as discussed earlier, some songs are harmful if performed by anyone but the initiated, and are best forgotten by those who happen to hear them.

But it is also important to keep in mind that intentional forgetting can also take much more destructive forms. After the Pueblo Revolt of 1680, when Hopis executed Catholic priests who had abused them for more than 50 years and leveled their churches to the ground, some clans in the Hopi village of Awa'ovi began practicing Catholicism again. As Elgean Joshevama explains it, they “started to reconstruct the remains of their church *and tried to reconstruct their power there* as well” (Sheridan, et al. 2015:241). It was not so much that the Franciscans were gaining a foothold in local politics again; rather Hopis recognized the resurgence of a power in the practice of Catholicism, a knowledge coupled with force (Foucault 1977:27), with the efficacy of ritual, that was threatening to take control over Hopi bodies again and to determine Hopi lives.²⁰⁸ Joshevama continues, “[T]hat destruction, when you think about it, a Hopi village to be destroyed by Hopi people, that Hopi lives would be taken, when you think about it, how many of our people would be willing to make that kind of a decision today? . . . I think that demonstrates to us today how strongly the Hopi people felt about saving this Hopi way of life . .

208. Foucault's description of disciplinary power in *Discipline and Punish* is an apt description for the kind of power Hopis in 1700 were concerned about. “What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behavior. The human body was entering a machinery of power that explores it, breaks it down and rearranges it. A ‘political anatomy’, which was also a ‘mechanics of power’, was being born; it defined how one may have a hold over others’ bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines” Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 138 (1977).

. That they just didn't want any other way of life, especially the kind that had been imposed on us by, by the Spaniards" (Sheridan, et al. 2015:241-42).

The erasure of the logics and rituals of Catholicism from Hopi memory, though practiced and adopted by many Hopis in the seventeenth century, was permanent and intentional. So too have been other acts of erasure, including the erasure of certain Hopi rituals over time. Peter Whiteley (1998) recounts one such episode in his book *Rethinking Hopi Ethnography* that happened at Hotevilla back in 1927. K.T. Johnson, a Hopi priest turned Mennonite convert was one of the last members of the Bow Clan from the Hopi Village of Hotevilla. As one of the most powerful clans at Hopi, the Bow Clan held ownership over some of the most important ceremonies in our village, and Johnson's position within the clan made him an heir to the village leadership. But with dwindling numbers, and Johnson's conversion, the Clan had not performed its ceremonies for a number of years. At one point the Bow Clan altar and other ceremonial objects were stolen by two of Johnson's rivals who were intent on revitalizing the ceremony without him. In fact, had they been successful, it would have demonstrated their legitimacy as village leaders, and our village's history might have taken a much different course.

But in 1927, Johnson's aunt—the last matriarchal authority of his clan—died. As Johnson describes it, “the fire of our clan [was] extinguished” (Whiteley 1998: 134). Not long thereafter, and with a Mennonite missionary in tow, he approached the rival leaders, who were in the process of conducting a ceremony, and requested the return of the sacred objects *so that he could burn them*. Suspicious of the missionary's influence over Johnson, the rivals initially resisted, but later relented, recognizing Johnson's legitimacy as the one rightfully authorized to

control the ceremonies and the ritual objects. Once in possession of them, Johnson piled them up, poured gas on the pile, and asked a local young man to light a match.²⁰⁹

How is an archivist, activist, or community ally to understand these historical moments? Do we look at them as historical precedents that might authorize us in deciding the future of Hopi archival materials? When is destructive forgetting permitted and even necessary, and when do we risk and even take lives for the sake of preserving and remembering? I could attempt to weave a concise theoretical thread through these powerful examples of forgetting, and attempt to connect my dad's decision to let more of our ceremonies die out, but that is not my place nor is it my purpose in writing this chapter. What's relevant here for those of us who care for indigenous voices is that the lives of these voices and the networks of which they are a part are often purposefully and profoundly finite in relation to our present world, as these examples make abundantly clear, and that the refusal to extend those voices in time or space or theory are in themselves generative acts of indigenous authority (Simpson 2014:113). The refusal to permit Catholic knowledge and power to exist in Hopi society meant we were never subjugated again by the Spanish, and I hope, through our memory of that forgetting, by anyone else. And, while it is true that Johnson's act of forgetting meant that some ceremonies are no longer performed at Hotevilla, I have witnessed how bits of these ceremonies—words, melodic phrases, affects—have now become references in newer ritual songs, which are remembered, circulated, and

209. While Johnson was a convert to the Mennonite faith, Whiteley (1998) suggests that he was actually intent on fulfilling Hopi prophecies about the development of Hopi culture along a pre-determined progression, which necessarily included the death of certain rituals so that others could develop and new leadership paradigms established. The rival leaders themselves recognized this at the time Johnson requested the alter, saying “in tones of deepest feeling, ‘Alas! *It has come*, but so must it be. By destroying these things you will have DESTROYED the very foundation of our ceremonies. The conflagration must spread. Take these and do as you have said” (140). While this language is clearly a flowery gloss by the Mennonite missionary of the actual statements made, one can see the intentionality of Hopi authority.

through repetition become profoundly meaningful as they lose their particular temporalities and yet retain their effects. Indeed, though our present generation may lose direct access to the entirety of forgotten ceremonies and their associated songs, the voices that sing them continue on in other times and places. In this way, forgotten song knowledge remains whole, resisting becoming distorted or altered outside of the necessary authority.

Conclusion

Determining when *taatawi* should be forgotten, or in the case of archival materials, deaccessioned or destroyed, can be a deeply disturbing question in an era where seemingly everything can or should be remembered and preserved. As Viktor Mayer-Schonberger (2009) writes,

“[i]f we had to worry that any information about us would be remembered for longer than we live, would we still express our views on matters of trivial gossip, share personal experiences, make various political comments, or would we self-censor? The chilling effect of perfect memory alters our behavior” (2009:5).

As knowledge about the past accumulates through public records and digital means, some have found it hopelessly intoxicating. Misplaced words, “fake news,” evidence of soured relationships continue to inhabit the lifeworlds of people’s virtual and actual lives as corporations generate massive archives filled with “big data’s” (toxic) assets. Governments, particularly in Europe, have started generating policies to ensure forgetfulness and erasure of memory (Grax, Ausloos, & Valcke 2012). Legal doctrines like expungement of criminal histories, the right to oblivion, and now the right to be forgotten, are all examples of ways law has been marshalled to force various kinds of archives to let go of the past so that certain publics can re-invent themselves in the present and future.

As my dad's decision exemplifies, indigenous voices may need to decay or be forgotten for the sake of allowing indigenous communities to fully live. As in the example of Hopi cornstalks, some archived ceremonial materials might provide beneficial guidance and direction for future creative efforts, but may lack the substance in their preserved form to generate meaning in today's complex indigenous worlds. Close, personal collaborations with, and deference to, indigenous communities in the care of their voices, rather than anonymous safeguarding of their culture, will no doubt help us to better recognize the agentive existences of these materials as they are planted in new contexts or allowed to pass on.

Conclusion:

Three Proposals to Advance Sonic Sovereignty

There is no doubt that sound is a key dimension of indigenous sovereignty in the twenty-first century. Not only is sound one of the core means through which knowledge has been and continues to be transmitted, it is also a primary means whereby boundaries are imposed, contested, transgressed or erased. One need only look at the ways indigenous sound has been mobilized in the Idle No More movement, #NoDAPL, and many other sites of indigenous activism in the last decade—filling shopping malls with songs, challenging government institutions and political leaders through symbolic (sonic) action, and raising the visibility, struggles, and strength of indigenous presences in concert venues, art museums, film screenings, mass and social media.²¹⁰ At the same time, sound is actively being used as a mechanism for colonization, including through the use of sonic weapons against indigenous peoples,²¹¹ unrelenting settler commodifications of indigenous culture,²¹² and the refusal by settler-states and their institutions to abide by indigenous laws and protocols governing sound. And yet, indigenous people continue to generate sound that has real effects in the world. The generative social, environmental, and political work of these indigenous networks of sound-based relations is what I have been calling sonic sovereignty, with Hopi *taatawi* creation, production and circulation marking out a small but vibrant source of this sovereignty.

210. See Victoria Levine & Dylan Robinson, eds. *MUSIC AND MODERNITY AMONG FIRST PEOPLES OF NORTH AMERICA* (forthcoming 2018).

211. See several uses of sound throughout #NoDAPL, <https://www.nodaplarchive.com/sept-daily.html>

212. See Kristen A. Carpenter & Angela K. Riley, *Owning Red: A Theory of Indian Cultural Appropriation*, 94 *Tex. L. Rev.* 859 (2016).

Given the actual and potential harms to sonic sovereignty I have witnessed and addressed in these chapters, I believe immediate action is necessary. In the concluding sections below, I begin to etch out three proposals for legal change in the United States that I believe are within our reach. They are modest, because in reality, the only appropriate solution lies in the return of all indigenous lands that were coercively, deceptively, or unlawfully taken from indigenous peoples without their prior, informed consent and an agreement of reciprocal benefit or other form of compensation to the community.

In the first proposal, I argue that current federal copyright laws should be amended to recognize indigenous sovereignty over sound created on the lands of indigenous peoples. The second proposal advocates for the development of indigenized licensing regimes to govern indigenous sound, drawing from successful examples already being used within the open source community. Third, I argue that indigenous peoples should have a “right to forget” through which they can require institutions holding their ancestors’ voices to deaccession all physical and digital copies of these materials, and relinquish all rights to control them, so that indigenous communities can care for these voices on their own terms.

Proposal 1: Amending the Copyright Act

As the case study presented in Chapter 3 suggests, there are significant gaps and ambiguities in the law surrounding the protection of indigenous creativity, particularly for works created on the lands of indigenous peoples. None of the three potential bodies of law that could potentially protect recordings of indigenous voices is a clear win for indigenous groups seeking to reclaim them from resistant holding institutions. And, one of these bodies of law appears to be in jeopardy of being preempted by proposed federal legislation, as I discuss below.

In 2009, Congress commissioned the Copyright Office to weigh the potential risks and benefits of bringing all sound recordings under federal copyright protection²¹³, including those made prior to 1972. In its report to Congress, the Copyright Office generally supported the move, citing the inconsistency of state statutes and common law governing these recordings, the economic and legal benefits of uniform coverage, and the potential for more works to eventually enter the public domain, thereby benefiting the American populace.²¹⁴ In 2017, and again in 2018, members of the House and Senate introduced the CLASSICS Act (Compensating Legacy Artists for their Songs, Service, & Important Contributions to Society Act), which proposed to eliminate some aspects of common-law copyrights for pre-1972 sound recordings. But while the Copyright Office funded reports analyzing the consequences of migrating works from state common-law and statutory structures to federal copyright, **no studies were commissioned on the potential impacts for sonic works created on the aboriginal lands of Native American Tribes, Alaska Native Corporations and Villages, and Native Hawaiian Organizations.** Did Congress and the United States Copyright Office assume that none of the “Legacy Artists” who made “Important Contributions to Society” did so within the borders of federally recognized Indian tribes?

There is an urgent need for research and legislation that takes into account the actual needs of indigenous communities as they seek to protect and promote creativity and innovation on their lands. Even at a conceptual level, tribes’ interests in protecting sound recordings may be altogether distinct from those interests protected by the Copyright Act. The classes of protection needed by tribes for recordings of ritual songs, ceremonial performances, and oral histories, for

213. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS (2011).

214. *Id.* at 120-39.

example, may be quite distinct from those reflected in the Copyright Act. I argue that such a conflict of interests over ownership and circulation of indigenous voices necessitates retooling our present copyright structure. As I discuss later in this section, these divergent interests are due in large part to ontological differences in the ways some forms of indigenous creative work function as compared to “musical works,” “audiovisual works,” or other forms of copyrightable expression currently protected under the Act. Ontologically distinct works can find adequate protection within the federal copyright scheme *only if* tribal laws governing their ownership and use are recognized and enforced by federal law. An “indigenous works” amendment to the Copyright Act may allow tribes to determine what kinds of sound generated on tribal lands should flow within global intellectual property regimes, and which should be subject to indigenous communities’ own protocols and ownership structures.

Numerous scholars have noted the problems Native American creators may face as they attempt to protect their works under the provisions of the Copyright Act.²¹⁵ Many indigenous creative works fall outside the scope of copyright and other kinds of intellectual or cultural property protections due to: (1) the nature of their creation, which may not be strictly human in origin, (2) differing concepts of “fixation,” where a work need not be embodied in a material object for it to be considered “fixed” for a given indigenous community,²¹⁶ (3) the finiteness of the terms of these protections, especially for some Native American communities where the

215. Two significant bibliographic resources compiling commentary on the uncomfortable fit between indigenous cultural expressions and copyright or other forms of intellectual property protection include Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and Their Politics*, 5 ANNU. REV. L. SOC. SCI. 393 (2009); Robert C. Lancefield, *On the repatriation of recorded sound from ethnomusicological archives: A survey of some of the issues pertaining to people’s access to documentation of the musical heritage* (1993) (unpublished Ph.D. dissertation, Wesleyan University).

216. *C.f.* 17 U.S.C. § 101 (defining “fixed”).

oldest creative works merit more protection than newer ones,²¹⁷ and (4) the difficulties indigenous communities face as they seek to prove ownership over materials using settler law and evidentiary doctrines. Further, as discussed in the previous chapters, many indigenous groups' interests in their ancestors' voices are not aligned with the kinds of economic and intellectual progress desired by generations of non-indigenous settlers on their lands who adopted and developed our present copyright regimes. Indeed, many indigenous groups are currently advocating for copyright protection for their creative works solely to prevent further colonization, which, while still occurring through the taking of land, is also happening through the misappropriation of their cultural knowledge and their modes of expression.²¹⁸

One of the central challenges facing tribes and legislators interested in protecting indigenous voices through copyright law is that these voices are often not simply artistic or expressive materials, but are actually active components of indigenous networks of relations. The challenge of determining ownership interests in these materials is an ontological problem—the question of what a recorded indigenous voice does in the world and how it relates to other entities and not necessarily how “original” it is or whether its transfer from one person to another can be proved.²¹⁹ This problem of ontological difference has been one that has plagued settler society

217. See Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 AM. INDIAN L. REV. 111 (1995).

218. See U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 11 § 1, art. 31 § 1 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfi/efstab720irnaturaldocuments/DRIPS_en.pdf. For specific examples related to the case study, see David Howes, *Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law*, 10 CANADIAN J. OF L. & SOC'Y (1995).

219. BRUNO LATOUR, AN INQUIRY INTO MODES OF EXISTENCE 48-49 (2013) (arguing that in developing analytical methods to deal with phenomena that move across modern intellectual domains (e.g. music and speech, which exist simultaneously in domains as diverse as law, science, politics, and religion), the problem is rarely an empirical one, but one of selecting the appropriate categories for analysis). The failure to strike the appropriate balance between creative monopoly and public access to culture in the application of copyright law in Native American contexts is not necessarily a factual problem—trying to determine who contributed certain pitches, rhythms, lyrics and chords only reinforces what are often Eurocentric categories. Rather, the categories of analysis to be used in determining

and settler law for generations. It is clear that, in the United States, Congress and the courts believe indigenous groups are entitled to control their lands, culture, and membership by means of sovereign governments operating under distinct ontological frameworks,²²⁰ but they are also uncomfortable with enforcing indigenous entitlements that arise from these ontological formations that cannot be justified through the logics of American jurisprudence.²²¹

Determining ownership interest in the indigenous voice requires taking into account these ontological differences. Tribal laws (including statutes, common law, and customary law), not the Copyright Act, should be the default body of law applied to questions of creativity, authorship, and ownership interests in sound recordings and other creative works made on the lands of indigenous peoples, particularly when a work in question is one that was never meant to be circulated beyond the control of the tribe or its members.²²² Therefore, the Copyright Act

the copyrightability and ownership of Native American works, and the appropriate relationships between those categories, are incompletely addressed under the copyright law at this juncture. The constitutional categories of copyright, including “Writings,” “Sciences and the Useful Arts,” “Progress,” and “Authors” each have developed with virtually no consideration of indigenous peoples’ fundamental categories of creativity. As discussed in Chapter 1, “Authors” of Hopi ceremonial songs—those who create and exercise dominion and control over the songs—include non-human actors. Could authorship and ownership rights of these sorts of actors be appropriately protected under current federal copyright regimes? *See* *Naruto v. Slater*, No. 15-cv-04324, 2016 WL 362231 *3-4 (N.D. Cal. Jan. 28, 2016) (denying standing to sue for copyright infringement of a photograph taken by a crested macaque, relying in part on the Copyright Office’s statement that “to qualify as a work of ‘authorship’ a work must be created by a human being.”).

220. *See* *Montana v. United States*, 540 U.S. 544, 566 (1981).

221. *See* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978). At issue was the ability of tribes to try nonmembers in tribal court, but the case has been relied upon in the civil context as setting forward the limits of tribes to regulate nonmembers’ conduct on tribal lands generally. Perpetuating the racialized frameworks of nineteenth jurisprudence exemplified in *Ex Parte Crow Dog*, 591 U.S. 556, 571 (1878), the *Oliphant* court found it “an intrusion[] on [U.S. Citizens’] personal liberty” that a tribal court could assert jurisdiction ““over the members of a community separated by race [and] tradition, . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . These considerations . . . speak equally strongly against the validity of respondents’ contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.”

222. *See* Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 74 (2005) (“Because it is suited to indigenous groups’ particular cultures and normative frameworks, tribal law is inimitably capable of capturing and accommodating the unique features of the tribal community. Tribal cultures are not all alike; tribal laws reflect a tribe’s economic system, cultural beliefs, and

should be amended to exempt works created on aboriginal lands of federally recognized Indian tribes, Alaska Native Corporations, and Native Hawaiian Organizations, and other indigenous communities, if conflicting tribal laws exist. In other words, tribal laws governing the ownership and circulation of the indigenous voice should supersede any property interests (or limitations on those interests) imposed by the Copyright Act (or other similar federal and state laws). In this way, tribal communities whose interests align with the Copyright Act's provisions and purposes are in no danger of losing the protections the Copyright Act affords—indigenous communities need not pass any new laws to receive general copyright protection, while tribes like the Hopi Tribe whose interests diverge significantly can take action through their own laws to prevent undesired exploitation of their members' works.

Some might argue that many works made on Tribal lands should be protected by copyright because they were created with the intention that they would circulate in local, national, or international creative markets, and would flow more efficiently through the global economy and be potentially eligible for multilateral treaty protection if subject to copyright law rather than tribal ownership structures. For example, artists in popular music genres or indigenous enterprises that want to create material for commercial consumption shouldn't be at a disadvantage simply because they reside on a reservation. While this may be true, indigenous communities—not settler states—should be the ones to sort out which forms of creativity should be governed by copyright and which should not; and, as I hope has become clear in this dissertation, indigenous communities are very much capable of having these debates and making these distinctions.

sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot.”).

Some might also argue that tribes shouldn't have their own, enforceable copyright laws because artists, cultural producers, or even research and development entities (members of a tribe or not), might take advantage of tribally created loopholes or safe harbors by creating their works on Indian reservations, thereby circumventing federal laws and disrupting the efficiencies of the information economy. But, such a scenario may actually be desirable under current public policy that emphasizes tribal self-determination and economic growth. In any case, indigenous communities should have the ability to develop their own ownership structures for creativity and innovation, irrespective of the desires or economic policies of colonizing states.²²³ And, should an indigenous community desire to forgo ownership structures of its own creation and adopt global copyright regimes, they should have the ability to do so—in whole or in part—and not be limited to the constraints set up by those who chose to colonize their lands.

At a minimum, Congress should ensure that copyright laws not preempt tribal protections governing works that are ontologically distinct from the kinds of works copyright was meant to protect.²²⁴ If a work has little or no ontological difference from the kind of work the Copyright Act was meant to protect, I believe most tribes would find that it would make little sense to exempt such a work from copyright law. But, where a work—a voice performing *taatawi* for example—functions not as music but as a mode of intervention or relation between people and environmental actors, such a work should be considered ontologically distinct from copyrightable subject matter, and aboriginal ownership interests, protocols and protections governing its circulation should supersede any other claims.

223. See UNDRIP art. 11 and 31.

224. This follows jurisprudence on the second fair use factor, which finds that the nature of a copyrighted work should play a role in whether a member of the public can use it without the copyright holder's permission under the doctrine of fair use. See 17 U.S.C. § 107(2). Importantly, at least some courts have found that the key question for determining how this factor weighs in determining whether a use is fair (or if not fair, copyright infringement), is whether the work in question is "the kind of work which copyright was meant to protect." See *DK v. Archive*

The necessity of specialized judicial expertise in determining ontological difference is clear: it would seem unlikely that juries or federal judges without substantial training in indigenous modes of relation would have the kinds of knowledge and skill—or the kinds of obligations to indigenous communities, their territories, and the networks that reside within them—sufficient to distinguish between a work that should be governed by the Copyright Act and one that should be protected by indigenous protocols. Fortunately, tribal courts and other indigenous adjudicatory mechanisms weigh these kinds of ontological differences on a regular basis as they apply tribal laws, codes, protocols, and practices alongside the imposed constraints of settler legal systems.²²⁵ Unfortunately, in the United States, tribal courts’ ability to perform such a specialized function has been sharply curtailed through judicial activism. Following the Supreme Court’s 2001 decision in *Nevada v. Hicks* penned by the late Justice Antonin Scalia, tribal courts are no longer recognized as courts of general jurisdiction.²²⁶ In a recent action for declaratory judgment in a trademark case under the Lanham Act, the Ninth Circuit rejected tribal court jurisdiction over the dispute, basing its decision in part on *Hicks*, finding the subject matter to have exceeded the scope of the tribe’s legislative, and, consequentially, its adjudicative power.²²⁷ Under current precedents, it is not clear that a federally recognized Indian tribe could, under its inherent sovereignty alone, assert jurisdiction in a copyright ownership dispute arising under federal copyright laws.²²⁸ Therefore, in order for tribal courts and other indigenous adjudicatory mechanisms to be empowered to make judgments regarding ownership interests in indigenous

225. See generally *Tribal Law and Policy Institute*, TRIBAL COURT CLEARING HOUSE (last visited Nov. 8, 2016), <https://perma.cc/5EJF-TP97> (discussing the complex issues involved in reconciling indigenous modes of adjudication with adversarial legal environments).

226. *Nevada v. Hicks*, 533 U.S. 353, 374 (2001).

227. *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 938 (9th Cir. 2009).

228. See *Hicks*, 533 U.S. at 366-69.

creativity and innovation, an amendment to the Copyright Act must also expressly recognize the inherent jurisdiction of indigenous communities to adjudicate copyright cases arising on tribal lands.

The above proposals are not without their support from other scholars who have explored these issues in far greater depth and made similar recommendations. Angela R. Riley and Kristen A. Carpenter have argued for nearly two decades that tribal courts should play a central role in resolving questions about indigenous intellectual properties that require a careful balancing of tribal and federal interests.²²⁹ James Nason has argued that federal courts should be asked to enforce tribal court decisions involving intangible cultural properties like songs and sound recordings through principles of comity.²³⁰ Rebecca Tsosie has advocated for a tribal “right to culture”—a judicial concept she has developed for protecting tribal intellectual properties—that likewise relies on tribal jurisprudence to solve questions of ownership.²³¹ Her proposed framework is based on Article 27 of the International Covenant on Civil and Political Rights, which declares that ethnic minorities “shall not be denied the right . . . to enjoy their own culture.”²³² Under her proposed framework, tribes are permitted to set limits on uses of tribal culture so as to allow them to flourish locally, and are also empowered, presumably under

229. See generally Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *Clarifying Cultural Property*, 17 INT’L J. CULTURAL PROP. 581, 587 (2010); Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175 (2000).

230. See James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL’Y REV. 255 (2001).

231. Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 334-38, 357 (2002).

232. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), Art. 27, U.N. Doc. A/RES/2200(XXI) (Jan. 1, 1967).

federal law, to prevent harmful appropriations of them, thereby striking a balance between tribal interests and freedom of expression concerns.²³³

Current public policy toward indigenous peoples (NAGPRA, UNDRIP) would also tend to support such a proposal. These policies reflect the public's desire to remedy past takings and suppressions of indigenous culture by recognizing ownership rights and returning control of these materials to those who can most appropriately use them. In doing so, the United Nations, Congress, and many other have explicitly recognized existing tribal laws, protocols, oral histories, etc. as the basis for establishing ownership in these materials, allowing such ownership claims to supersede those of government agencies, museums, and other federally funded organizations unless proof of voluntary transfer has been given.²³⁴ Additionally, concerns over social equity and judicial economy weigh heavily toward recognizing the place of tribal law in our nation's copyright system. Given the potential harm to tribal interests that could result from deferring all questions of ownership of the indigenous voice to the Copyright Act and other bodies of settler law, (and the likelihood that federal intellectual property laws' applicability on tribal lands will continue to be a litigated issue as tribes acquire more and more intellectual property),²³⁵ an indigenous works amendment to the Copyright Act must (1) allow tribes to continue to define ownership interests in forms of creativity and innovation generated within

233. See Tsosie, *supra* note 172. (explaining that it is not certain whether federal or tribal courts would adjudicate a "right to culture").

234. See 25 U.S.C. §§ 3001(13), 3005(c) (1990).

235. Several tribes already own significant IP portfolios. Two prominent examples include the Florida Seminole Tribe's purchase of the Hard Rock Café trademark. See Katy Byron, "Hard Rock Café sold to Native Americans." CNN MONEY (Dec. 7, 2006). And the St. Regis Mohawk Tribe's expansion of its IP holdings to include pharmaceutical patents. See Meg Tirrell, "Mohawk tribe sues Microsoft, Amazon for patent infringement." CNBC (Oct. 18, 2017) ("The [St. Regis Mohawk Tribe] says its patent partnerships are part of its efforts to economically diversify, noting gaming revenue from a casino it operates has leveled off in recent years, and that it has significant health and economic challenges in its community. In the Allergan partnership, the pharmaceutical company paid the tribe \$13.75 million after transferring the patent rights and then licensing them back exclusively.").

their territories and (2) require courts to look to tribal law and judicial expertise when called upon to determine copyright ownership in creative materials produced on tribal lands.

Proposal 2: Indigenized Licensing

As the discussion above illustrates, copyright and other intellectual property laws are not the perfect answer to indigenous people's demands that their creative works be protected according to their own interests and protocols.²³⁶ As of the writing of this dissertation, copyright and other federal intellectual property laws do not recognize tribes' authority to determine when and how indigenous interests apply to creative work generated on tribal lands, how indigenous protocols governing creative work will be enforced when they conflict with settler laws, or how indigenous ownership interests might affect those who are not members of federally recognized Indian tribes. And, given current politics, the possibility of such a change in these laws seems somewhat remote. Even if tribal laws governing copyrightable materials were enforceable by state and/or federal courts, there may very well be indigenous voices or other creative materials that presently exist in the "public domain" or which otherwise cannot be legally reclaimed by indigenous groups, but which tribes would still be anxious to care for and control. This leads us to ask whether another body of law that typically governs archival materials—contract law—might provide additional solutions for indigenous communities seeking to reclaim and control uses of their ancestors' voices.

Kathy Bowrey (2006) suggests that protocols governing ownership and circulation of Aboriginal Australian cultural materials, while not readily enforceable through existing intellectual property laws, might nonetheless be enforceable through private agreements between

236. See Howes, David, *Combating Cultural Appropriation in the American Southwest: Lessons From the Hopi Experience Concerning the Uses of Law*, 10 Canadian J. L. & Soc'y 129 (1995).

indigenous groups and holding institutions. She explains that in a number of communities—particularly the software development community—contract law has for decades been used as a means of creating alternative ownership and circulation regimes. These communities have generated specially tailored licensing frameworks that create pockets of industry custom through private law that are difficult to disturb.²³⁷ Over time, indigenous protocols for ownership and circulation embedded in contracts with holding institutions could potentially receive recognition in copyright law in the same ways open source (and to some degree CopyLeft) paradigms of ownership and circulation have. At the very least, as the open source software movement has shown, the risk of litigation and the potential for community sanctions and shaming may be enough of a deterrent that regimes established through these kinds of licenses will be widely adhered to.

History and Function of Open Source Licenses

Open Source licensing had its origins in the early 1980s as a form of “ethical rebellion” by software programmers who were opposed to the proprietary model of software development espoused by the software giants of the day. Under the proprietary model, the use of source code had been restricted under copyright law to copyright holders (typically a software manufacturer) and its licensees (paying customers), thereby limiting the possibility for collaboration within the industry.²³⁸ To remedy the situation, the open source movement sought to move away from exclusion as the device used to manage the circulation of software, replacing it with a set of universal software licenses that actually did the opposite: open source licenses effectively

237. Kathy Bowrey, *Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices* 6 Macquarie Law Journal 65, 90 (2006).

238. Vikrant Narayan Vasudeva, *Open Source Software and Intellectual Property Rights* (2014)

prevented anyone who possessed open source software from restricting its flow.²³⁹ The first open source license was generated for the GNU (later Linux) operating system—an open source alternative to the commercial UNIX operating system.²⁴⁰ As Vasudeva (2014) reports, the GNU license “gives subsequent users of the copyrighted code the ability to pass along restrictions that embody open source tenets”—in other words, it exercises a copyright owner’s right to determine who reproduces or distributes software in a way that forces all subsequent users to keep the circulation of the software open without extracting royalties or placing other conditions on its use.²⁴¹

The GNU GPL open source license contains a number of provisions that carry out the ideals of the open source movement despite its reliance on traditional copyright law to enforce the license. On a broad scale, the GNU license affirms the copyright rights that apply to the software it covers (“This License explicitly affirms your unlimited permission to run the unmodified Program” and “This License acknowledges your rights of fair use or other equivalent, as provided by copyright law.”).²⁴² Nothing in the license suggests that copyright law does not apply or is not enforceable. To the contrary, unless some kind of limitation on circulation or access (including copyright rights like reproduction, distribution, or the creation of derivative works) could be exerted by the licensor, the terms of the GNU open source license probably would be unenforceable. To achieve the open source movement’s objectives, the GNU license partially negates the exclusivity of some of the copyright holder’s rights in a way that

239. *Id.* at 34

240. *Id.* at 18.

241. *Id.* at 34.

242. GNU General Public License, Version 3 [hereinafter “GNU 3 License”] § 2 (2007), *available at* <https://www.gnu.org/licenses/gpl.html>.

defeats copyright's underlying premise (i.e., that owners of copyrights should have the right to exclude others from the work they create in order to advance their [or their firm's] own financial interests). But in order to obtain the negation of the copyright holder's exclusive ownership and circulation of the software, the Licensor imposes rules on circulation and ownership that those in the open source community must theoretically agree to to be able to use it—i.e., conditions that arguably advance collaborative innovation by allowing all potential users the ability to access and use the original software and any newly created work derived from it as long as they also give open access to others on the same, generally accepted terms.

At a more granular level, the GNU 3 License propagates open source ideology through its conditional granting clause, which allows those who receive the work to use it and distribute it, but (1) only upon the recipient's compliance with the terms of the GNU 3 open source license, and (2) only on condition that any re-grant of the work by the recipient follows essentially the same terms of the original grant along with a copyright notice providing the “rules of the game.”

For example, the GNU GPL 3 granting clause contains the following language:

“You may convey verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and appropriately publish on each copy an appropriate copyright notice; keep intact all notices stating that this License [and any additional terms permitted under the GNU 3 license] apply . . . ; and give all recipients a copy of this License²⁴³”

“You may convey a work based on the Program . . . provided that you also meet all of these conditions:

a) The work must carry prominent notices stating that you modified it . . .

b) The work must carry prominent notices stating that it is released under this license . . .

c) You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, [along with additional terms added by the licensee], to the whole of the work, and all its parts, regardless of

243. GNU 3 License at § 4, ¶ 1.

how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.”²⁴⁴

Under the GNU GPL 3’s granting clause the licensee acts essentially as the agent of the licensor. The licensee is required to offer a license to subsequent users to use the work, but only on the conditions specified by the open source license. Importantly, the licensor does not explicitly grant the licensee the right to sublicense the work;²⁴⁵ rather, when the licensee provides the work to another person, the initial licensee is simply facilitating the grant of a license from the original licensor to the new user (“Each time [the licensee] convey[s] a covered work, the recipient automatically receives a license from the original licensors, to run, modify and propagate that work, subject to this License.”)²⁴⁶ So, there is no chain of title that can be broken or altered—all users of the work are required to be linked to the owner of the work via contract.

As mentioned above, the GNU GPL 3 license also contains a “whip” of sorts to ensure compliance with its provisions. The License contains an automatic termination provision, where “[a]ny attempt otherwise to propagate or modify [the GNU license] is void, and will automatically terminate your rights under this License.”²⁴⁷ In practice, this means that if a software developer uses a piece of GNU-protected source code in her commercial software, but attempts to add additional exclusions to the license, her license ends and she could be sued for copyright infringement if she were to sell the software. But even if her license is terminated, the GNU GPL ensures that anyone who uses her software remains a licensee of the original licensor,

244. GNU 3 License at § 5.

245. *See* GNU 3 License at §2, ¶3. (“Sublicensing is not allowed”)

246. GNU 3 License at § 10, ¶1.

247. GNU 3 License at §8, ¶1.

bound only to the conditions of the GNU GPL. Because the license is granted anew from the owners of the work each time the original software passes from one person to another (rather than being sublicensed in a chain of licensees) any termination of a licensee’s rights “does not terminate the licenses of parties who have received copies or rights from [a licensee] under this License.”²⁴⁸ The terminated licensee’s unauthorized additions to the GNU GPL, if any, fall out, and the License continues on, unchanged.

Application of the GNU Open Source License Model to Indigenous Voices

The GNU open source license, then, is a means of leveraging copyright (or other rights to limit access to a work) in a way that superimposes a specific economic structure and mode of relations within a particular community—backed up by the coercive power of the state. My argument here is that this same structure could be utilized to achieve the goals of indigenous groups who are seeking to negotiate agreements with museums, archives, and even private collectors over the ownership of their ancestors’ voices.

Using Licenses to Recognize Tribal Interests in Indigenous Media

First, as discussed above, the GNU GPL 3 License uses copyright law as a means of compelling compliance with its ideology and economic structure. It effectively limits the scope of copyright rights, but on condition that the work be used in ways that coincide with open source principles. As discussed above, the GNU license would not function unless at least some rights were held solely by the Licensor. If a work distributed by the GNU license were somehow owned by another entity or in the public domain (and physically or digitally available for the general public to make copies from), there would be no need for the public to abide by the conditions of the GNU GPL.

248. GNU 3 License at §8, ¶4

In situations where an indigenous legal entity (individual, federally or state recognized tribe, corporation or unincorporated association of indigenous community members, etc.) clearly owns reproduction and/or distribution rights to indigenous media housed in an archive, or, if the media is not subject to copyright but the tribe or other indigenous entity has secured the right to control public access to media from the institution, the stage is set for the indigenous owners to control the circulation of the media under a contingent licensing framework like the GNU GPL.²⁴⁹ It is imperative, then, that tribes first secure agreements with holding institutions that bind the parties to an understanding of how copyrights and other exclusive intellectual property rights pertaining to indigenous media are owned, as well as an agreement to abide by any exclusive rights arising under tribal, international, or federal laws. And if tribes do not hold these rights, they should seek to reclaim them either by an institutional grant back to the tribe or some other kind of repatriation mechanisms (see Chapter 3). In cases where the holding institution might not otherwise be within the jurisdiction of the tribe or bound by the protocols established by the tribal entity,²⁵⁰ it is also important that these licensing agreements contain choice of law provisions that recognize tribal laws governing these materials.

249. In the rare instances where museums or archives hold valid intellectual property interests in indigenous media, a clause transferring all right, title and interest from the holding institution to the Tribe or an authorized tribal authority may permit the tribe to exercise control over these items in a manner consistent with tribal ownership and circulation protocols. But, as discussed above, neither museums and archives nor tribes typically hold complete, unencumbered or uncontested intellectual property rights to indigenous media contained in museum or archival collections. In fact, museums and archives may claim that many indigenous media materials are in the public domain and free to use by anyone.

250. The Supreme Court has set limits to tribal civil jurisdiction over nonmembers in both *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Montana v. United States*, 540 U.S. 544 (1981), and in subsequent cases. Under *Montana*, an entity can become subject to tribal laws when that entity (1) enters into contractual relationships with the tribe or its members in such a way that the activity has a nexus with tribal interests, or (2) when the entity's activities on an Indian reservation "threaten or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 540 U.S. at 566. Given how vitally important control over these archival materials may be both to tribal interests and the political integrity and the welfare of the tribe, an archive or museum could potentially come under tribal legislative jurisdiction under either of *Montana's* provisions.

Some specific terms that may allow for indigenous rights in these materials to be recognized may include:

- An agreement that that Tribes or tribal members are the rightful owners of some or all of the intellectual property rights, including copyrights, contained in the media.
- An agreement that the Tribe or tribal members possess ownership interests in the media arising out of tribal law, and that the Archive consents to being subject to tribal laws governing those interests; and, if the Archive is a federal or state agency, waives any sovereign immunity from suit for actions brought in federal, state or tribal courts to assert or defend those interests.
- An agreement that the media in question is considered by both parties to be a sacred object or an object of cultural patrimony within the meaning of the Native American Graves Protection and Repatriation Act; that the Museum or Archive has no evidence that the media was obtained with the voluntary consent of an individual or group that had authority of alienation; and therefore, the media, and any intellectual property rights appertaining to it, is owned solely by the Tribe and subject to expeditious repatriation by the Museum or Archive.
- As between the parties, the United Nations Declaration on the Rights of Indigenous Peoples, articles 11 and 31 (which require the return of indigenous intellectual property, cultural heritage and traditional knowledge and the enforcement of indigenous laws governing them), shall determine the ownership interests pertaining to the media in question, and shall provide any remedies applicable to the unauthorized use of the media.

- Any dispute as to ownership or circulation of the media between the parties shall be adjudicated in a court of the Tribe, or through an alternative adjudicatory mechanism approved by the Tribe.

Using Licenses to Require Compliance with Indigenous Protocols in the Circulation of Indigenous Media

As discussed earlier in this section, transferring copyrights from a museum or archive to a federally recognized Indian tribe or other indigenous community entity is not always possible, nor is it a foolproof way of ensuring that indigenous media is circulated within indigenous cultural protocols. The GNU GPL 3 license also provides a potential mechanism indigenous communities might use to require archives and potential follow-on users of their materials to circulate those materials according to tribal customs or protocols or only with permission of specific tribal or cultural authorities. Indigenous groups, upon securing exclusive control over archival materials through tribal, federal, state, or international law as discussed above, could grant a conditional license to archives and other users of their work, requiring that (1) the holding institution must comply with indigenous protocols governing the use of the materials, and (2) that the archive must license the work, on behalf of the tribe, to anyone who obtains possession of a copy of the work in any form, using a license approved by the Tribe or incorporating tribal laws, policies, or protocols pertaining to cultural materials. A sample granting clause, based on the GNU GPL 3 discussed above, might read:

“The Tribe hereby grants a nonexclusive license to the Archive to reproduce, distribute, perform, or convey the Media or any materials derived from the Media to

Users provided that the Archive also meet all of the following conditions:

1. (1) Every copy of the Media must carry a prominent notice stating how the Media is owned and who may

authorize its use including but not limited to the name and contact information of the owner(s) of any copyrights or other intellectual property rights in the Media and/or tribal or aboriginal rights pertaining to the Media, and a warning that by using the Media, the User will enter into a License Agreement with the Tribe (directly affecting tribal interests) under the same terms as that of the Archive, and that any violation of the License Agreement may be subject to remedies available under tribal law and enforcement in tribal court.

2. (2) The Media must carry a prominent notice plainly visible to all Users of the Media, that access to the Media is conditioned on compliance with the protocols, customs, or other conditions annexed to this License Agreement, which the Archive shall make available in full [at a specific location / on the organization's website / upon request to the Archive], unless permission to use the Media has been otherwise expressly granted by [the Tribe or a specific tribal or cultural authority] to the User under separate terms and conditions.
3. (3) The Archive must license the Media described in this License Agreement to anyone who comes into possession of a copy of the Media. This License will apply to the Media, in whole or in parts, regardless of how it is packaged. This License gives no permission to license the Media in any other way without the express written consent of [the Tribe or a specific tribal or cultural authority].”
4. (4) Any attempt otherwise to propagate or modify this License Agreement is void, and will automatically terminate the Archive's rights under this License. However, the termination of the License Agreement does not terminate the licenses of Users who have received copies of the Media or any rights to access or use the Media under this License.

While it might seem counter-intuitive, the goal of this granting clause is to compel the archive to license the conditional right to use the media it holds to each and every person who obtains the media, whether in person, via streaming from an online database, etc. But even though end-users technically receive the right to use the work, that right is made contingent on their abiding by the indigenous community's laws and protocols or obtaining approval from indigenous authorities.

By making both the archive's and the end-user's license from the indigenous entity conditional on their fulfillment of these obligations, any violation of indigenous protocols contained or referenced in the agreement would not only constitute a breach of contract, but, if the material is under copyright, any § 106 use of the material once the license is breached could also constitute copyright infringement.²⁵¹ Further, the Archive could be subject to tribal laws and remedies for the violation of its tribal or aboriginal rights. In effect, the archive would be required to ensure that the material is circulated and protected under the terms set forward by the indigenous community.

In sum, licensing agreements that contain provisions like these may allow indigenous communities to assert and exercise control over these materials on their own terms, including the application of tribal laws, protocols, or authorities established in or referenced by the agreement, to questions of ownership and circulation involving indigenous media.

Proposal 3: Indigenous Care of our Ancestors' Voices

The final proposal I want to make concerns what to do about indigenous voices currently held outside of the care of indigenous communities. As I argued in Chapter 4, erasure and forgetting are necessary aspects of indigenous sonic sovereignty. When indigenous voices are made to live under the anonymous care of the settler state, indigenous sovereignty is diminished. Therefore, the care of indigenous voices should be, in the first instance, in the hands of indigenous peoples and not settler institutions. Importantly, this care may include the right of indigenous communities to determine how these voices should live, or whether these voices should die, disintegrate, or be forgotten. In many ways, the right of indigenous peoples to care

251. But, there may also be limitations on § 106 rights that may preclude liability for infringement, particularly § 107 fair use.

for their voices parallels current debates in Europe regarding the right of individuals to have their data be erased or “forgotten” by big data corporations like Google, Facebook, Apple and Amazon. For indigenous peoples to retain their sonic sovereignty, they must have the power to create culture, but also to let their culture die.

The Right to Forget

Governments, particularly in Europe, have started generating policies to ensure forgetfulness and erasure of memory (Grax, Ausloos, & Valcke 2012). For example, in May 2016, the European Union adopted major revisions to its 1995 Data Protection Directive that includes an individual “right to be forgotten.” The European Parliament found that each European citizen “should have the right to have his or her personal data erased” under certain conditions, including the following:

- where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed,²⁵² or
- where [the citizen] has withdrawn his or her consent or he or she objects to the processing of personal data concerning him or her,²⁵³ or
- where personal data have been unlawfully processed.²⁵⁴

The EU was particularly concerned about situations where individuals, particularly children, were “not fully aware of the risks involved.”²⁵⁵ At the same time, the EU also faced considerable pressure from social media corporations, journalists, and historians, among others, to weigh carefully the potential impact of the right to forget on freedom of expression and

252. Reg. 2016/679, European Parliament and Council, art. 17(1)(a) (Apr. 27, 2016).

253. Reg. 2016/679, European Parliament and Council, art. 17(1)(b) (Apr. 27, 2016).

254. Reg. 2016/679, European Parliament and Council, art. 17(1)(d) (Apr. 27, 2016).

255. Reg. 2016/679, European Parliament and Council, Preamble ¶65 (Apr. 27, 2016).

information. In fact, the EU took particular care to preserve an exception to the right to forget for “archiving purposes in the public interest, scientific or historical research purposes or statistical purposes” among other apparently self-evident “publicly beneficial” interests.²⁵⁶ But even in providing an exemption for archival institutions from the “right to forget” for these “publicly beneficial” purposes, the EU stipulates that holding data against an individual’s wishes can only occur when it is “likely to render impossible or seriously impair the achievement of the [publicly beneficial] objectives of that processing.”²⁵⁷ As the Regulation later instructs, archival institutions holding data from individuals for these purposes “shall be subject to appropriate safeguards” protecting individual privacy (specifically “pseudonymization” and measures to prevent identification of data subjects). However, nothing in the EU’s “right to forget” provision requires that these holding institutions, EU member states, or the EU take into account group rights or indigenous rights²⁵⁸ as described in the United Nations Declaration on the Rights of Indigenous Peoples.²⁵⁹

In the United States, several legal scholars have mocked European efforts to implement a right to forget, taking particular interest in a 2014 Court of Justice of the European Union ruling requiring Google Spain to delete search results containing an archived article with “irrelevant

256. Reg. 2016/679, European Parliament and Council, art. 17(3)(a),(d) (Apr. 27, 2016).

257. Reg. 2016/679, European Parliament and Council, art. 17(3)(d) (Apr. 27, 2016).

258. Reg. 2016/679, European Parliament and Council, art. 89(1) (Apr. 27, 2016).

259. The United Nations Declaration on the Rights of Indigenous Peoples, while not necessarily binding on signatories (“a standard of achievement to be pursued in a spirit of partnership and mutual respect), does provide norms for data gathered from indigenous groups. *See* Resolution adopted by the General Assembly 61/295, (2007) (“States shall provide redress . . . developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”); *see also* art. 31 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . . They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”)

and excessive” information after a Spanish citizen requested that it be taken down and de-listed.²⁶⁰ At least one of these scholars considered the “right to forget” to be “the biggest threat to free speech on the Internet in the coming decade.”²⁶¹ Certainly EU and American notions of freedom of speech have fundamental differences: contributors to American First Amendment thinking have advocated for an “uninhibited, robust, and wide-open” debate on public issues,²⁶² which for some legal theorists, requires citizens to have uninhibited access to information for the purpose of self-government.²⁶³ And yet, doctrines like expungement of criminal histories and various forms of evidentiary privilege show that American law can be marshaled to force various kinds of archives to either let go of (or refrain from circulating) knowledge acquired in the past so that certain publics can move forward unconstrained in the present and future.

My argument here is that one of indigenous sovereignty’s core attributes must be the ability to care for and maintain connections to our land through the voices of our people, past and present. This may include (but is certainly not limited to) the ability of indigenous communities to determine appropriate preservation techniques, possibilities of circulation, and/or the right to demand the destruction of archived ancestral voices, and it may require archives to deaccession them and transfer complete ownership of the physical media and intellectual or cultural property rights to indigenous communities. There are important counterarguments as to why First

260. Some commentators considered the European court to be out of their minds. *See The Right to Be Forgotten: The Good, the Bad, and the Ugly*, *The Digital Citizen* (July/Aug. 2015), available at <http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=7131393>

261. Jeffrey Rosen, *The Right to be Forgotten*, 64 *Stan. L. Rev. Online* 88 (Feb. 13, 2012), available at <https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/>

262. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

263. *See* Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 24-25 (1948) (“The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.”)

Amendment concerns over access to indigenous information are either irrelevant or, at best, sidestep the immense inequities in the way indigenous peoples are “known” as compared to settler populations in the United States.²⁶⁴ But perhaps the most compelling argument for recognizing indigenous peoples’ rights to care for their and their ancestors’ voices comes from the role these voices play in the networks of relations that constitute our contemporary indigenous communities: they are material manifestations of sonic sovereignty.

264. Audra Simpson, *On the Logic of Discernment*, 59 *Am. Quarterly* 479 (2007)

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