

# **Ethical Considerations**

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The call to preserve the anthropological record is a call to recognize our responsibilities to anthropology, the joint enterprise in which we are all engaged. As several of the papers in this volume make clear, however, there are multiple ethical issues and obligations involved in preservation. There is the basic question, raised by Tuzin, as to whether ethnographers actually "own" the descriptive records they generate in the field or are only their custodians or stewards. If it is the latter, then anthropologists have an ethical responsibility to preserve these data for future generations of the peoples among whom they have worked; they cannot ethically dispose of them without due consideration. Applied anthropologists, as van Willigen notes, have obligations not only to those studied but also to the clients for whom they work under contract. Are data so generated the property of the firm or agency, and who has the ultimate say in their disposition? Such concerns apply, but are made more complex, when the data at issue involve medical records, as Estroff describes. The process of archival disposition and the use of archival materials raise other issues related to data sensitivity, control of access, and retention of rights to continued use and publication. Archivists have ethical and legal responsibilities to preserve records and make them accessible while balancing the sometimes differing needs of their publics, some of which could potentially conflict with the wishes of a donor.

This paper attempts to pull together several of these issues, in order to raise awareness of them and to consider what protections can and cannot be expected when the anthropological record is preserved. Three questions are asked: who owns the data? who controls access? and what is fair use?

## **Who Owns the Data?**

It is certainly not peculiarly Western to commodify property, both tangible and intellectual, and to think in terms of the individual's buying, selling and owning it. Other cultures and societies of the world share some of these ideas, but they may simultaneously also consider certain forms of property as collective and/or inalienable and thus not subject to commodification. Nonetheless, it is perhaps the Western concept of property more than any other that guides individual decisions as to what to do with the records that have accumulated from a research project or a lifetime. It also seems to be this Western view that is at the root of present debates about who owns data — the information and knowledge



Rose Namikili Graham (left) and anthropologist Kimberly Christen discussing the Mukurtu Wumpurrarni-kari Archive, a browser-based digital archive built around the cultural protocols of the Warumungu Aboriginal community in Australia's Northern Territory. The archive provides a cultural solution to the community's concern over access to and reproduction of recently digitized versions of cultural materials and personal and community photos. Photo by Trisha Narrurlu Frank.

as well as the material on which these are inscribed — and what rights, privileges and obligations flow therefrom. Larger debates about who owns the past, present and future will certainly follow.

The records held by most anthropologists can be divided into several types, although such divisions are not always clearcut or easy to make due to the diverse trajectories of individual careers. A basic division can usually be made between personal records, in the form of correspondence, manuscripts generated, diaries, lectures, grant applications, analytic records, etc., and the raw material of observation. Personal records, of course, may also contain synthesized (and sometimes primary) data from the field or laboratory. Depending on the subdiscipline, some raw data may be unusable without analysis, explication, or synthesis (especially if elaborate coding forms or shorthand techniques were used in recording them). But for the most part, it is the basic data, the primary set of descriptive observations, that should come first to mind when considering archival disposition and the question of who owns the material.

For all subfields, it is these data that are of fundamental use to the people studied, to various publics, and to the future of the discipline. A fieldworker has ethical obligations to all of these constituencies in the preservation of a research record, although his/her sense of where the primary obligation lies may influence the choice of where to archive materials (in a local/tribal repository, public institution, disciplinary

archives, or other). Advice on archiving these primary data should also be sought from the individuals from whom information was obtained, as such records are the most likely to involve collective rather than personal property, and potentially someone else's intellectual property (see Greaves 1994).

Personal and professional papers, on the other hand, more clearly pertain to an individual's intellectual property. They are primarily the product of a scholar's mental activity: analyses, interpretations, syntheses, policy plans, and the like. Here preservation considerations concern the potential for reinterpretation of one's intellectual activities by others and the overall history of the field.

The entire record of a scholar's life would be of greatest value if kept together, but if priorities must be assigned, it would seem best to preserve that which has the potential to serve the greatest number of individuals and needs. This would likely be the records of fieldwork. Where such records are at stake, it does not matter whether the anthropologist is a major figure in the discipline or of more modest accomplishments: if data were generated, they are of value.

Some individuals, perhaps especially ethnographers, worry that the quality of their data will reflect on them personally — that they will reveal how good they were at the craft (Jackson 1990). While to some degree true, it is generally recognized that note-taking is partly a matter of personal style. Some fieldworkers write little, assuming that memory will help fill in the blanks; others write a great deal, leaving little to chance or recollection. Some change their style during a lifetime, moving from one to another and perhaps back again. Those who read raw field notes may be frustrated by a minimalist approach, but if a researcher knows the subject matter well, even the most limited comments may become highly significant. Having worked extensively with the field notes and other unpublished materials of four fieldworkers, I found that they differed greatly in what they observed and how they recorded data. Yet each data set, including the most minimal, is an invaluable link in the descriptive chain. Natives of the cultures described have drawn more meaning than I out of seemingly insignificant statements or observations. They were also sometimes as frustrated as I by comments in field notes, not necessarily for their brevity but for the lack of attribution. For them, the validity or representativeness of a statement comes more often from knowing who said it than from the statement itself.

Lest one think that the problem of who owns the data is solely the preoccupation of ethnographers, it should be emphasized that the same concerns apply to other subfields. While it has been more common for archaeologists to deposit their field records with the collections made from an excavation, this practice is by no means universal. There are archaeological collections scattered in museums around the country that are largely useless because the researcher kept the field notes as personal property, usually with the ultimate aim of writing up the site ("someday"), but sometimes also because of concern that the notes were not good enough — full enough, complete enough, accurate enough, cleanly written. The archaeologist might rationalize that no one else

could make sense out of them; or that others might misuse them. Regardless of motivation, it can be argued that the notes are not personal property. They belong with the collections, or in a repository where there is access to all researchers. Without them, the database is incomplete, it can be easily misinterpreted, and both the record and the discipline suffer.

Similarly, linguists sometimes are minimalists in note-taking, hoping that backup tape recordings will fill in the gaps (although many of these never get fully transcribed). They may also change the transcription systems they use over time, and then worry that this might be misinterpreted as a failing. Sometimes translations are missing or meager. Yet field notes, morpheme slips, and untranscribed tape recordings are all of value, not only to other linguists but also to those whose languages are in jeopardy.

Those involved in contract research face additional dilemmas, although the terms of the contract may make clear who owns at least some of the data or products. Dongoske et al. (1994:56), for example, speak of "the contractual rights of the Hopi Tribe to approve publication of the research it sponsors [as being] no different than the proprietary rights exercised by businesses and governmental agencies." The raw data may not be covered under the contract, however, leaving ambiguities. Contract research in archaeology, at least on federal lands, requires the deposit not only of material remains from survey and excavations, but also of all "associated records," including field notes, photographs, maps, and charts, in approved repositories (U.S. Department of the Interior 1991). Some states require similar disposition for work conducted on state land. However, large portions of the United States are not public lands, and thus these rules do not apply. Some collection repositories have addressed the problem by refusing to curate archaeological material without appropriate field records — a step in the right direction.

Archivists, in negotiating deeds of gift with donors, generally know the legal difference between their institution's right to possess the physical property of records and rights to the intellectual property thereof. U.S. copyright law, as revised in 1978 and 1980, grants protection to creators of literary, musical, dramatic, and other categories of artistic products, as well as computer programs. Copyrights are bundles of rights provided to individuals for their creation of original materials that are fixed in tangible form. Knowledge and ideas are not copyrighted, but what is written on a page is. As a property right, copyright is intended to provide authors and artists protection with regard to the results of their creation, limited by the public's right to fair use. This protection is limited in time, and eventually all works become part of the public domain. Currently, that protection extends for the life of the author plus fifty years, but in no case expiring before the year 2003.

Most donations of personal papers and field notes would be subsumed under this law by the assumption that the person "authoring" the materials (published or unpublished) holds the copyright. If that person does not specifically transfer copyright to the archives in a deed of gift, those rights are retained *ipso facto*. Specifically retaining them is, in fact,

one way to protect one's intellectual property rights. Most archives now request that a transfer of copyright be made in writing, but some also accept donors' retaining them, within reason. This does not mean that if another person misuses the archived materials, there is automatic legal redress for damages. Before any infringement of copyright can be litigated in civil court for damages, the original copyright must have been registered with the Copyright Office before the infraction (see Peterson and Peterson 1985 for details).

When archivists receive copyrights from a donor, they assume that the individual has the right to them in the first place. For some kinds of field data, the situation may be ambiguous; examples might be an audio or video record of a performance, the text of a story, or a life history. In the future, it may be decided on legal grounds that in such contexts the fieldworker was indeed only the custodian of these materials, or else a distinction may be made between the tape and the transcription, with the researcher becoming the "author" of the transcription. The question of who owns the data may become more legal than ethical and will certainly evolve as the courts set precedents.

### **Who Controls Access?**

Many anthropologists are concerned about archiving field notes and personal papers because of the sensitive materials they may contain. How can subjects (and the fieldworker) be protected? If restricted access is deemed necessary, who will review the materials and assess how they can be used, anticipating what uses could bring harm? These questions are not easy to answer. They involve access to what was once private but now might become public. Each anthropologist needs to give careful thought to these issues in light of his/her own materials when considering what and where to archive. If possible, anthropologists should consider such issues while their field records are being created.

Raw field notes, as we know, contain many types of observations, from the purely descriptive to the fully interpretive. For the purpose of more easily separating sensitive from other material, a sound practice would be to keep notes separate from a field diary (Werner and Schoepfle 1987). The diary would be the place to record personal experiences, "raw" rather than "cooked" analyses, and details that might be important to interpretation but potentially damaging. Field diaries make fascinating reading and provide insight into the anthropologist and the field situation, but they may need to be held apart from other data and controlled by different criteria of access.

Few ethnographers — but probably many medical anthropologists — have field notes in which subjects are identified only by number and not by name. In large communities, such a procedure might afford good protection. In small communities, however, it probably would not provide much safety, as everyone would know or could guess others' identity from a reasonably full cultural account.

In recent years, particularly in light of the codes of ethics adopted by professional societies as well as federal guidelines for the protection of

human subjects, anthropologists have become more sensitive to the potential for harm to subjects. Yet, purging one's field notes (or publications) of all identification may not be the best answer or even the best safeguard. To do so might render the research materials less useful to native peoples, who often need to know identities in order to evaluate the data. It might also lead to speculation about identities that could be more harmful than identification. Hopi anthropologist Hartman Lomawaima suggests that anonymity perpetuates a "we-they" attitude, implying that only anthropologists can make sense of traditional data (Dongoske et al. 1994:56). The Hopi Historic Preservation Committee contends that allowing consultants to choose to be named, remain anonymous, or be identified collectively in publications is good practice for the future. It will not, however, solve the problem of how to handle records collected in the past or of unpublished materials in general.

Anthropologists who work for federal or state agencies may find that access to data deposited with the agency is governed by a freedom of information act. Normally, these acts cover only certain materials relating to governmental activities, and most carry access exemptions for such items as medical records, investigative records (which may include interview data that has been designated as confidential), and matters involving national security (Peterson and Peterson 1985:46). While the latter may cover the location of archaeological sites deemed necessary to be secret for their protection, such laws may or may not govern raw data or materials retained by a fieldworker, leaving these subject to special legal considerations. (See Peterson and Peterson 1985 for a discussion of federal and public, as opposed to private and personal, records.)

When materials are archived, some protection of sensitive data can be obtained, but it will not be complete or permanent. Most archives follow the Statement on Access to Original Research Materials jointly issued by the American Library Association and the Society of American Archivists, in which they pledge to properly care for such materials and provide equal access to all users unless specifically restricted from doing so. The statement asserts that "every repository has certain obligations to guard against unwarranted invasion of personal privacy and to protect confidentially in its holdings in accordance with law." While recognizing the donor's right to impose some restrictions on access, it adds that repositories should discourage donors "from imposing unreasonable restrictions and should encourage a specific time limitation on such restrictions as are imposed" (quoted in Peterson and Peterson 1985:98). While cataloguing collections many archivists become familiar with potential "red flags" that might involve matters of personal privacy. However, they cannot be expected to know them all or to protect for unanticipated violations. Donors have to take at least some responsibility to either eliminate potentially harmful materials or impose "reasonable restrictions." It is well to remember that the federal Privacy Act applies only to federal governmental records, and that no federal (and probably few state) statutes protect individual privacy in other types of records.

The easiest restrictions for archivists to administer are those that close access to all users for a specified time period, such as twenty-five or fifty years, or until after the death of the donor. Unreasonable restrictions are those that require archivists to sort users into categories such as

"serious researchers," "professionals," "only certain families," or other ambiguous designations. Most archives are understaffed, and although researchers file applications identifying themselves and their intended use of materials, repositories cannot check credentials or police users. Because of this, some donors feel that their materials are safer in a disciplinary repository, or in an institution with a reputation for collecting related materials. Donors need not exclude the possibility of restricting access, but they should carefully consider the implications, realizing that archivists have concerns of their own, both legal and ethical. Donors should also be aware that every repository will periodically review restrictions on specific collections.

### **What is Fair Use?**

An issue related to that of who controls access is what might be the outcome of such access. Individuals archiving records might be concerned about whether their intellectual property, or the property for which they are custodians, could be used in unapproved ways. The question is legitimate and the answer complicated, reflecting in part archival responsibilities and in part the ethics of the wider community of scholars.

Within U.S. copyright law, there are certain provisions that govern what is called "fair use". These mandates recognize the right of individuals to use a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (Peterson and Peterson 1985:82). Further provisions outline principles for determining the extent and nature of fair use: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit, educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for, or value of, the copyrighted work" (U.S. Code, Title 17, Sec. 107). Additional guidelines govern the responsibilities of archives with regard to transferred copyrights, and provide protections for donors who retain copyrights for archived materials. However, these property rights are difficult to police, and would probably only be enforced in a civil court after some alleged violation (for example, the publication of an entire manuscript without specific permission). In other words, the damage will probably have been done before something could be done about it. Moreover, legal recourse for copyright infringement is quite limited; while all works hold an informal copyright once created, authors or heirs cannot sue for damages in civil court unless the work was formally registered.

Archives are allowed, by an additional section of the Copyright Act (Section 108), to make copies of materials under the provisions of fair use. Copies can be made for individuals for their own scholarly use; an entire work normally cannot be copied unless it is clear that the archives holds the copyright. Archives generally must give formal approval for publication of materials if more than ten to fifteen percent of the content of an item is to be directly quoted. However, archives can only exercise

authority over the quotation of material, not its intellectual uses. Again, ideas and information are not copyrighted, only their physical representation.

These provisions govern archives only with regard to making photocopies for users. Archivists cannot prevent a researcher's copying material by hand and then using it. They instruct users as to restrictions of various sorts, including copyright restrictions, as well as notify them of proper ways to cite the material and normally require researchers to sign agreements to abide by those restrictions. However, archivists cannot follow up to ensure that materials were used fairly, nor would they enter into litigation over such matters unless the case were clear and damages substantial. At that point, the ethics of the scholar must take over.

There is little doubt that the ethics of manuscript use must be communicated to students in much the same way as practices governing citation of published works and credit for verbally communicated ideas. Students rarely receive specific training in the use of archived materials unless they are in a specialty (such as ethnohistory) where this is routine. Methodology courses may not treat ethical issues of use even in these contexts, and there are as yet few graduate courses in professional ethics.

Unfortunately, there have been cases in which ethical if not legal violations have occurred. Training of users cannot fully protect a donor or the subjects of the records, especially as increasing use is being made of anthropological materials by non-anthropologists. But training can help to avoid some abuses, especially those due to ignorance, and forestall ethical pitfalls. It would be sad if efforts to preserve the discipline's record had to call for measures to stringently monitor its use because of ethical lapses of some users. Despite these concerns, archivists report that "Like the purity of the famous soap, 99.44 percent of all records are open and 99.44 percent of all working relationships between archivists and users are noncontroversial" (Peterson and Peterson 1985:7). In large part, then, donors' and native groups' apprehensions about potential misuse may be unfounded. Careful consideration of the ethical issues involved in archiving can help to reduce the other half of one percent.

## **Summary**

- In planning for the preservation of records, researchers should take account of their multiple ethical responsibilities — to the people from whom the records were generated, to the discipline of anthropology, to other potential users of the records, and to society.
- Anthropologists should assess the sensitivity of the information contained in their records and make informed decisions about the handling of sensitive material after consultation with the individuals or groups affected and with archivists.
- Anthropologists should familiarize themselves with copyright laws



and with intellectual property issues.

- The training of graduate students should include attention to the ethical use of archival materials.