Cultural Patrimony & Sacred Objects and Sites

STATE AND FEDERAL LAWS

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MONTANA LAW

Applies to public and private lands

In 1991, Montana joined approximately 35 other states in establishing a policy and procedure for protecting from disturbance or destruction all human remains, burial sites, and burial materials in marked or unmarked graves or burial sites. The **Human Skeletal Remains and Burial Site Protection Act** (Title 22, chapter 3, part 8, MCA) protects burial sites on state and private land, provides a procedure to be followed upon the inadvertent discovery of all human remains, regardless of ethnic origin, burial context, or age, and attempts to recognize and balance cultural, tribal, or religious concerns with the interests of scientists, landowners, and developers.[1] However, the act only applied to discoveries after 1991.

In 2001, the Legislature adopted the **Montana Repatriation Act** (Title 22, chapter 3, part 9, MCA) to address the discovery and disturbance of burial sites and the removal of human remains that occurred before 1991. The Repatriation Act (House Bill No. 165) was requested by the Law, Justice, and Indian Affairs Committee, a predecessor to the present-day State-Tribal Relations Committee.

Similar to federal law, the Repatriation Act requires state agencies and museums that receive state funding to create and maintain an inventory of human skeletal remains or funerary objects within their possession or control. A claim for repatriation of any of those items, inventoried or not, may be made by filing a written claim and providing a preponderance of evidence of the claimant's cultural affiliation to the remains or objects and that the possessing entity does not have the right of possession.

Claims are reviewed by a hearings examiner, who makes a recommendation to the Burial Preservation Board. The board then decides whether to support or deny a claimant's request. A possessing entity that repatriates culturally affiliated human skeletal remains or funerary objects in

[1] Montana's Human Skeletal Remains and Burial Site Protection Act: Repatriation and Board Reimbursement, McClure, Eddye, Montana Legislative Services Division, August 2000, page 1.

good faith is not liable for claims by an aggrieved party or for claims of breach of fiduciary duty or the public trust or of violation of state laws that are inconsistent with the Repatriation Act.[2]

PENALTIES

The Human Skeletal Remains and Burial Site Protection Act requires that a person conducting ground-disturbing activities[3] who discovers human skeletal remains, a burial site, or burial material shall immediately notify the county coroner. Failure to do so subjects a person to the penalties provided in 22-3-808(5), MCA. As shown in the table below, 22-3-808, MCA, establishes a hierarchy of penalties for offenses committed after July 1, 1991.

Penalties provided in 22-3-808, MCA		
Offense	**1st Offense**	**Subsequent Offense**
Purposely or knowingly pilfer, disturb, destroy, or permit pilferage, disturbance, or destruction of a marked, unmarked, unrecorded, registered, or unregistered grave or burial ground or burial material	Up to $1,000 fine, up to 6 months in jail, or both + Civil penalty up to $2,000	Up to $20,000 fine, up to 5 years in jail, or both + Civil penalty up to $10,000
For commercial use, knowingly possess, buy, sell, transport, barter, or display human skeletal remains or burial material acquired in violation of Title 22, chapter 3, part 8	Up to $50,000 fine, up to 20 years in jail, or both + Civil penalty up to $2,000	Up to $50,000 fine, up to 20 years in jail, or both + Civil penalty up to $10,000
Purposely or knowingly disclose information knowing that it is highly probable that the disclosure will lead to pilferage, disturbance, or destruction of a burial site	Up to $500 fine, up to 6 months in jail, or both + Civil penalty up to $2,000	Up to $10,000 fine, up to 5 years in jail, or both + Civil penalty up to $10,000
Knowingly fail to notify coroner of a discovery pursuant to 22-3-805, MCA	$100 - $500 fine + Civil penalty up to $2,000	$100 - $500 fine + Civil penalty up to $10,000
Violation of the conditions of a scientific analysis permit issued under 22-3-806, MCA	Civil penalty up to $2,000	Civil penalty up to $10,000

[2] 22-3-916, MCA.
[3] Ground-disturbing activities include archaeological excavation and agricultural, mining, construction, and other activities.

FEDERAL LAWS

ANTIQUITIES ACT

According to the U.S. Department of Justice (USDOJ), "The first significant protection for archaeological and Native American cultural resources came about in the Antiquities Act of 1906. 16 U.S.C. §§ 431- 433 (2009). The Antiquities Act is the federal mechanism for establishing national monuments. Its purpose was to establish historic and prehistoric structures and other objects of historic or scientific interest on federal lands as national monuments. It was an attempt to prevent looting, but it also played a major role in the professionalization of American archaeology by restricting excavation to professionals and requiring a permit for excavation which is issued only by the Smithsonian. For better or worse, the Antiquities Act vested control over Native American sites in the museum establishment. After the Ninth Circuit found the Antiquities Act to be unconstitutional because certain terms were not clearly defined, U.S. v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974), additional legislation was deemed necessary."[4]

ARCHAEOLOGICAL RESOURCES PROTECTION ACT

Applies to federal, public, and Indian lands

The USDOJ says the Archaeological Resources Protection Act (ARPA) is probably the most-used enforcement tool for the protection of cultural resources. Enacted in October 1979, the purpose of the ARPA is "to protect irreplaceable archaeological resources and sites on federal, public, and Indian lands."[5]

"An ARPA violation can be either a felony or a misdemeanor, depending upon the severity of the violation. It can also be pursued civilly when deemed appropriate or necessary. The elements of an ARPA violation include the following:

- The act must involve an archaeological resource more than 100 years old. 'Archaeological resource' is defined as: (1) material remains of past human life of (2) archaeological interest (3) over 100 years old (4) including, but not limited to, pottery, basketry, bottles, weapons, projectiles, tools, structures, pit houses, rock paintings, graves, and human skeletal materials.
- With the exception of the trafficking provisions of 16 U.S.C. § 470ee(c), the act must occur on public lands for ARPA jurisdiction to attach. Such lands include lands owned and administered by the United States as part of the National Park Service, National Wildlife Refuge System or National Forest System; all other lands to which fee title is held by the United States; Indian lands; land held in trust by the United States; and land subject to the restriction against alienation imposed by the United States.

[4] http://www.justice.gov/usao/priority-areas/indian-country/native-american-artifacts, July 24, 2015.
[5] Ibid.

- The act must be one prohibited by ARPA as listed under:
    - 16 U.S.C. § 470ee(a): Excavate, remove, damage ... alter or deface an archaeological resource or attempt to do so
    - 16 U.S.C. § 470ee(b): Sell, purchase, exchange, transport, receive, or ... offer to do so
    - 16 U.S.C. § 470ee(c): Sell, purchase, exchange, transport, receive, or offer to ... in interstate or foreign commerce any archaeological resource ... in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law
    - 16 U.S.C. § 470ee(d): Violates, counsels, procures, solicits, or employs any other person to violate any provision in subsection (a), (b), or (c)"[6]

Penalties for a violation of ARPA include a fine of up to $10,000, up to 1 year in jail, or both. If the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500, the person shall be fined up to $20,000 or imprisoned for up to 2 years, or both. In the case of a second or subsequent violation, the person shall be fined up to $100,000 or imprisoned up to 5 years, or both.

"Under ARPA's Excavation and Removal provision, a permit is required, notification must be sent to any tribes that may consider the site as having religious or cultural importance (§ 470cc), and the consent of the tribes involved must be received when the site is on Indian Land (§ 470cc(g)(2)).

"ARPA excludes coins, bullets, unworked minerals, and rocks, unless they are found in direct physical relationship with another archaeological resource; arrowheads found on the surface (defined as any projectile point designed for use with an arrow, 43 C.F.R. § 7.3(5)(b) (2010); items found on private lands; and items in one's lawful possession prior to October 31, 1979. 16 U.S.C. § 470kk (2009).

"Forfeiture is used in ARPA cases and can be sought criminally, civilly, or in rem. In a criminal case, the forfeiture count will be in the indictment or information and may be part of any plea negotiations. Forfeiture may also be used as part of civil proceedings or initiated after assessment of a criminal or civil penalty. In an in rem proceeding, no individual defendant is identified, so forfeiture does not have the same breadth as it does in other areas of law enforcement, and is limited to objects, vehicles, and tools."[7]

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The federal Native American Graves Protection and Repatriation Act (NAGPRA) was enacted in 1990. It provides a process for federal agencies and museums that receive federal funds "to return certain Native American cultural items -- human remains, funerary objects, sacred objects, or objects of cultural patrimony -- to lineal descendants, and culturally affiliated Indian tribes and Native Hawaiian organizations. NAGPRA includes provisions for unclaimed and culturally unidentifiable Native American cultural items, intentional and inadvertent discovery of Native American cultural items on Federal and tribal lands, and penalties for noncompliance and illegal trafficking. In addition, NAGPRA authorizes Federal grants to Indian tribes, Native Hawaiian

[6] http://www.justice.gov/usao/priority-areas/indian-country/native-american-artifacts, July 24, 2015.
[7] Ibid.

organizations, and museums to assist with the documentation and repatriation of Native American cultural items, and establishes the Native American Graves Protection and Repatriation Review Committee to monitor the NAGPRA process and facilitate the resolution of disputes that may arise concerning repatriation under NAGPRA."[8]

In 1993, all federally funded universities and museums "were required to send a summary of Native American sacred and ceremonial objects to Indian tribes associated with those artifacts. In 1995, those institutions were required to file inventories of Indian remains and grave goods."[9] Federally recognized Indian tribes to which the remains belonged could request the artifacts' return.

There is no single source for how many human remains and cultural items have been repatriated under NAGPRA. Museums and federal agencies keep their own records, but must publish notices in the Federal Register when they have determined items are eligible for repatriation. The national NAGPRA program compiles annual statistics based on those notices. As of September 30, 2014, the statistics were:

Human remains: 50,518 individuals
Associated funerary objects: 1,185,948 (includes many small items, such as beads)
Unassociated funerary objects: 219,956 (includes many small items, such as beads)
Sacred objects: 4,914
Objects of cultural patrimony: 8,118
Objects that are both sacred and patrimonial: 1,624[10]

When cultural items are exposed or are found already-exposed on federal lands and the federal agency does not want activity in the area of the exposed items to halt, NAGPRA regulations (43 C.F.R. 10.3 and 10.5) require the agency to complete a plan of action (POA). Under the POA, the items can be excavated, removed, or left in place. "Exposing or finding already-exposed cultural items without a POA is known as a 'discovery'. When a discovery occurs, any activity taking place in the area of the discovery must cease for 30 days."[11] The responsible agency must then initiate a consultation on the discovery, followed by the completion of a POA, even if no ongoing activity is to occur.

"NAGPRA enforcement, specifically related to trafficking, is found under 18 U.S.C. § 1170. The penalties for trafficking are similar to those for violating ARPA in that the first offense is generally considered a misdemeanor, whereas the second is an automatic felony.

- 8 U.S.C. § 1170(a) addresses the trafficking of Native American remains, and defines a trafficker as one who knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act.
- 18 U.S.C. § 1170(b) addresses the trafficking of Native American cultural items and defines a trafficker as one who knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Graves Protection and Repatriation Act. For purposes of this Act, cultural items include

[8] http://www.nps.gov/nagpra/FAQ/INDEX.HTM#What_is_NAGPRA?, July 24, 2015.
[9] http://unlhistory.unl.edu/exhibits/show/bones_controversy/NAGPRA_law, July 24, 2015.
[10] http://www.nps.gov/nagpra/FAQ/INDEX.HTM#What_is_NAGPRA?, July 24, 2015.
[11] Ibid.

human remains, associated funerary items, unassociated funerary items, objects of cultural patrimony, and sacred objects."[12]

OTHER FEDERAL STATUTES

The USDOJ says a variety of other statutes can be used to prosecute cultural heritage crimes, including conspiracy, theft of government property, damage of government property, theft from a tribal organization, interstate transportation of stolen property, aiding and abetting, accessory after the fact, theft of major artwork, and the Migratory Bird Treaty Act.

The **Indian Arts and Crafts Act of 1990** "is a truth-in-advertising law that prohibits misrepresentation in marketing of Indian arts and crafts products within the United States. It is illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian Tribe or Indian arts and crafts organization, resident within the United States. For a first time violation of the Act, an individual can face civil or criminal penalties up to a $250,000 fine or a 5-year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to $1,000,000.

"Under the Act, an Indian is defined as a member of any federally or officially State recognized Indian Tribe, or an individual certified as an Indian artisan by an Indian Tribe.

"The law covers all Indian and Indian-style traditional and contemporary arts and crafts produced after 1935. . . . All products must be marketed truthfully regarding the Indian heritage and tribal affiliation of the producers, so as not to mislead the consumer. It is illegal to market an art or craft item using the name of a tribe if a member, or certified Indian artisan, of that tribe did not actually create the art or craft item."[13]

The **American Indian Religious Freedom Act of 1978** "protects and preserves for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[14]

The **Indian Sacred Sites (Executive Order No. 13007)** enacted in 1996 protects and preserves "Indian religious practices, orders agencies managing Federal lands to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, the agency is to maintain the confidentiality of sacred sites."[15]

[12] http://www.justice.gov/usao/priority-areas/indian-country/native-american-artifacts, July 24, 2015.
[13] http://www.iacb.doi.gov/act.html, July 24, 2015.
[14] http://www.oregon.gov/OPRD/HCD/ARCH/pages/arch_laws.aspx, July 24, 2015.
[15] Ibid.

OTHER STATES

Arizona

Applies to public and private lands

"Human remains and associated funerary objects in unmarked graves and abandoned cemeteries that exceed 50 years in age are protected on State, county, city and municipal lands in Arizona under Arizona Revised Statute 41-844. This statute also protects sacred ceremonial objects and objects of national or cultural patrimony on State lands that have special importance to American Indians. On private lands, Arizona Revised Statute §41-865 provides similar protection to human remains and associated funerary objects that also exceed 50 years in age. These laws were adopted in 1990 and are similar to federal laws protecting human remains on federal lands."[16]

The laws provide for the repatriation of human remains, funerary objects, sacred ceremonial materials, and items of tribal patrimony. The statutes confer repatriation rights on the governments of Indian tribes that have cultural or religious affinity to the materials.

California

Applies to public and private lands

California law (Section 5097.9, et seq. and Section 7050.5) prohibits severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require. The public property of all cities and counties located within the limits of the city and county, except for all parklands in excess of 100 acres, are exempt.

It is state policy that Native American remains and associated grave artifacts be repatriated. When remains are discovered, the persons believed to be most likely descended from the deceased are contacted. They may, with the permission of the landowner, inspect the site and may recommend means for treatment or disposition, with appropriate dignity, of the remains and any associated grave goods.

> *No other race has had to endure the injustice that the Native American community has had to suffer in knowing that their relatives' and ancestors' skeletal remains are lying in a box in some university or museum, when what they deserve is a proper burial by their loved ones. . . . The passage of this bill is the first step in the settlement of a long-overlooked human rights issue.*
> *—Richard Katz, California Assemblyman, 1991*

California law prohibits obtaining or possessing any Native American artifacts or human remains that are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or agreement.

Nebraska

Applies to public and private lands

Nebraska Revised Statutes (12-1201 through 12-1212) require the discovery of human skeletal remains or burial goods associated with an unmarked human burial to be reported. If the remains or burial goods are determined to be of American Indian origin, known relatives or Indian tribes

[16] http://www.statemuseum.arizona.edu/crservices/burials_objects_you.shtml, July 24, 2015.

that may be tribally linked to the remains or goods are contacted regarding reburial or other disposition.

Nebraska enacted the nation's first general repatriation statute in 1989, requiring all state-funded or state-recognized museums to repatriate "reasonably identifiable" remains and grave goods to tribes of origin upon request.[17]

Oregon

Applies to public and private lands

Oregon's Indian Graves and Protected Objects laws (ORS 97.740-97.760) protect all Native American cairns and graves and associated cultural items. Oregon's laws regarding archaeological objects and sites (ORS 358.905-358.961) define archaeological sites as those 75 years of age or older that are part of the physical record of an indigenous or other culture and are material remains of past human life or activity that are of archaeological significance including, but not limited to, monuments, symbols, tools, facilities, technological by-products and dietary by-products. Sites of archaeological significance are defined as any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer or any archaeological site that has been determined significant in writing by an Indian tribe. The laws prohibit "the sale and exchange of cultural items or damage to archaeological sites on public and private lands. Items of cultural patrimony or associated with human remains are protected everywhere, unless the activity is authorized by an archaeological excavation permit."[18]

[17] Montana's Human Skeletal Remains and Burial Site Protection Act: Repatriation and Board Reimbursement, McClure, Eddye, Montana Legislative Services Division, August 2000, page 10.
[18] http://www.oregon.gov/OPRD/HCD/ARCH/pages/arch_laws.aspx, July 24, 2015.

COPYRIGHT LAW – AN OVERVIEW

- **What are the sources for copyright law?**
  - In the United States, the Constitution's Patent and Copyright Clause provides that "The Congress shall have the power… to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Art. 1, sec. 8, cl. 8.
  - The modern legal framework for copyright protections is found in the Copyright Act of 1976, as amended, which is codified in Title 17 of the United States Code.
- **What is a copyright?**
  - A copyright is a legal right that is granted to the creator of an original work to give the creator exclusive rights for the use and distribution of that original work. In other words, a copyright holder can prohibit other people from using an original work without the copyright holder's permission.
  - The duration of this legal right depends on the type of authorship of the work:
    - For a known author, the copyright lasts the length of the author's life plus 70 years.
    - For anonymous and pseudonymous works, and for works made for hire, the copyright lasts for 95 years after the date of first publication or 120 years after creation, whichever comes first.
  - Once a copyright expires, the work becomes part of the public domain.
- **What can be copyrighted?**
  - Copyright protections extend to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."
  - According to statute, works of authorship include the following categories:
    - Literary works
    - Musical works, including any accompanying words
    - Dramatic works, including any accompanying music
    - Pantomimes and choreographic works
    - Pictorial, graphic, and sculptural works
    - Motion pictures and other audiovisual works
    - Sound recordings
    - Architectural works
  - To be considered "original," the work must be independently created by the author, not just copied from another work, and it must possess at least a minimal degree of creativity.
- **How do you get a copyright?**
  - Any work that qualifies as an original work of authorship is protected by federal copyright from the moment it is fixed in a tangible medium of expression, without regard to whether the work has been registered or bears a copyright notice (e.g. the "©").
    - However, the copyright owner is generally required to register the copyright to be able to enforce the owner's exclusive rights in an infringement proceeding.
    - In addition to registering the copyright with the U.S. Copyright Office, a copyright holder must provide a deposit to the U.S. Copyright Office when the copyright holder applies for registration or publishes the work.
    - "Publication" generally refers to making copies of a work of authorship available to the general public.
  - An additional point: the requirements for obtaining a copyright under the 1909 Act were a lot stricter, and failure to follow the requirements exactly could trigger harsh consequences, up to the loss of copyright protection entirely. The requirements of the 1909 Act would be

applicable to a work that was created and published prior to the effective date of the 1976 Act, while a work that was created prior to but published after the 1976 Act's effective date would be subject to the requirements of the 1976 Act.

- **Who can obtain a copyright?**
  - Copyright ownership is created through the authorship of an original work.
  - A copyright can be transferred through assignment or inheritance, and it can also be licensed, both exclusively and non-exclusively. However, a transfer is only effective if it is made in writing.
- **What are the exclusive rights granted to a copyright holder?**
  - The owner of a copyright has the exclusive right to do and authorize the following:
    - Reproduce the copyrighted work in copies
    - Prepare derivative works based on the copyrighted work
      - NOTE: a derivative work is something that is based on one or more preexisting works, which themselves may be protected by copyright or may be in the public domain. Copyright in the derivative work is independent of copyright in any underlying work. Each case must be analyzed individually to determine whether the derivative work is a "substantial variation" from the original that warrants its own copyright protection, or whether the derivative work is merely a copy.
    - Distribute copies to the public by sale or by rental, lease, or lending
    - In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures or other audiovisual works, to perform the work publicly
    - In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to display the work publicly
    - In the case of sound recordings, to perform the work publicly by means of a digital audio transmission
  - In practice, this means the copyright owner has a right to exclude others from engaging in these activities
- **How does a copyright holder protect or enforce these rights?**
  - With limited exceptions, a copyright holder may not institute a copyright infringement suit until the copyright has been registered or preregistered with the Copyright Office.
  - To establish a prima facie case of infringement of an exclusive right, the plaintiff must demonstrate:
    - ownership of the right asserted; and
    - unauthorized appropriation by the defendant of a material amount of the plaintiff's copyrighted work.
  - If a copyright holder wins a lawsuit for infringement, available remedies include: temporary and permanent injunctions; impounding and destroying the infringing articles; excluding foreign articles by U.S. Customs; and monetary damages, which may include actual damages and profits, statutory damages, and costs and attorney fees.
  - There is also an avenue for criminal prosecution of copyright infringement, and the potential penalties upon conviction include a prison term, a fine, or both.
- **Are there exceptions or limitations to copyright protections?**
  - Limitations on the exclusive rights:
    - <u>Reproduction and distribution by libraries and archives</u>: there is a limited exception to the copyright holder's exclusive rights of reproduction and distribution when a library or archive needs to maintain or preserve its collection.

- Exemptions for nonprofit activities: generally limited to the performance of nondramatic works, and in some cases, nonprofit performance of musical works; exempt activities may include classroom teaching, distance learning, performances for persons with disabilities, and the display or performance of a work of a religious nature during worship services.
- Exemptions that apply to for-profit activities: there are three exemptions that apply to for-profit activities – transmission of a performance or display of work by broadcast in a public place; performance by a retail store for the sole purpose of the sale of copies of the work or of the devices used in the performance; and use of certain types of motion picture editing technologies to edit the performance of a work within a private household.

- Exceptions (also known as defenses):
  - Fair Use: originally a judicial doctrine, the fair use defense became part of the 1976 Act at §107. Lacking a bright-line test to apply, §107 instead provides a non-exhaustive list of factors a court can consider in determining whether a particular use of a copyrighted work is fair: the purpose and character of the use (commercial nature; nonprofit educational purpose; etc.); the nature of the copyrighted work; the amount and substantiality of the portion of the work used in relation to the work as a whole; the effect of the use on the potential market for or value of the copyrighted work.
  - Statute of Limitations: in a civil action, the plaintiff must bring suit within three years from the date on which the claim accrues (in most courts, when the copyright owner knows or has reason to know of the infringement). In contrast, in a criminal action, the proceeding must commence within five years after the cause of action arises.
  - Abandonment: the intentional surrender of a copyright can justify an abandonment defense. Although there aren't clear rules as to what constitutes abandonment, most courts agree that there must be an overt act that establishes the copyright holder's intent to abandon that copyright.

- **Factors to Consider in Looking at the Application of Copyright Law to Sacred Objects and Objects of Cultural Patrimony:**
  - When was the original work created?
  - Is the author of the original work known?
  - Is there an existing copyright in the work? If so, who is the current owner of the copyright?
  - Would any of the limitations discussed above be applicable?
  - Would someone copying or performing a work be eligible for one of the defenses?