

**Access and Control of Indigenous Knowledge in Libraries and Archives:
Ownership and Future Use.**

Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena

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1. Introduction

Last year, a friend of mine from a remote community in Arnhem Land, in northern Australia, came down to Canberra to look through various collections that pertained to his community and his clan, the Gupapynu people. (The trip takes a day and a half by plane.) This material had been collected since the 1920s by a range of individuals – anthropologists, linguists, musicologists, archaeologists, teachers, missionaries. In particular, Joe was seeking a photograph or film taken of him and his father Djawa around the 1950s. Joe knew that many films had been made in the 1950s, and he had been slowly finding these held in libraries and archives around Australia. But Joe had not yet found a film or photograph that showed him with his father, a prominent man who had been a senior Gupapynu leader.

Initially Joe and I spent some time in my organization, The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), which holds the largest collection of material pertaining to Aboriginal and Torres Strait Islander people and lifestyles (for instance - 650,000 pictorial images; 300,000 hours of recorded film; half a million feet of film footage; 15,000 hours of film sound-track; 5000 video titles; 750 works of art and artifacts; and, the largest comprehensive collection of print materials).¹ As a break from searching the collections at AIATSIS, we went up to Screensound Australia (the national archive for sound and film material) to see what material they had. They were not really sure what was on the roll of film they showed Joe, only that it was a recording of Djawa in the 1950s. As the film ran it became clear that it a ceremony, and that Djawa was teaching this ceremony to a few children, one of the children Joe recognized instantly to be himself. He asked for the film to be stopped and to rerun the part with him and his father. We watched this scene many more times – Joe had never seen anything with him as a child nor anything where he and his father were both performing in the same space. Fifty years after the film had been made, Joe was sitting in a cultural institution in Canberra watching his father teach an important clan ceremony – he was watching a film that had been made in Arnhem Land, recorded by an anthropologist and did not belong to him, his father, or his clan.

As a senior clansman, Joe feels very strongly about accessing historical and contemporary material that relates to his family, clan and community. Joe searches the country for this material, often spending days in libraries and archives pouring over catalogues and classificatory systems. He wants to repatriate all the material that he finds back to his community in Galiwinku – and is often successful in convincing librarians and archivists to help him find, and then copy or digitize that material. It is a long and difficult process but he always returns home with something that no-one knew still existed, perhaps a photograph from the mission days, perhaps an incomplete sound recording, perhaps hours of off-cuts from a film.

This may be a familiar story about locating family pasts and histories – and to some extent it is. However, it comes with a significant difference in collecting and management rationale that has generated challenges for Australian libraries and archives. For most of the material is

¹ In the audio-visual archive, the earliest film and audio is from A.C Haddon's Cambridge University Expedition to the Torres Strait in 1898. See: www.aiatsis.gov.au

not owned by Indigenous people, but rather the people who ‘made’ the film, sound recording, photographs and manuscripts. This means that the key issues that are currently facing collecting institutions in Australia revolve around ownership and access and they exist because of the historical power dynamics that meant that Indigenous people were studied and documented in unprecedented ways. Tensions do not just revolve around providing access to the material, but also inevitably engage with politics addressing the historical conditions under which such material was collected. In most cases, Indigenous people are not the legal copyright owners of the material – and this means that they have very little say in how the material is used and accessed. Material relating to Indigenous peoples lifestyles and cultures exists as published and unpublished material – with a significant amount already in the public domain. The kinds of forms the material take include sound-recordings, photographs, films and manuscripts, with a more recent trend relating to Indigenous knowledge systems including the compilation of lists and inventories, and forming databases of knowledge.

Fundamental questions about access and control, ownership and authorship test rationalities of library and archival management. In Australia, like in other places around the world, Indigenous people are seeking greater access to and, in certain cases, control over cultural material. This not only challenges rationalities of library and archival management but legal conceptions of authorship and ownership including, importantly, conceptions of ‘public’. On one hand such struggles can be understood in the light of dynamic post-colonial politics. On the other hand, the reinterpretation of material from within libraries and archives by the historical subjects of colonial projects of documentation affects not only how the material itself is understood but the extent that libraries and archives respond to Indigenous needs in terms of access, control, ownership and future use.

This paper will explore the extent that Indigenous interests in material held in libraries and archives generate contests over ownership. Critical issues that expose the tensions between the legal framework and Indigenous rights and interests include:

- the complex history of collecting and depositing cultural material;
- who speaks and/or 'owns' the cultural material once creators are deceased and the material may be in the public domain;
- the changing relationship between the secret and the sacred in Indigenous communities and the consequent effects on access;
- gender divisions in access to knowledge;
- the nature of negotiations between Indigenous peoples and researchers in knowledge creation and use.

With these thoughts in mind this paper derives from the following questions: can our interpretations of fair use and access to material remain normative in the context of Indigenous knowledge and folklore? Or do we need to reconsider Indigenous peoples needs as generating differing interpretations of what is at stake with the circulation of information. How can libraries and archives respond to Indigenous people as new user groups? Can libraries and archives be actively engaged in rebalancing copyright for Indigenous people and communities? If so, how might this new relationship be imagined and then translated into practice?

This is a difficult conversation because it involves intersections of remnant colonial power, rationalities of copyright, and interpretations of knowledge circulation, access and control. Nevertheless the aim of this paper is to share some of the insights from Australia. Australia has certain expertise in this area, but it is in no way definitive – it is still one country among many. In describing approaches to this issue I will be drawing directly upon my own experiences of working on specific copyright issues within an archival setting that holds the world’s largest collection of material relating to Aboriginal and Torres Strait Islander peoples. I should say from the outset that the most difficult material I deal with in terms of Indigenous access, control, ownership and copyright law is films, sound-recordings and photographs. Consequently it is this kind of material that will inform the position taken in this paper. Further, as a significant amount of this material remains unpublished, and hence in an almost perpetual copyright,² the movement into a digital environment raises new questions about reproduction, publication and ownership.

But to begin it is first necessary to situate this discussion within a global political context about Indigenous rights in intellectual property – if only to see the myriad discussions on this topic, and the extent that Indigenous interests in intellectual property are raising concern across a range of international forums.

2. A Global Context

2.1 *Circulating rights in intellectual property*

Intellectual property law is an internationally recognised term covering a collection of intangible rights and causes of action developed by western nation states at various times to protect particular aspects of artistic and industrial output – copyright, designs, patents, trade secrets, passing off, aspects of competition law and trade marks. A description of, purpose for and scope of intellectual property law has been defined internationally through *The Convention Establishing the World Intellectual Property Organisation 1967* (WIPO).³ In general, intellectual property laws seek to “promote investment in, and access to, the results of creative effort, and extend to protecting the marketing of goods and services.”⁴ One reason for this is that intellectual property is increasingly an important mechanism of world trade.⁵ Thus the regime of intellectual property law in Australia is in keeping with the definitions

² Copyright Act 1968 (Cth) Section 32, 33.

³ Prior to 1967, international standards for intellectual property protection were established through the *Paris Convention for the Protection of Industrial Property* (1884) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886).

⁴ J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition) The Lawbook Company: Pyrmont, Sydney 2002 at 3.

⁵ This has been made explicit through the 1994 *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPs). As McKeough, Bowrey and Griffith note “TRIPs is one of a system of agreements which make up the World Trade Organisation (WTO). TRIPs links intellectual property rights to GATT or WTO rights and obligations.” J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* supra n.12 at 4. See also: M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* Sweet and Maxwell: London, 1996; P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* Earthscan Publications Ltd: London, 2002; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* Palgrave MacMillan: Hampshire and New York, 2002; F.W. Groscheide and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* Intersentia Publishers: Antwerp, Oxford, New York, 2002.

provided through the WIPO Convention and subsequent agreements made through this international body.⁶

With a direct relationship between intellectual property, economics and trade becoming more explicit critical evaluation of intellectual property and its history have emerged.⁷ Critical interest has been facilitated in part by concern for new and emerging technologies and related practices, such as developments with digital technology and biotechnology.⁸ Much of this commentary has involved an evaluation of the role of intellectual property laws in facilitating commodification and the development of new markets.⁹ As part of the developing discourse, attention has also been directed to the implicit cultural elements (and hence cultural prejudices) of intellectual property law, wherein cultural products are increasingly circulating as commodities within networks of private property relations.¹⁰

Accompanying a rise in the predominance of literature addressing intellectual property rights, an interest in the dynamic establishing property rights in knowledge has alerted a range of non-legal scholars to the profound complex of rights generated through intellectual property law.¹¹ This is more than a contemporary Australian, or indeed 'western' fascination.

⁶ In particular see the *WIPO Performances and Phonograms Treaty* (1996) and the *WIPO Copyright Treaty* (1996).

⁷ See for example: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge, 1999; P. Drahos, *A Philosophy of Intellectual Property* Dartmouth Press; Sydney 1996.

⁸ P. Drahos, "Capitalism, Efficiency and Self-Ownership" (2003) 28 *Australian Journal of Legal Philosophy* 215.

⁹ J. Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* Harvard University Press: Cambridge, Massachusetts, 1996; L. Lessig, *The Future of Ideas: The fate of the commons in an interconnected world* Random House: New York 2001; D.E. Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" (1998) 23 *N.C.J. Int'l L. & Com.Reg.* 229; M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* Brookings Institution Press: Washington D.C., 1998; S. Sell, "Industry Strategies for Intellectual Property and Trade: The Quest for TRIPS and Post-TRIPS Strategies" (2002) 10 *Cardozo Journal of International and Comparative Law* 79; C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosure?* Routledge: London and New York, 2000.

¹⁰ For example: P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13; P. Drahos and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge Access and Development* supra n.4; R. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* Duke University Press: Durham and London, 1998; K. Aoki, "Neocolonialism, Anticommons Property and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 *Ind. J. Global Leg. Stud.* 11; J. Gaines, *Contested Culture: The image, the voice and the law* The University of North Carolina Press: Chapel Hill, London, 1991; V. Shiva, *Protect or Plunder? Understanding Intellectual Property Rights* Zed Books: India, 2001; D.E. Long, "'Globalization': A Future Trend or a Satisfying Mirage" (2001) 49(1) *Journal of the Copyright Society of the USA* 313; R. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24(1) *Dem. J. Int'l L. & Pol'y* 109; P.E. Geller, "Copyright History and the Future: what's culture got to do with it?" (2000) 48(1) *Journal of the Copyright Society of the USA* 209; D.E. Long, "'Democratizing' Globalization: Practicing the Policies of Cultural Inclusion" (2002) 10 *Cardozo Journal of International and Comparative Law* 217.

¹¹ By the term non-legal scholars, I am referring to the interest in intellectual property law in academic disciplines including anthropology, history, sociology, political science, ethnomusicology, philosophy and science. For a selection of articles positioned within these disciplines but speaking to the legal space of intellectual property law see: M. Strathern, "Potential Property: Intellectual rights and property in persons" (1996) 4(1) *Social Anthropology* 17; M. Brown, "Can Culture be Copyrighted?" (1998) 39(2) *Current Anthropology* 193; M. Sunder, "Intellectual Property and Identity Politics: Playing with Fire" (2000) 4(1) *Journal of Gender, Race and Justice* 69; S. Harrison, "Ritual as Intellectual Property" (1992) 27 *Man* 225; S. Harrison, "The Politics of Resemblance: Ethnicity, Trademarks: Head-Hunting" (2002) 8 *Journal of the Royal Anthropological Institute* 211; S. Kirsch, "Environmental Disaster, 'Culture Loss' and the Law" (2001) 42(2) *Current Anthropology* 167; E. Hirsch,

It is also an area of fundamental interest in many 'developing' countries where intellectual property is considered as a mechanism providing new techniques of control, authority and knowledge management in the post-colonial era. In short, the increased circulation of intellectual property rights provides an interpretative framework that normalises the concept of private property rights existing in information.¹²

Recently Peter Drahos (with Braithwaite) observed that, "[i]ntellectual property rights are, in essence, government tools for regulating markets in information."¹³ With the continuing global redefining of intellectual property standards and the animated trade bargaining pivoting around the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) a variety of publications by governments and non-government organisations (NGOs) echo concerns about the control over knowledge markets facilitated through intellectual property laws.¹⁴ The increasing exposure of 'developing' countries to genetically modified (GM) crops and the production of low cost medicines for AIDS in Africa demonstrate that knowledge of intellectual property rights are globally circulated and utilised by a widespread range of actors and agencies. "Intellectual property rights have gone

"Malinowski's intellectual property" (2002) 18(2) *Anthropology Today* 1; J. Christie, "Enclosing the Biodiversity Commons: bioprospecting or biopiracy" Hindmarsh, R., G. Lawrence, J. Norton (eds), *Altered Genes: Reconstructing Nature – the debate* Allen and Unwin: Sydney, 1998; F. Dawson, "The importance of property rights for biodiversity conservation in the Northern Territory" (1996) 3(2) *The Australian Journal of Natural Resources Law and Policy* 179; S. Brush, "Whose Knowledge, Whose Genes, Whose Rights?" Brush, S., and D. Stabinsky (eds), *Valuing Local Knowledge: Indigenous Peoples and Intellectual Property Rights* Island Press: Washington DC, 1996; T. Seeger, "Ethnomusicology and Music Law" Ziff, B., and P. Rao (eds), *Borrowed Power: essays on cultural appropriation* Rutgers University Press: New Jersey, 1997; B. Williams (ed), *The Politics of Culture* The Smithsonian Institute: Washington DC, 1991. Australian newspapers are increasingly reporting on issues of intellectual property see for example: "Amazon tribes fight vine patent" *The Canberra Times* 29 May 1999; "Euphoria in South Africa as drug company drops case" *The Sydney Morning Herald* 20 April, 2000; "One rule for all is patently inequitable: intellectual title will be the next battle ground for academics and other traditional cultures" *The Australian* 18 September 2002.

¹² For example Arun Agrawal has recently noted that efforts to document and scientise indigenous knowledges can lead to inequitable power imbalances where, once the knowledge is in the public domain, "it can be refined and privatised through the existing system of intellectual property rights." A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287 at 294.

¹³ P. Drahos with J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* supra n.13 at 3.

¹⁴ For example see the Canadian NGO, Rural Advancement Foundation International (RAFI) at <<http://www.rafi.org.au>>. See also the Third World Network, *The Need for Greater Regulation and Control of Genetic Engineering: A Statement by Scientists Concerned about Current Trends in the New Biotechnology* Penang, Malaysia, 1995. Released articles include "Feared reviewed science: contaminated corn and tainted tortillas - Genetic Pollution in Mexico's centre of maize diversity" (2002) 74 *RAFI Communique* at <http://www.rafi.org/article.asp?newsid=287>; "GM Fallout from Mexico to Zambia: the great containment", RAFI press release, October 25, 2002 at <http://www.rafi.org/article.asp?newsid=366>; "Sovereignty or Hegemony: Africa and security, Negotiating from reality" May 30 1997 at <http://www.rafi.org/article.asp?newsid=192>. For a discussion of implications for patents on plants like neem and tumeric see: Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* London, 2002; E. Martin, "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) 22 *B.C. Int'l & Comp. L. Rev.* 279; V. Shiva, *Monocultures of the Mind: perspective on biodiversity and biotechnology* Zed Books: India, 1993; F.W. Grosheide, "General Introduction" Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n4 at 28.

global.”¹⁵ Thus we are situated at a specific point in time when the knowledge of the field of intellectual property law is undergoing transformation both in circulation and exposure.¹⁶

As is commonly cited, copyright law protects the expression of the idea not the idea itself. The idea/expression dichotomy is integral to copyright. Judicial judgment and frameworks of classification are integral in deciding at which point an idea is actually expressed and thus legally recognisable (and protected). The requirement of ‘capturing’ the intangible indicates the one constant tension in intellectual property law: granting property rights to something that is intangible and identifying the metaphysical dimensions that make up the ‘property’.¹⁷ This logic is reflected in the way that the Australian *Copyright Act 1968* (Cth) provides for ownership of sound recordings, photographs and films. For instance, the maker of the sound recording is the copyright owner.¹⁸

Public awareness and increased discussion about intellectual property law and its effects is a feature of the late twentieth century. With attention to the purpose and meaning of intellectual property, its implications within an Indigenous context have generated a wealth of literature.¹⁹ In Australia this interest in the intersection of intellectual property and Indigenous knowledge is directly tied to the copyright and Aboriginal art cases that evolved in the 1980s.²⁰ These cases were significant as they addressed on what terms Indigenous knowledge could be included and recognised in the intellectual property discourse. Importantly the cases emerged from discrete instances of political, governmental, legal and individual influence.²¹ Paralleling the interest nationally, the international sphere has also been concerned to investigate means for protecting elements of Indigenous knowledge at least since 1976.²² The recent international focus by the World Intellectual Property Organisation on ‘traditional knowledge’ illustrates how embedded Indigenous concerns are within the intellectual property discourse.²³

¹⁵ P. Drahos “Introduction” Drahos, P., and R. Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* supra n.4 at 1. See also C. May, *A Global Political Economy of Intellectual Property Rights: The new enclosures?* Routledge: London, New York, 2000.

¹⁶ It could be argued that knowledge of intellectual property rights is always undergoing transformation, however there is a difference in the increasing globalisation of such rights. See D.E. Long, “The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective” supra n8. Also see: K. Bowrey, *Copyright and Culture. Australian Law and Controversies* (forthcoming 2003) at [4.5, 4.6].

¹⁷ J. Anderson, *Law, Knowledge, Culture: The Production of Indigenous Knowledge in Intellectual Property Law* Edward Elgar Publishers: United Kingdom (forthcoming 2006).

¹⁸ *Copyright Act 1968* (Cth) s89.

¹⁹ For an example of this literature see: T. Davies, “Aboriginal Cultural Property?” (1996) 14 (2) *Law in Context* 1; M. Dodson, “Indigenous peoples and intellectual property rights” *Ecopolitics IX – Conference Papers and Resolutions* Northern Land Council, Sydney 1996; M. Blakeney, “The Protection of Traditional Knowledge under Intellectual Property Law” (2000) 6 *European Intellectual Property Review* 251; R. Sackville, “Legal Protection of Indigenous Culture in Australia” (2003) 11 *Cardozo Journal of International and Comparative Law* 711; M. Brown, *Who Owns Native Culture* Harvard University Press: Cambridge, Massachusetts, 2003.

²⁰ *Yanggarmy Wunungmurra v Peter Stipes* (1983) Federal Court, unreported; *Bulun Bulun v Nejlam Pty Ltd*, (1989) Federal Court, unreported; *Yumulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurruru v Indofurn Pty Ltd* (1994) 30 IPR 209; *Bulun Bulun v R and T Textiles* (1998) 41 IPR 513.

²¹ For example consider the advocacy of Wandjuk Marika from 1976. See: W. Marika, “Copyright on Aboriginal Art” (1976) 3(1) *Aboriginal News* 7. See also: J. Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law* PhD Dissertation, University of New South Wales, 2003 (unpublished).

²² Consider the *Tunis Law on Copyright for Developing Countries 1976*.

²³ See: World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva,

2.2 Position of Indigenous knowledge within intellectual property law

With the increased exposure to and awareness of rights in intellectual property, legal frameworks appear more accessible to a variety of users. For instance, indigenous people within nation states such as Australia have recognised that, potentially, such legal mechanisms could be manipulated and used to control and manage access and management of culturally specific knowledge. Both in Australia and in the key agency governing intellectual property standards, the World Intellectual Property Organisation (WIPO), multiple reports and initiatives have been dedicated to the subject.²⁴ This represents both an effort to be inclusive to indigenous needs and also to bring the subject ‘indigenous knowledge’ under the rubric and management of global standards of intellectual property. The variety of demands made to include indigenous knowledge as a subject of intellectual property reflects the complex motivations and interests of stakeholders. It also highlights and the positions that shape what can be known about the dimensions of indigenous knowledge, and the extent to which it can be recognised within this legal framework. However, in positioning indigenous knowledge within an intellectual property regime, the law produces a subject that is difficult to manage.

The position of Indigenous knowledge within intellectual property law has been critiqued from a number of perspectives.²⁵ These critiques share the argument that Indigenous knowledge does not necessarily fit the forms of classification and identification required to ‘identify’ intellectual property subject matter. Australian Indigenous leader Mick Dodson has described the problem in the following way:

It is clear that our laws and customs do not fit easily into the pre-existing categories of the Western system. The legal system does not even know precisely what it is in our societies that is in need of protection. It is a long way from being able to provide such protection. *The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem.*²⁶

This need to identify intellectual property subject matter derives from the historical difficulty of justifying a right of property in relation to something that is intangible. In the long and

Switzerland 2001. WIPO also has a permanent Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore that investigates national and international attitudes towards potentially reforming current intellectual property regimes to accommodate Indigenous interests. For a selection of the documents produced through this committee see:

www.wipo.int/globalissues/igc/documents/index.html.

²⁴ See for instance: World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, 2001; Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore* WIPO, Fourth Session, Geneva, 2002. See also: W. Wendland, “Intellectual Property and the Protection of Cultural Expressions: The Work of the World Intellectual Property Organisation” Grosheide, F.W., and J.J. Brinkhof (eds), *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* supra n4.

²⁵ This has included critiques from both legal and non-legal scholars.

²⁶ M. Dodson, “Indigenous peoples and intellectual property rights” *Ecopolitics IX: Conference Papers and Resolutions* Northern Land Council: Sydney, 1996 at 32 [my emphasis].

contested emergence of intellectual property law, this difficulty was resolved by justifying the right of property in the object produced through the intangible knowledge for instance, the book or the sound recording. Law could then move away from troubling questions about determining a right of property in something that could not be seen, and with no clear boundaries.²⁷ Arguably however, the lack of clear boundaries is a characteristic of all knowledge and so the problem persists in current processes for determining intellectual property rights.

Following the comments by Mick Dodson, and owing to the perceived interconnected nature of Indigenous knowledge systems, intellectual property laws in certain instances have been described as inappropriate for protecting Indigenous knowledge. This concern arises due to the sense that intellectual property laws falsely segment forms of knowledge and only protect these upon their engagement with the market. This gives rise to a tension about the purpose of employing intellectual property law. Chris Arup has observed the tension in the following way:

A movement is growing to give Indigenous knowledges and practices recognition through some kind of property law regime. But without a doubt, this movement has opened up a hugely complex and sensitive issue. It is not easy to see how a property right can cope with all these aspirations, especially if its tendency is to render the knowledges into a saleable form which is amenable to the individualised exchanges transacted in the marketplace.²⁸

Thus there appears little room within the law for considerations of cultural integrity and preservation issues that are argued to be more relevant to Indigenous communities than relations with the market.²⁹ In addition the law is reluctant to consider political and cultural factors that govern the context where particular property rights are developed – for instance in the political context leading to the recording of the ceremonies within Indigenous contexts. That copyright has emerged as a new challenge for cultural institutions, libraries and archives that store extensive collections of Indigenous cultural material also speaks to the multiple interests that intersect in the documentation process.

2.3 Concepts of Indigenous knowledge and problems of terminology

Engaging in discussions about the position of indigenous knowledge (and its analogues including traditional knowledge, cultural knowledge and folklore)³⁰ in intellectual property

²⁷ For further consideration of this history see: B. Sherman and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge 1999; and, K. Bowrey, *Law and Internet Cultures* Cambridge University Press: Sydney and London, 2005.

²⁸ C. Arup, *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* Cambridge University Press: Cambridge 2000 at 243.

²⁹ However as the carpets case *Milpurruru v Indofurn Pty Ltd* (1994) 30 IPR 209 demonstrated there is room within the law to consider issue of cultural difference, as the awarding of communal damages and the new remedy 'cultural harm' reflects. These developments were in direct response to the differing subject positions that the Indigenous artists within the case occupied. Of course, the distinction between the market and preservation of cultural integrity is a distinction that cannot be effectively established or taken to be given for all Indigenous communities.

³⁰ A. Agrawal, "Indigenous knowledge and the politics of classification" (2002) 54(173) *International Social Science Journal* 287 at 293.

law requires an appreciation of how the term indigenous knowledge is employed in this paper and how other concepts of indigenous knowledge are currently circulated from academic and indigenous perspectives. To my mind discussing concepts of indigenous knowledge requires a certain process of demystification. By demystification I mean exposing certain conditions that have enabled indigenous knowledge to be constructed as a coherent entity and, most importantly, significantly different from ‘western’ knowledge. Recognising that indigenous knowledge like all knowledge is changeable and permeable is often overlooked in discussions of this subject because it disrupts a dichotomy between indigenous and western knowledge that, in turn, depends upon concepts of difference and otherness.

If we are to understand the process of positioning indigenous knowledge in intellectual property law, it is at first instance integral to appreciate how the term ‘indigenous knowledge’ is itself a construct that limits what can be understood within the wide range of indigenous epistemology. My interest here is not what constitutes indigenous epistemology nor its classifications but more the use of terminology – how the construct ‘indigenous knowledge’ circulates within intellectual property discussions. For intellectual property law produces indigenous knowledge as a coherent entity. My point is that the mystification of indigenous knowledge has led to mistaken conclusions about the dynamic intersections permeating indigenous ways of knowing.

In 1995 Arun Agrawal in his pioneering article, “Dismantling the Divide Between Indigenous and Scientific Knowledge” challenged the way indigenous knowledge was discussed in contemporary anthropological and social theory research.³¹ The article begins by tracing the increased interest in indigenous knowledge from a variety of sectors, including international and national institutions, and for a variety of purposes including indigenous participation in development strategies and scientific research. The focus on indigenous knowledge within these discourses signals a profound shift in appreciating the content (and hence value) of indigenous ways of knowing. However, as Agrawal seeks to highlight, there is a tendency in such studies to construe indigenous knowledge as somehow fundamentally different to other forms of knowledge. Arguably this process of construction echoes the past romanticisation of indigenous people: an extension of the way indigenous people have been historically positioned and associated with land and nature, intrinsically and perpetually displaced from and disinterested in advancing technology and thus anything ‘modern’. Agrawal questions the “validity and even the possibility of separating traditional or indigenous knowledge from western or rational/scientific knowledge.”³³ His point is twofold. Firstly, it highlights the permeability and intersections of all knowledge, whatever the genesis; and secondly it invites critical reflection upon how the effects of the dichotomy generally assumed between indigenous knowledge and ‘western’ knowledge are produced through networks of power.

³¹ A. Agrawal, “Dismantling the Divide Between Indigenous and Scientific Knowledge” (1995) 26 *Development and Change* 413. Another version of this article “Indigenous and scientific knowledge: some critical comments” (1995) 3(3) *Indigenous Knowledge and Development Monitor*, generated varying and considered responses. See responses in: (1996) 4(1) *Indigenous Knowledge and Development Monitor* and (1996) 4(2) *Indigenous Knowledge and Development Monitor*.

³³ A. Agrawal, “Dismantling the Divide Between Indigenous and Scientific Knowledge” supra n30 at 414.

Agrawal's key position is that a classification between indigenous and western knowledge can never effectively be established. This is because such classification "seeks to separate and fix in time and space (separate as independent, and fix as stationary and unchanging) systems that can never be thus separated or so fixed."³⁴ Knowledge is more complicated than any form of binary allows and fundamental concerns about the intersection of relations of power in the production and circulation of knowledge are often understated or ignored. Labeling and classifying knowledge as 'types' produces categories that bear little resemblance to practical utility and the interchangeability of experience. Moreover they remain vague and ambiguous and therefore ineffective as forms of classification. Thus Agrawal advocates for critical reflection upon the usage of such categories and encourages the recognition of multiple types of knowledges "with differing logics and epistemologies."³⁵

Recently Martin Nakata has considered the resonance of Agrawal's observations within an Australian indigenous context. The theme of Nakata's paper "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems"³⁶ highlights similar tensions to those identified by Agrawal – namely recent trends to describe and document indigenous knowledge. Nakata begins by explaining contentions in the current debate about the utility of indigenous knowledge: primarily that the use of the term 'indigenous knowledge' seldom engages in any contextualisation of knowledge use and tends to indicate quite particular interests.³⁷ As he remarks, "the Indigenous Knowledge enterprise seems to have everything and nothing to do with us."³⁸ Indigenous people function as the subjects from which the 'indigenous knowledge enterprise' develops. This is at the expense of continued appreciation of the changing uses of knowledge systems.³⁹

Nakata makes the observation that the increasing discussions of indigenous knowledge remake it as "a commodity, something of value, something that can be value added, something that can be exchanged, traded, appropriated, preserved, something that can be excavated and mined."⁴¹ Becoming a term that can be used by a variety of groups to support partisan interests, it runs the risk of losing meaning and context. Following Nakata, the position of indigenous knowledge in intellectual property law is significant because it indicates quite a particular interest. Intellectual property law, like development discourse and the scientific frameworks that Agrawal and Nakata discuss, has become a key site constructing indigenous knowledge as a stable subject and further, producing it as a 'type' of

³⁴ Ibid. , at 422.

³⁵ Ibid. , at 433. In Australia, the recent decision in the protracted Hindmarsh Island case arguably draws a similar conclusion and recognises the validity of this position within the law. See: *Chapman v Luminis Pty Ltd* (No.5) [2001] FCA 1106 (21 August 2001).

³⁶ M. Nakata, "Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems" (2002) 28 *International Federation of Libraries Association Journal* 281.

³⁷ Quoting from Warren, M., G. von Liebenstein and L. Slikkerveer, "Networking for Indigenous Knowledge" (1993) 1(1) *Indigenous Knowledge and Development Monitor*, Nakata notes that these interests include "fields of ecology, soil science, veterinary medicine, forestry, human health, aquatic resource management, botany, zoology, agronomy, agricultural economics, rural sociology, mathematics, management science, agricultural education and extension, fisheries, range management, information science, wildlife management, and water resource management." Ibid. , at 282.

³⁸ Ibid. , at 282.

³⁹ Agrawal also argues this point in "Indigenous knowledge and the politics of classification" supra n.20 at 292.

⁴¹ Ibid. , at 283.

distinct knowledge to be documented and managed through networks of legal power. This is at the expense of complicated contexts and contested politics.

The subject of indigenous knowledge in intellectual property law functions through several terms that are, importantly, used interchangeably. I highlight the usage of these additional terms, in particular *folklore* and *traditional knowledge*, for two reasons. Firstly, I want to suggest that the ways by which indigenous knowledge is equated to ‘traditional knowledge’ is representative of the way that indigenous knowledge structures and thus indigenous people subsume a position of exteriority to contemporary cultural practice. The pervading emphasis on the ‘traditional’ component of indigenous knowledge facilitates a perception of incompatible differences between indigenous and western knowledge – upholding the unworkable dichotomy alluded to above by Agrawal. Secondly, the emphasis on traditional knowledge significantly affects how indigenous knowledge is understood and made intelligible before the law. This therefore underpins how realistic outcomes in intellectual property law are envisaged. Reliance upon the term ‘traditional’ precludes an appreciation of the dynamism of indigenous ways of knowing: fixing in time, and therefore in the past, forms of knowledge that are, through practical utility, constantly evolving.

The recent Report *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*⁴² emanating from the intellectual property standard setting organisation WIPO, aptly demonstrates the interchangeability of the terms used in reference to indigenous knowledge. The document starts in the following way;

Traditional knowledge is created, originated, developed and practiced by traditional knowledge holders... From WIPO’s perspective, expressions of folklore are a subset of and included within the notion of traditional knowledge. Traditional knowledge is in turn, a subset of the broader concept of heritage. Indigenous knowledge being the traditional knowledge of Indigenous peoples, is also a subset of traditional knowledge. As some expressions of folklore are created by Indigenous persons there is an overlap between expressions of folklore and indigenous knowledge, both of which are forms of traditional knowledge.⁴³

The struggle to describe indigenous knowledge is reflected in this quote. At one level, a symbiotic relationship between indigenous and traditional knowledge is suggested. At another level, the position of indigenous peoples as ‘traditional knowledge holders’ is also indicated. The Report ties indigenous knowledge and indigenous people to a distinct, if not also unitary, heritage. Indigenous people as ‘traditional knowledge holders’ are imagined as existing outside modernity as they “create, originate, develop and practice traditional knowledge in a traditional setting and context.”⁴⁴ This invariably plays into perceptions of indigenous identity – from both indigenous and non-indigenous perspectives. The anxiety of

⁴² World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, 2001.

⁴³ Ibid. , at 26.

⁴⁴ Ibid. , at 26. For a consideration of this anxiety in the position of indigenous people between the modern and the traditional see: C. Perrin, “Approaching Anxiety: The Insistence of the Post-Colonial in the Declaration of the Rights of Indigenous Peoples” Fitzpatrick, P., and E. Darian-Smith (eds), *Laws of the Postcolonial* University of Michigan: United States, 1999 at 161.

location and position also effects how indigenous people are recognised as subjects before the law.

It appears that the problem indicated through this Report in positioning indigenous knowledge within the sphere of intellectual property reflects both uncertainty and insecurity. In an attempt to minimise legal insecurity about the position of indigenous subject matter and the competence of the law to adequately respond to indigenous people's needs, a dualism between 'traditional' knowledge and 'contemporary' knowledge has been established. Observations made by Ivison, Patton and Sanders are pertinent as they suggest that "when we evoke a mysterious otherness or radical difference in referring to indigenous cultures we are in danger of replaying prejudices that assume the inherent inferiority of indigenous peoples and their practices."⁴⁵ The emphasis on the 'traditional' lifestyles and 'traditional' peoples misunderstands colonial realities and the commonality of indigenous engagement with information management. The insistence on the 'traditional' as the key marker of difference obscures contemporary indigenous practice and the reality that indigenous knowledge, like all knowledge, undergoes transformation in usage and circulation. Claims of cultural difference have to be balanced against the dynamic ways in which cultures borrow and import practices and that cultural identities are constantly reforming and renegotiated.⁴⁶ Thus what is potentially destabilising for the position of indigenous knowledge in intellectual property is a reliance on notions of a 'traditional culture' that evoke particular romanticised perceptions of indigenous cultures, experience and communities. This effects how indigenous knowledge is produced, positioned and managed through an intellectual property regime and how indigenous people negotiate positions in relation to these laws.

3. Why are cultural materials important?

3.1 Knowledge, property and collecting

Discussion of Indigenous knowledge and intellectual property are most popularly heard in the context of copyright in Aboriginal art (or artistic expressions) and more recently, with patents and biodiversity and genetic resources. There has been far less attention to Indigenous copyright interests in recorded material, historical and present. This is curious given the massive national, international and Indigenous push to document and preserve

⁴⁵ D. Ivison, P. Patton and W. Sanders, "Introduction" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* Cambridge University Press: Cambridge, 2000 at 4.

⁴⁶ For influential work in this area see: J. Beckett (ed), *Past and Present: The Construction of Aboriginality* Aboriginal Studies Press: Canberra, 1988. For more recent considerations see: M. Dodson, "The end in the beginning: re(de)finding Aboriginality" (1994) 1 *Australian Aboriginal Studies* 2; M. Langton, *Well I heard it on the radio and saw it on the television...': an essay for the Australian Film Commission on the politics and aesthetics of filmmaking by and about Aboriginal people and things* The Australian Film Commission: Sydney, 1993. See also: M. Barcham, "(De)Constructing the Politics of Indigeneity" Ivison, D., P. Patton and W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* supra n45.

⁴⁹ Much of this discussion revolves around the publication or documentation of material in an attempt to alleviate demands of 'prior art' where indigenous people can prove that there existed a body of knowledge about a plant which challenges the 'prior art' requirement for patent law.

Indigenous knowledge – for such documentation processes involve inventories, lists and databases – and hence automatically engage with copyright.⁴⁹ It is also curious given the extensive historical collections that exist in cultural institutions around the world. The future use of this material - what it means for libraries and archives, as well as for Indigenous communities, is of profound importance. This is not only because the demands for access involve intersections about how we understand and make meaning of the past, but also raise challenges in the extent that collections can be accessed, future meaning made and colonial power relations rebalanced.

I have been thinking about archives, libraries and copyright for several years now – and I often wonder why so little has been written about the impacts of copyright and fair-dealing on Indigenous collections. For me, libraries and archives provide a pivotal space for negotiating meaning about past histories, reconstructions of cultural memory, and reinterpretation of culture. As many other writers in this field have already suggested, this social function is dependent upon free access to information. This is for instance why there are exceptions within copyright legislation for libraries and archives.

The surprising lack of attention to Indigenous collections perhaps has more to do with the inherently political nature of these collections. This is not only in relation to their establishment and collection – and the colonial power relations that enabled such projects, but also the changing nature of Indigenous political representation. In short, over the last twenty years a shift in access to such collections by Indigenous people has occurred. Thus we are now in a contemporary space that needs to recognize an emerged and emerging Indigenous ‘public’. As the historical subjects of colonial archives start becoming new users, it is inevitable that there will be challenges in terms of representation and access, control and ownership. The resulting impact upon library and archival rationalities of access and control of information – as well as conceptualizations of fair use – raise difficult questions for policy and practice. What happens when Indigenous people ask for material *not* to be freely available? What happens when Indigenous people wants to restrict material that is in the public domain? How does this alter and perhaps compromise our understanding of fair-dealing? Significantly, to what extent does it affect practical daily negotiations of access?

Before moving to these questions, it is integral to briefly discuss some of the historical dimensions that feed this problematic. I want to do this for two reasons. Firstly, there is a need to historicise this debate. This will make it clear that the issues we are dealing with today have their genesis in colonial projects of recording Indigenous peoples lives, languages, cultures and histories. This is not an *ahistorical* problem to which we are now expected to respond. Secondly, an understanding of this history repositions how fair-dealing, and public domain may be interpreted by Indigenous people as being culturally contingent categories that do not necessarily benefit emerging postcolonial political projects of cultural interpretation and assertions of sovereignty through controlling the dissemination of material.

3.2 The colonial project and the indigenous subject

It is useful to develop an understanding of what kinds of historical spaces archives and libraries constitute. In this sense it is possible to argue that they can be conceptualized as centres for interpretation. In providing a way of relating to the past, significantly a

predominately written past, these places are not innocuous or neutral holders of material but are part of socio-political practices. Although archives continue to be valuable facilities, the practices and struggles associated with composing, assembling and controlling access to documents plays a substantive role in history as well as the scholarly reconstruction of history.⁵⁰

We can appreciate that libraries and archives are as much products of historical struggle as they are primary sources for writing histories.⁵¹ Here the interest in the archive is not what it constitutes as a space, but what meanings have been made and how, in the particular colonial contexts the documentation. The subsequent interpretation and development of meaning from archives and libraries came to hold an immensely influential position in the development of categories of social organization. Colonial libraries and archives provided a wealth of information about Indigenous people. In Australia this is most aptly illustrated through the kinds of material that libraries and archives contain about Indigenous people – for they contain information not only about specific kinds of Indigenous sociality and praxis, but also details of the birth and death rates, conditions of employment, wage negotiations, as well as family records about the removal of children, governmental strategies of assimilation, and even in some rare cases (that were ‘officially’ recorded), the documentation of massacres. This kind of material is not always easily digestible and offers an interpretation of how the state sought to manage the lives and futures of Indigenous people. For instance, many institutions in Australia hold early photographic material of Indigenous people in very compromised and denigrating positions – for example with chains around necks, standing naked and emaciated. This is sensitive material, particularly for those who can identify family members in denigrating positions. In the contemporary political climate concerns have been raised about making these kinds of representations of Aboriginal experience publicly accessible. One side the argument runs along the lines that making the material even more accessible (through the web for instance) is in the interests of the public good: that we should know how Aboriginal people were treated. The counter argument is that this material is offensive to the families involved who do not want pictures of their nameless family members again ‘paraded’ for other peoples benefit. The debates are intensely political and can seldom be separated from emotions and experiences of Australia’s colonial past.

Nicholas Dirks, Partha Chatterjee and Ann Stoler, as well as many others, have argued that overall the colonial project was about knowledge and that the colonial knowledges produced for and through archives and libraries was more powerful than the colonial state ever was. The colonial documentation project encoded a certain anxiety that rule was always dependent upon knowledge, even as it performed that rule through the gathering and application of knowledge.⁵²

⁵⁰ M. Lynch, “Archives in formation: privileged spaces, popular archives and paper trails” (1999) 12(2) *History of the Human Sciences* 65 at 67.

⁵¹ Ibid.

⁵² N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* Princeton University Press: Princeton, 2001 at 123; A. Stoler, “Colonial Archives and the Arts of Governance” (2002) 2 (1-2) *Archival Science* 87; P. Chatterjee, *A Princely Imposter: The Kumar of Bhawal and the Secret History of Indian Nationalism* Princetown University Press: New Jersey, USA, 2002.

In colonial states, archives and libraries made renderings of other places, people and cultures and functioned as repositories of coded beliefs that clustered (and bore witness to) connections between secrecy, the law and power.⁵³ This leaves the question to what extent can we understand these spaces as epistemological experiments and to colonial archives as cross-sections of contested knowledge? For example, what constitutes the archive, what form it takes, and what systems of classification signal at specific times, are the very substance of colonial politics.⁵⁴ “Colonial archives were both sites of the imaginary and institutions that fashioned histories as they concealed, revealed and reproduced the power of the state.”⁵⁵ As Jacques Derrida’s discussion of the etymology of the word ‘archive’ has illustrated, power and control have been fundamental to term and its effects within liberal and colonial contexts.⁵⁶

Different national contexts must also make us recognize that these historical struggles are not all of one kind, and that they are not the expression of a single ‘archic’ or ‘patriarchic function’.⁵⁷ Instead they are local materializations of history, or rather, historical materializations of the records from which histories are (re)constructed. If, as Stoler and Dirks suggest, that archives hold a powerful position as political technologies in how we make meaning of the past, of social organization and representations of relations between ourselves, then the political shifts that re-imagine relationships with the archive are certainly relevant to this discussion. As we negotiate new forms of ‘public’, we need to be mindful of the way in which the public is not all of one kind.

3.3 *A ‘new’ Indigenous public? Control, access and ownership*

Patrick Joyce has traced the emergence of the ‘public’ in relation to libraries in Britain. He locates as the Reading Room in the British Museum in 1753 and the Public Record Office in 1838 some eighty years later as offering a fuller rendering of the ‘public’. Joyce argues that the (British) Library Act of 1850 instituted the first democratic archive, and I would add, as a further observation, that we should not discount the role of law – through legislation - in enabling this new free space of interpretation. The very idea of the free library was central to the new vocabulary of the social that was engineered through the library – especially the meanings of ‘public’.⁵⁸ However, whilst both the British Museum and the Public Record Office were theoretically ‘public’, access to both was limited – and this was not only in what was accessible, but the extent that freedom of the public was also limited or contained by the very structure and architecture of the buildings.

Thus the generation of the public space is a relatively recent phenomena, it is worth reflecting how it is also intrinsically tied to the development of liberalism, and the autonomous liberal subject. I am fascinated in this notion of the archive as a public space and the freedom of the individual to access that space. In particular, I am interested in the range of political powers that are engaged when, for instance, the public space of the archive

⁵³ A. Stoler, “Colonial Archives and the Arts of Governance” (2002) 2 (1-2) *Archival Science* 87 at 96.

⁵⁴ *Ibid.*, at 92..

⁵⁵ *Ibid.*, at 97.

⁵⁶ J. Derrida, *Archive Fever: A Freudian Impression* Chicago University Press: Chicago, 1996.

⁵⁷ *Ibid.*

⁵⁸ P. Joyce, “The Politics of the Liberal Archive” (1999) 12(2) *History of the Human Sciences* 35 at 39.

is disrupted by explicit, as opposed to more subtle forms, of restriction. For the prior consignment of documents to libraries and archives limits what visitors can find in it, and in cases where the archive is tightly constructed to enhance the reputation of an author or to cast an event in a way that supports a partisan cause, the archive can be said to embody an intentional design. Archives are not always coherent, and they may contain a surplus of materials which enable adversary readings.⁵⁹

One example that has particular resonance in Australia has been the recent controversy about stolen wages. From 1904 all employment, wages and savings were controlled by government under compulsory labour contracts.⁶⁰ Over this period of time, millions of dollars of wages, savings and trust funds were collected by and administered through state governments on behalf of Indigenous people who were not seen as being sufficiently able to care for their own affairs.⁶¹ Surprising as this may seem, whilst the money was never paid, there remains a wealth of documents that record the processes of embezzlement actively encouraged by multiple governmental agencies. Public access to these documents provided the possibility for bringing the activity into a public space of recognition, even though the reality of finding the relevant material meant spending months pouring through documents in the basement of governmental offices – whilst access was theoretically possible it was still difficult.⁶² Currently in Australia there is an ongoing dispute, not only over the subsequent destruction of these documents, but how current state governments are going to address the restitution of millions of dollars owed to Indigenous people. Faced with contested material the changing nature of ‘public’ can, in certain instances create a myriad of challenges and this affects how libraries and archives function.⁶³

Until now this section of the paper has been sketching a frame for understanding the libraries and archives as places that are influenced by and distribute a myriad of relations between knowledge and power. With the above example in mind, we might then ask what happens as there are shifts in the colonial polity – and the people traditionally subjected to archives, gain a recognized voice and question not only status within the archive, but the authority of the archive as a centre of interpretation.

The relationship between the archive and its constituents (the public) raises a range of questions. In thinking about who the public for a library and archive might be, Osborne notes that, “the archive is there to serve memory, to be useful – but its ultimate ends are necessarily indeterminate. Material is deposited for many purposes, but one of its potentialities is that it waits a constituency or public whose limits are of a necessity

⁵⁹ M. Lynch, “Archives in formation: privileged spaces, popular archives and paper trails” (1999) 12(2) *History of the Human Sciences* 65 at 79.

⁶⁰ R. Kidd, “Queensland Stolen Wages Fact Sheet” at www.antar.org.au/stolen_wages_factsheet.html (accessed 12 April 2005)

⁶¹ Indigenous people were only recognized as citizens in a referendum in 1967.

⁶² R. Kidd, “Processes of Discovery” Libraries and Indigenous Knowledge Colloquium: A National Forum for Libraries, Archives and Information Services, State Library of New South Wales, 9-10 December 2004.

⁶³ Following Dr. Kidd’s presentation, there was a lengthy discussion about the intentional destruction of documents, and the difficulties faced by head archivists in situations where there is political pressure to ‘lose’ and ‘misplace’ documents.

unknown.”⁶⁴ Just as a text exists because there is a reader to give it meaning – so a library or archive exists because there is a user to give it meaning.

So interest here turns from the politics of the liberal and colonial projects and the constitution of Indigenous subjects – to a more sustained attention in how meaning is conveyed to a variety of users. In the changing social and historical contexts of Australia, it seems worthwhile asking what happens to the meaning produced by the archive when the users of the archive shift focus – and what happens when new user groups are constituted, users who have not only been historically excluded from the ‘public’ space but whose lives and histories informed and consequently formed a corpus of material contained within the walls of libraries and archives?

In my organization, the Australian Institute of Aboriginal and Torres Strait Islander Studies, it is possible to locate the moment when Indigenous people started becoming the primary users of the archive, constituting a new Indigenous public. Currently, approximately 75% of the clientele of the library are Aboriginal and Torres Strait Islander people – in the 1990s this figure was 1%.⁶⁵ In a period of roughly fourteen years this is a dramatic increase and reflects three major changes that have occurred over this period in regards to Indigenous affairs. In no particular order these include an era of land rights and native title, recognition of the issue of stolen generations, and the rise of interest in reviving Indigenous languages. Land rights and, more recently native title have produced more Indigenous users because, quite simply, the possibility of native title (or title in land) rest upon proving continuity or Indigenous connection to particular parts of Australia.⁶⁶ Much of the early anthropological and historical work with Indigenous people document where people lived, and how and for how long they engaged with particular parts of Australia. With the demands of the native title legislation, Aboriginal people have come to AIATSIS to find the historical texts that ‘prove’ in a court of law this existence.⁶⁷ As the courts do not often rely on oral testimony, this written evidence is often crucial.⁶⁸ On the flip-side, the published and unpublished documents that AIATSIS holds can also be used to prove the contrary, for instance that certain groups were ‘transient’ and didn’t hold any connection to land.⁶⁹ (One can start to see how access to this material might also render an adverse reading of Indigenous experience of land use – by relying on the ‘authority of the author’.

⁶⁴ M. Lynch, “Archives in formation: privileged spaces, popular archives and paper trails” supra n59 at 55.

⁶⁵ Conversation between E. Hudson and B. Lewincamp for *ALATSIS/IPRIA Intellectual Property and Indigenous Knowledge Project: Access, Ownership and Control of Indigenous Cultural Material*. IPRIA Preliminary Report April 2005.

⁶⁶ *Native Title Act 1993*(Cth) and *Native Title (Amendment) 1998* (Cth).

⁶⁷ *Members of the Yorta Yorta Community v Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45 and *Members of the Yorta Yorta Community v State of Victoria* [2002] HCA 58. For example: V. Kerriush and C. Perrin, “Awash in Colonialism” (1999) 24(1) *Alternative Law Journal*, 3; S. Young, “The Trouble with ‘Tradition’: Native Title and the Yorta Yorta Decision” (2001) 30(1) *The University of Western Australia Law Review* 28; J. Weiner, “Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta” (2002) 2(18) *Land, Rights, Laws: Issues of Native Title* 1; L. Strelein, “Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 – Comment” (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1.R. Bartlett, “The obsession with traditional laws and customs creates difficulties establishing native title claims in the South” (2003) 31(1) *The University of Western Australia Law Review* 35.

⁶⁸ R. Bartlett, “The obsession with traditional laws and customs creates difficulties establishing native title claims in the South” (2003) 31(1) *The University of Western Australia Law Review* 35.

⁶⁹ The evidence relied upon in the Yorta Yorta native title case was a text written in the 1890s by Edward Carr.

The stolen generations, is a term for describing a governmental policy between 1910 and 1970 of removing Indigenous children from their parents and relocating them in institutions often with no further contact with their parents.⁷⁰ Many Indigenous people come to AIATSIS to try and locate records of family, and records of family histories. The displacement of Aboriginal people has had profound effects, and people use the library and archive to reconstruct histories of which they may know very little, and to reconfigure meaning about associations and identity. This is always a sensitive and often emotional process that is worth recognizing. For libraries and archives also have effects upon the personal. Issues of privacy are also engaged in this case.

Similarly, the reviving of Indigenous languages is also tied to the abovementioned changes in Australia's negotiation of its past. Indigenous people access language materials – wordlists, dictionaries, sound recordings and films – in order to learn or relearn specific languages that relate to their family, their clan, or their country. For instance, it is estimated that prior to colonization there were approximately 250 languages spoken in Australia. That figure is now estimated at approximately 20.⁷¹

So the changing status of Indigenous use of Australian libraries and archives points to the emergence of a new kind of public, one that includes Indigenous people rather than posits them as subjects which the eurocentric gaze makes meaning about (although this still occurs). But the question here is whether this new public generates differing demands to those historically managed by libraries and archives, both through policy and management structures and daily negotiations of users need? In Section Four I will detail several case studies from Australia that suggest, in certain circumstances, it does. At this point however it is worth indicating a further point: that with these changes in access have come certain claims for ownership and control of material that resides in these institutions. This does place institutions like AIATSIS in difficult negotiating positions – both in the extent that it wants to do the right thing by Indigenous people (and recognizing the historical imbalances that left Indigenous people excluded from these spaces), whilst also maintaining a healthy perspective of what material is in the public domain and should remain there. Certainly, from the perspective of my institution, these changes have produced certain anxieties in terms of rationalities of managing future access to material. Such anxieties manifest themselves in debates over the increasing use of technology and the extent that digitization of material can better facilitate access for Indigenous people, who are often in locations along way away from AIATSIS – or simply don't have the financial where with all to make the physical trip to Canberra.

3.3 *Changing Technological Functions*

The technological changes that have occurred over the last ten years have facilitated an increase in the range of users to libraries and archives that would not have previously been

⁷⁰ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* 1997.

⁷¹ P. McConvell and N. Thieberger, "State of Indigenous Languages in Australia – 2001" Australia State of the Environment Technical Paper Series (Natural and Cultural Heritage) Department of Environment and Heritage, 2001. See also <www.fatsil.org>.

possible. In an information age, digital technology provides an important opportunity for the further dissemination of material. Libraries and archives have capitalized on the potential of new digital mediums for a variety of reasons including better storage capabilities, preservation, better scope for circulation of public domain material, and sometimes more streamlined processes of ordering and classifying material. As Lehman has noted, “within the framework of a national digital library, the Library of Congress digitized five million items of Americana by the year 2000.”⁷² Like other material, Indigenous cultural material is also being digitized, if not for preservation issues, then for facilitating access.

In Australia, digital technology has provided an important vehicle in providing access to Indigenous people and communities in regional and remoter locations. This has facilitated the inclusion of Indigenous people within walls of libraries and archives, rather than leaving them as marginalized participants. To date, AIATSIS has focused its digitization and web access programs on unambiguous public domain material – for instance community produced newsletters⁷³ and the Sorry Books.⁷⁴ In other contexts, material that has been digitized and placed on the web includes, in particular, wax cylinder recordings from early anthropological expeditions, and more generally photographs, art, letters, manuscripts and films.⁷⁵ With the possibility of digitizing collections in order to place on the web for greater access, AIATSIS probably works more slowly than most institutions. For AIATSIS, and other organizations like the Australian Museum and Screensound Australia, a priority is placed on consultation with Indigenous people about access through the web. This is often regardless of where the legal rights, if any, vest. Inevitably this is a slow process, but it does result in fewer contests over the material in the longer term.

As in other contexts, the capacity for libraries and archives to respond to remote users, Indigenous and non-Indigenous, has also generated new copyright challenges. In particular these are in terms of reproduction and copying and exist because of the way in which digital technology has altered the ways in which accessing and communicating material can be achieved. Whilst libraries and archives are not the only organizations effected by changing digital technology and the changing law, questions about how libraries and archives maintain their core functions of making material available to the public without onerous administrative burdens are of key concern. Kenyon and Hudson have recently argued, that in an Australian context, whilst the changes to Australian copyright law brought about through *the Copyright Amendment (Digital Agenda) Act 2000* (‘Digital Agenda Act’), provided some scope to exploit digital and communicative technologies, this is countered by administrative limitations such as obtaining licenses from copyright owners.⁷⁶ In situations where copyright owners are difficult to locate or provenance is hard to determine (which is often the case with material relating to Indigenous people), cultural institutions are faced with the choice of infringing copyright or not facilitating digital access. This decision really does depend upon the rationales of each library and archive, and whilst AIATSIS is developing risk-

⁷² K. Lehmann, “Making the Transitory Permanent: The Intellectual Heritage in a Digitized World of Knowledge” (1996) 125(4) *Daedalus* 307-329.

⁷³ See the digitisation of Dawn and New Dawn magazines from 1952-1975
<www.aiatsis.gov.au/lbry/dig_prm/dawn/dawncontents.htm>

⁷⁴ See also <www.aiatsis.gov.au/lbry/dig_prm/sorrybooks/sorrybooks_intro.htm>

⁷⁵ See <www.collectbritain.co.uk/personalisation/object.cfm?uid=025TOR0C8OS1041U00001C01>

⁷⁶ A. Kenyon and E. Hudson, “Copyright, digitization and Cultural Institutions” (2004) 31 *Australian Journal of Communications* 89 at 91.

management strategies in this regard, the extent that changes in copyright law are making it even harder to facilitate access by Indigenous people to cultural material is an issue of some concern.

3.4 *Politics over who can speak, who can represent, who can access*

Despite the above challenges, it is equally important to recognize that with the changing technological and information technologies, material that may once have been difficult to access, becomes relatively easier to access. For institutions that hold substantial collections of Indigenous cultural material, this changing technological environment can also create a range of questions about who can access certain kinds of material. The questions affect both copyright subject matter, and that which is already in the public domain. This is a difficult matter because, in certain circumstances, not all Indigenous cultural material that currently resides in the public domain should actually be there. Some material can be offensive and inappropriate and involve questions of privacy. For instance, in certain communities in Australia photographs of deceased Aboriginal people can cause offence. Other kinds of material can also raise questions about censorship and/or confidential information relating to who is entitled to 'see' it, for instance, a film-recording of a ceremony may only be for viewing by one clan or community – and not necessarily to be shared.⁷⁷ Indeed the politics over who can speak for different types of material raises a range of ethical questions to which libraries and archives have been asked to respond. They are ethical questions because libraries and archives have no legal obligations with respect to the treatment of Indigenous material. However, many institutions do respond directly to requests put by Indigenous people in regards to management criteria in how and who access is provided.

In Australia, both AIATSIS and the Australian Museum have pioneered ways of dealing with these ethical questions. Primarily they involve a variety of policies and guidelines for conducting consultations with Indigenous people and communities to determine the right access conditions, as well as cultural clearances for using material. Determining provenance remains an issue. Getting cultural clearance can also be a lengthy process because community consultation and organizing permissions can take longer than normal given the regional and remote communities in which some Aboriginal people reside as well as matters of translation. In recognizing that Indigenous cultural material is not all of one kind, and that there are a range of politics over who can speak for material, as well as who can access certain kinds of material, libraries and archives have had to invent certain processes that work as a compliment to current legislation. In some instances these processes contradict legal notions of fair use and public domain, but the institution makes a decision in this regard on a case by case basis, and this decision is informed by ethical considerations in regards to the process of rebalancing rights of access and control to Indigenous people.

That archives and libraries can choose the level of ethical behavior, in contrast to legal obligation is illustrative of where the balance of power within libraries and archives rests. Law facilitates the extent that archives and libraries privilege a position of authorship, which

⁷⁷ There were two confidential information cases in Australia that illustrated the importance of Indigenous material and the authority of Indigenous people to regulate access. See: *Foster v Mountford* (1977) 14 ALR 71 and *Pitjantjatjara Council Inc v Lowe* (1983) Victoria Supreme Court, unreported.

the archive and library must uphold through legislation like copyright but also distributes more broadly as if also caught in their own ‘author-function’. For the archive is sustained within society, not only by what it produces, but through what networks of authority are relied upon. In this sense it is the invisible strings that bind law to the archive through narratives of authorship and ownership – played out in the context of access – fulcrum for the relationship between the public and the archive – that I will now explore.

4. Case Studies from Libraries, Archives and Collecting Institutions in Australia

The following case studies will illustrate some of the complex demands that certain kinds of Indigenous cultural material can generate. I have chosen three case studies that involve issues of public domain, fair-use and copyright. The case studies demonstrate the variety of interested parties involved in negotiating ownership over material, and they also illustrate the contests over access that can be generated and the fears and desires that can be mobilized around such material.

4.1 Case Study One: Art, Public Domain and the Copying Published Works (Brandl)

From its genesis as an Institute in 1964, the Australian Institute of Aboriginal and Torres Strait Islander Studies (known then as the Australian Institute of Aboriginal Studies) has funded research through a grants system. This research conducted with Indigenous individuals, communities and organizations forms a corpus of material that AIATSIS now manages. In the early 1970s, AIATSIS funded a research project conducted by Eric Brandl to document Aboriginal rock art sites in the Northern Territory. In his research, Brandl reproduced the rock art images into his art folio. Upon his return Brandl and AIATSIS negotiated to publish a book based on the material, including the images, that Brandl had collected during his field visit. Whilst there was no explicit contract between the parties in regards to ownership of the material, it appears as though the copyright arising from the publication rested with both AIATSIS and Brandl. Significantly, Brandl and AIATSIS were the copyright owners of the reproduction images of the rock art –known as the Mimi figures. Rock art was and remains understood as public domain material. This is because of the age of the rock art and the difficulty of identifying an ‘author’. The Bardmardi clan, who Brandl had worked with, and who had taken him to the site in the first place, retained no rights in Brandl’s artistic interpretations of the Mimi figures.

In 1995, a company by the name of Riptide Churinga manufactured a range of tshirts that featured images of the Mimi rock art and started selling these commercially throughout Australia. The existence of the tshirts became known the Bardmardi clan in the Northern Territory. They found the representation of their cultural imagery on tshirts offensive, but as the rock art is not protected by copyright they had no legal ground to make a complaint to Churinga. Instead the Bardmardi clan turned to AIATSIS and Brandl’s estate to see whether the ‘authors’ of the book might have a better chance of stopping the production of the tshirts.

Upon a comparison between the tee-shirts and Brandl’s line sketches in the publication – it was clear that Churinga had directly copied the images from the AIATSIS/Brandl

publication. Thus, the Bardmardi clan made a representation to AIATSIS, that as the copyright owner of the book, and as an organisation that acted in the interests of Indigenous people, that they might be able to raise a claim of copyright infringement.

After sustained negotiation within AIATSIS and a range of copyright lawyers, it was decided that indeed Churinga had a case to answer with regard to the use of the images from the book, and in this way, AIATSIS could act in some capacity for the interests of the Indigenous clan. As a preliminary, AIATSIS wrote to Churinga stating copyright infringement and demanding the cessation of the manufacturing of the t-shirts, the delivery up of the remaining merchandise and a public apology to the Bardmardi clan, AIATSIS and Brandl's estate. With the threat of legal action, Churinga complied to AIATSIS' demands, and whilst Churinga did not admit copyright infringement – a public apology was posted in Australia's national newspaper *The Australian*.⁷⁸

The case raised a range of issues about the collecting of material relating to Indigenous people, the difficulty when that material exists in the public domain, and the extent that an Institution has an obligation to act on behalf of Indigenous people when there has been an infringement. Certainly AIATSIS, as an organization that prioritizes the interests of Indigenous people, was much more likely to pursue the claim of infringement, than any other library or archive. As AIATSIS had funded the original research and published the resulting book, it had a legitimate claim of copyright ownership. However, in many cases, libraries and archives may retain ownership of the physical object, but copyright will still vest with the author. So the circumstances of this particular case were unique. Nevertheless, the case is illustrative of the kinds of tensions that arise when Indigenous people or clans have no legal rights in material that has been recorded on site with Indigenous individuals or communities providing considerable help, guidance and contribution – and then who is entitled to act when that material gets used in ways which Indigenous people may consider inappropriate. As the options available to Indigenous people to assert rights of control or ownership are extremely limited these often have to be negotiated through intermediaries. For libraries and archives this can increase the administrative and financial burdens when they want to recognize cultural rights.

Of course, had the images of the Mimi reproduced on the tee-shirts been copied straight from the rock-art itself, there would have been no grounds for complaint by AIATSIS, the Brandl estate or the Bardmardi clan, for the material would be classified as being in the public domain and therefore open to use. The problem of protecting rock art has existed as a persistent complaint about the biases of copyright in relation to Indigenous knowledge.⁷⁹ However, the extent that it could be incorporated into a copyright regime would challenge traditional concepts of public domain (given how old rock art is) and would also raise the question of how long it should be protected for. These are not easy questions to determine answers, and this is perhaps why the issue of rock-art and public domain remain on the

⁷⁸ V. Johnson, "Getting Over Terra Nullius" Paper Presented at the Australian Registrars Committee Conference, St Kilda, Melbourne, 2003.

⁷⁹ T. Janke, *Our Culture: Our Future. Report on Australian indigenous cultural and intellectual property rights* (produced for Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] and the Aboriginal and Torres Strait Islander Commission [ATSIC]) Michael Frankel and Company Solicitors: Surry Hills, 1998. T. Janke, *Minding Cultures Report* The World Intellectual Property Organisation, 2002 at <http://www.wipo.org/globalissues/studies/cultural/minding-culture/index.html>.

periphery of debates about including Indigenous knowledge within an IP system in Australia and elsewhere.

4.2 Case Study Two: Digital Technology and Access (Djalumbu [Hollow Log] Ceremony)

In 1963, a husband and wife team traveled to central Arnhem Land in the Northern Territory. They had a variety of funding for their fieldwork – from Australian universities and cultural institutions, as well as funding from their own sources. The recording equipment and film had been supplied by AIATSIS. In the process of their fieldwork they recorded in film and sound recordings the important Djalumbu [Hollow Log] ceremony. This ceremony represents one of the final acts in the Yirritja mourning rights – where the body is interned in the Djalumbu [hollow log]. The recording of the ceremony featured [Djāwa] who was the leader of the Daygurrurr Gupapuyngu people.

In 1997, one of Djāwa's sons, Joe Neparrnga Gumbula composed a song called 'Djiliwirri' for his band, Soft Sands (which was the first band from Arnhem Land to ever travel overseas). The song was about Joe's homeland Djiliwirri – "a forest estate inherited from his father through the Gaykamangu yarrata patriline."⁸⁰ The song "alludes to the veiled core of hereditary sacra held in perpetuity by the Daygurrurr Gupapuyngu."⁸¹ In creating the film clip to accompany the song, Joe decided that he wanted to inter-cut the present with the past, and to show images of his father from the 1963 Djalumbu recording. As Joe has explained:

"That Djalumbu ceremony was filmed in 1963 with my father [Djāwa] who, during that time, was the leader of the Daygurrurr Gupapuyngu people. I called the [AIATSIS] archives in Canberra where they dubbed it for me from 16-mm to betacam and then sent it over to Darwin where I was editing my video clip. I've got footage of the Djalumbu from this old film, and added it to new technologies to show that that was the old time of Djalumbu and that this is the new time of Djalumbu. All the people who were in the film from 1963 are all gone. They're all dead. So we, the people of this generation, have made another Djalumbu film, which is also in the video."⁸²

Whilst the film clip did not have wide circulation, it almost certainly infringed the copyright of the couple who recorded the ceremony. For without permission from the original copyright owners, the making of a new work that takes parts of another published work infringed copyright. Certainly Joe and AIATSIS were not really thinking along these lines when the recording was copied for use in the music video. But to argue for fair-dealing exceptions in copyright law, it does matter what purposes the copy is going to be used for.⁸³ It is unlikely that a court would have been willing to see the making of a video-clip to accompany a commercial work, such as a rock and roll song, as existing within the fair use exceptions despite the cultural dimensions of the situation.

⁸⁰ A. Corn with N. Gumbula, "Nurturing the Sacred through Yolngu Popular Song" (2002) 2(69) *Cultural Survival*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ For exceptions under fair dealing see *Copyright Act 1968* (Cth) Section 40-47H. For provisions for libraries and archives see Section 48-53.

The original Djalumbu film (1963) continues to hold significant resonance within Joe's community – to the extent that there are suggestions about digitizing the film and putting it on the community's website. The film itself is seen as educational – as it is understood that Djawa only allowed the recording to take place so that it could be used as a learning lesson for future generations. It is in the spirit of the Djawa's intention for the film that the community perceives the film as theirs, to do with as they choose. The differences between the rights of the legal owner as to those of the community have been hard to translate.⁸⁴ The copyright owner observes their rights in a strict legal sense and this has created an acrimonious relationship between copyright owner, Indigenous community, and the Institution that holds the original.

In this case, the copyright owner fastidiously pursues any unauthorized use of her work. She presents considerable challenges for Institutions who hold her work, and can be very difficult to negotiate with. In certain instances she holds that an institution has no right to display her holdings in its online catalogue. She is reluctant to let communities reuse the material she and her husband recorded, and it is often under protracted terms of negotiation about the extent that copying is even possible. This is onerous on the institution, in terms of time and labor, but also manifestly unfair to the community who wants to use material that relates to their community and knowledge structures. The terms of negotiation can, at times, be illogical especially to the community. The copyright owner has very firm ideas about who the material was made for, and who can access it – she is in control and speaks for the material, even though it may be fifty years since the material was made.

The challenge for communities is that, in many instances, they are unable to make physical contact to negotiate with the copyright owner themselves. This can be because of location and/or linguistic difficulties. Because of the diversity of kinds of Indigenous cultural material the range of strategies a cultural institution needs to develop to manage the material requires considered thought. Indigenous people want to access material so that it can be re-interpreted and new meanings made, but how these meanings are to be made can contravene the copyright owners rights. Indigenous people's desired uses can also sit outside fair-use claims, especially when material is commercially valuable. So in changing technological environments and with changing laws relating to copying and communicating copyright material, Indigenous interests can sit awkwardly outside of those commonly cited.

4.3 Case Study Three: *Secret/Sacred Material and Fair Use* (Red Ochre Ceremony)

Just to complicate matters further, in certain instances the Indigenous cultural material that has been collected and recorded is of a secret/sacred nature. In Australia, this particular classification of material relates to access – in that some material is not to be viewed by people other than those authorized to do so. Whether this includes Indigenous custodians or members of a community who have authority to use and disseminate the material often depends on the nature of the material and the authority structures within any given community. These can vary, and importantly change over time.

Contrary to many earlier anthropological views, the cultural practices relating to significant restricted material have always been dynamic, and the potential for change lies within the

⁸⁴ J.Anderson, Field notes, August 2004. On file with author.

Aboriginal community; that is, the community itself dictates and orchestrates the fluid nature of restricted material.⁸⁵

Because certain Indigenous performance genres, including music, are associated with religious ceremony, changing restrictions on the ceremonies will in some way affect access to the recordings made during those events.⁸⁶ Although the recordings will have been made at a specific time within a particular social context, the question remains as to how they should be treated if, for political or other reasons, the ceremony becomes either more or less closed.⁸⁷

Indigenous people also have varying degrees of sensitivities about hearing the voices or viewing photographs or videos of deceased people. For example, Torres Strait Islanders place fewer limitations upon viewing images or hearing recordings of people who have passed away than Aboriginal people, who may impose extended restrictions of access depending upon the relationship of the listener or viewer to the deceased or community attitudes towards the person who has died. Thus there is a need for some level of control over use of recordings and other representations of cultural material by Indigenous people so that changing circumstances may be respected. With many communities experiencing very short-term relationships with researchers, especially in work for land claims, to what extent are researchers responsible for maintaining contact with communities from which recordings have been made? Is there a place for these ethical concerns and can they be practically negotiated through law?⁸⁸ From an Indigenous perspective, such short-term relationships present the additional difficulty in knowing where the recorded knowledge is held and therefore how to access it.

Unfortunately, contested ownership and access issues relating to the material form of the recording can and do arise when trying to accommodate these changing contexts and the various relationships of rights that these produce. Yet the law only remains a viable mechanism when the changing needs of people in relation to material are addressed practically. Because the law is reluctant to openly address issues of 'culture' and politics, researchers must serve as interpreters between the requirements of the law and the changing nature of the cultural material they collect and study. However problems arise in highlighting the shortcomings of the law in terms of not accounting for original context when researchers themselves find the actual context difficult to discern and account for, both at the immediate moment and as time goes by. In turn, practical difficulties arise for archives and their access procedures.

⁸⁵ See F. Cubillo, "The politics of the secret" Kleinert, S., and M. Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* Oxford University Press: Sydney 2000 at 30-32 for an example of open display of restricted objects and the effects upon the Yolngu community brought about by the Elcho Island Memorial of 1957.

⁸⁶ L. Barwick, "Song as Indigenous art" Kleinert, S., and M. Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* Oxford University Press: Sydney 2000 at 328.

⁸⁸ In response to this concern certain institutions and organisations have developed ethical guidelines and are developing protocols for research with Indigenous people and communities. For example see the Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies* Canberra, 2002.

In the 1970s, another husband and wife ethnographic team went to Central Australia to record material relating generally to the Pitjantjatjara people. In the process of recording a vast array of material relating to traditions and ceremony, (recordings and written documentation) was made of a specific ceremony known as the 'Red Ochre Ceremony'. Very little is known about this ceremony, except that it is arguably the most secret and restricted ceremonies in Aboriginal cultural life in Central Australia. The material is so sensitive, that it is housed in a locked room at AIATSIS, with the only persons with permission to enter including the Principal and the Director of the Library. A preservation copy of this material has been made in keeping with the *Copyright Act 1968* (Cth) but that is the extent of the copying that has been allowed. No women are permitted to look at this material, and hence if the Director of the Library is female, they must nominate another senior male librarian in circumstances when the material is to be moved or accessed. As stated earlier, AIATSIS, as an Indigenous organization, respects Indigenous cultural values of the gendered nature of some ceremonial material. In this sense it has two restricted rooms, one for women's secret/sacred material and another for men's.

In the course of thirty years, from when the material relating the 'Red Ochre Ceremony' was originally rendered into a tangible form, the traditional custodians for that material have also changed. In this sense, it is the children of the people who provided the information in the 1970s, that are now the senior men. In Central Australia there has been significant progress in the development of a significant digital archive. The Ara Iritja Archive was developed to house and manage Indigenous cultural material, ranging from manuscripts and photographs, to sound recordings. The Archive has a range of moderators, including senior Indigenous elders. The Archive was developed with the capacity to manage restricted material. For instance, it has password controlled levels for entry into different parts of the Archive. The Archive works on the rationale that not all material is open access, either to younger Indigenous members of the community or researchers.

The existence of documentation relating to the 'Red Ochre Ceremony' became known to senior Pitjantjatjara men very recently. They made a delegation to come and see the material and to get copies so that they could manage it according to their own rules of access in the digital archive. The copyright owner refused permission for digital reproduction of the material – arguing that the primary 'informants' had not given their permission (indeed they were all deceased). The material is culturally sensitive, and resorting to legally wrangling over what fair-use may mean in this context, as it would be used for educational purposes, and will not be republished, is far from desirable. Again AIATSIS is placed in a difficult position in relation to its responsibilities to the Indigenous community, the copyright owner, and copyright law. What 'fair-use' might mean in this context is under-explored, and points to the competing agendas of legal stakeholders and Indigenous people.

5. Digital Technology and Innovation

So far, the paper has traced the historical conditions that have led to the documentation of Indigenous cultural material, and pointed to some of the anxieties that this has produced in relation to access and ownership. I want to now turn to issues of digital technology and innovation within Indigenous communities. This is to suggest that issues of digitization and copyright law also have effects on Indigenous communities, both in their interface with new

technological mediums, and also in the relationships developing between libraries, archives and Indigenous communities.

5.1 *Computer use in Indigenous communities in Australia*

In 2000, the Australian Government undertook a study into the increasing use of telecommunications. The resulting Regional Telecommunications Inquiry 2002 made recommendations for ways of improving telecommunications in remote Indigenous communities.⁸⁹ For Indigenous communities this included basic infrastructure such as computers, training and education, and the development of low cost service providers in regional locales.

In 2005, Indigenous communities are increasing group of computer and internet users in Australia.⁹⁰ Whilst there is still a digital divide, it is clear from any visit to an Indigenous community that computers and internet connections provide an important link to economic markets, and educational programs.⁹¹ Whilst internet communication is now relied upon for many agencies within communities (Town Councils etc), other organizations are developing where the central focus is on the emerging technology.

The concept of the digital archive within communities themselves has been developing for at least ten years. In Central Australia, the Ara Iritja Archive started as an archive based at the University of South Australia, that provided digital access to material for the Pitjantjatjara people. Practically, the archive was moveable, and the Archive through the medium of the computer was taken to each community on a rotational basis, so that communities could see what material was being added, and could make comments or provide histories that accompanied the already existing material. The current plan is to extend the Archive so that each community has its own point of access through its own computer, though this remains dependent upon further funding and training.

The concept of the Knowledge Centre was developed in the Northern Territory and has extended into Queensland. These Centres are being developed through the Library Services of each respective state. Even though their manifestation is different within each context, the premise of establishing a building that functions as a locus point like a library or archive is a key agenda. The establishment of these Centres is ongoing and there are increasing projects and funding being dedicated to making them a success.⁹²

⁸⁹ Department of Communications, Information Technology and the Arts, *Regional Telecommunication Inquiry* 2002.

⁹⁰ According to the 2001 Census, home computer use in Australia was 18% for the Indigenous population. Home internet use 9% for Indigenous people and 29% for non-indigenous people and internet use overall 16% for Indigenous people and 39% for non-indigenous. Broken down into remote and very remote regions – 3% of Indigenous people have a computer at home, 1% for internet use at home, and 4% of Indigenous people had used the internet. Year Book Australia (information and technology) <www.abs.gov.au>

⁹¹ Aboriginal art centres have been successful in co-ordinating an online presence and marketing Indigenous art from the site, as opposed to being more reliant on dealers in cities. See: <www.ankaaa.org.au> and <www.desart.com.au>

⁹² See for the Northern Territory <www.dcdsca.nt.gov.au/dsdsc/intranet.nsf/pages/ntlis_lkc> and Queensland <www.slq.qld.gov.au/about/vistors/indigenous_knowledge_centres>

The involvement of libraries in the ongoing development and facilitation of these Centres has raised a range of copyright issues that need to be addressed. These do not only involve how libraries manage their legal obligations in relation to the Copyright Act, but also maintain and distribute these obligations within Indigenous contexts. For instance, there is a need for the development of policy for these Centres that is in keeping with the legal obligations of libraries. Practically this initially means the translation of concepts of copyright into the community, and then the development of policy that is accessible to the community (this could include in the language of the community).⁹³ But when libraries and archives are being faced with considerable hurdles in relation to new controls on reproduction and copying, how might this affect the extent that libraries can work with Indigenous communities? How might these legal issues be translated into Indigenous contexts that do not have the same kinds of infrastructure and training to those organizations in cities?

5.2 Production and reproduction

The Copyright Act sets out a series of exceptions that allow libraries and archives to perform certain Acts of reproduction and communication. As many would be aware, these provisions are quite limited: for example they do not extend to putting material online even at low resolution. One primary difficulty for libraries and archives is that often physically possess copyright materials without necessarily owning copyright in the materials. As Kenyon and Hudson point out, cultural institutions “constantly risk infringing copyright through acts that are necessary to fulfill their missions.”⁹⁴

In March 2001, the *Copyright Amendment (Digital Agenda) Act 2000* came into effect and amended the *Copyright Act 1968*. The amendment expanded copyright owners right’s in three specific ways. The legislation confirmed that converting a work into, or from a digital form, reproduces a work – meaning that copyright owners of analogue works have the first rights of digitization.⁹⁵ The amendment also replaced earlier technology specific dissemination rights with a broader right of communication to the public by making it available online or through electronic transmission. Thirdly, copyright owner’s positions were enhanced with the extension of enforcement measures – notably technological protection measures.⁹⁶

That the changes in the copyright act contain substantial implications for cultural institutions has not escaped the attention of many commentators in Australia or the US. For the subject of this paper the amendment directly affects the capacity of libraries and archives to manage Indigenous cultural material in two substantial ways: firstly the capacity for libraries and archives to digitally reproduce material for remote Indigenous communities; and, secondly through the increase of administrative burdens where cultural institutions are required to obtain licenses for the digital reproduction. As mentioned above, with Indigenous collections, owners of material are often difficult to locate. This increases the pressures on institutions like AIATSIS where demands exceed its capacity to respond to its Indigenous

⁹³ See *AIATSIS/IPRLA Intellectual Property and Indigenous Knowledge Project 2003-2006: Access, Ownership and Control of Indigenous Cultural Material*.

⁹⁴ A. Kenyon and E. Hudson, “Copyright, digitization and Cultural Institutions” supra n76 at 91.

⁹⁵ Ibid at 5. See s 21(1A) of the *Copyright Act*.

⁹⁶ Ibid.

clientele.⁹⁷ Exceeding the capacity of the Institution has both financial and staffing implications.

Whilst Australian law provides exceptions for fair-dealing and special provisions for libraries and archives, it remains unclear the extent that the fair-dealing defense could assist cultural institutions when it acts on behalf of users.⁹⁸ In this sense, it is not clear how far libraries and archives could argue fair-dealing for Indigenous communities, when the intentions of users in Indigenous communities themselves remain relatively ambiguous. At this stage some institutions require a warranty from the party asking for the reproduction, that the material will not be used for specific purposes and indemnifying the institution against actions that might contravene the rights of the copyright owner. The extent that this would transcend the responsibilities of libraries and archives in relation to the material they manage and the Copyright Act remains untested in law. But institutions have to carry on regardless, treading a delicate balance between owners and users in contexts exacerbated by colonial pasts and postcolonial politics.

5.3 Increasing access but also process

The other clear impediment to libraries and archives with the introduction of the Digital Agenda Act, has been the massive increase in administrative time and costs. It means that practically, staff and finances are pushed to the limit, where negotiating licenses with owners for the reproduction of works take precedence over actually getting the material out to the community. This is an unenviable position as it places substantial pressure on staff to deliver material to people in reasonable timeframes.

6. Protocols and Best Practice: addressing issues of custodianship

Despite the complications affecting the function of libraries and archives following the *Digital Agenda Act*, Australia has made significant progress in recognizing the kinds of rights that Indigenous people expect in relation to cultural material that relates to them. This includes the development of protocols for dealing with Indigenous cultural material, and directing attention to ethical issues that might arise. Negotiating these protocols is a fluid process, and the Aboriginal and Torres Strait Islander Protocols for Libraries and Archives developed in 1994 is currently under review. The Australian approach in using protocols to augment legal frameworks is an attempt to sidestep some of the contingencies of law relating to Indigenous people's needs. Of course this is not without its problems as recognising Indigenous needs can result in a compromise about what constitutes the public domain.

6.2 Implications for fair-dealing and public domain

As stated already, Australia has fair-dealing defenses/exemptions within the Copyright Act. The purposes for these defenses include: research and study; criticism or review; reporting the news; and, legal advice or judicial proceedings. The fair-dealing defense also rests upon an interpretation of 'fair' including the character of the dealing, its effect on the market, and

⁹⁷ AIATSIS Briefing Report for *AIATSIS/IPRLA Intellectual Property and Indigenous Knowledge Project 2003-2006: Access, Ownership and Control of Indigenous Cultural Material* (Interview 4).

⁹⁸ See *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.

the possibility of obtaining the work within a reasonable time.⁹⁹ The general defense of ‘fair-use’ as it exists in the US is not applicable in Australia, and while there have been calls to expand the Australian ‘fair-dealing’ defense so that it is more in line with the US approach – to date there has been resistance to such proposals. This does make the fair-dealing defense in Australia narrower to that in the US.

Whilst fair-dealing is important for cultural institutions, they predominately rely on the special provisions provided for libraries and archives. These provisions aim to promote the public interest, allowing cultural institutions to make some use of copyright material without paying copyright owners. Thus the mandate for library and archival function is argued to be in the public interest. But there are circumstances where the public interest and Indigenous interests collide, and this creates challenges for libraries and archives who seek to respect and represent Indigenous interests. How libraries and archives deal with a conflict over what is currently in the public domain and what perhaps should not be, ultimately depends on the specific policies and management guidelines that each library or archive adopts. For instance, AIATSIS is more likely to respect the wishes of Indigenous clients than organizations who have very few Indigenous clients or collections. Nevertheless, questions about the public domain remain difficult to determine in a general way, as the instances that provoke contest are usually quite specific and sometimes overtly political.

Whilst archives and libraries are facing new challenges in terms of continuing their function within a digital environment, they are also being faced with new demands from new user groups. The face of the public has always been changing, and the increase of Indigenous claims can be understood in this light. Whereas many of the issues arise because libraries and archives may ‘own’ the tangible product but not the copyright in that product, Indigenous people hold neither position as possessors of the real property or owners of the copyright. This heightens the politics of the claims and the demands upon institutions. There is no easy answer, but the implication is that the new Indigenous public is also increasing work loads and administrative costs. Inevitable as this is, in an environment where libraries and archives are already battling new technological changes, the new challenges of rebalancing colonial power relations in practice and in law are fraught. In some circumstances Indigenous use will be covered by fair-dealing, and in other situations, the library and archive will be covered by the provisions provided in the Copyright Act. However there remain substantial gaps wherein situations exist where Indigenous users, libraries and archives (sometimes at the same-time) infringe copyright on a regular basis.

Given the extent that Indigenous access and ownership of cultural materials within Australia remains a daily practical challenge, certain management processes have been and continue to be developed and it is these that I will now turn.

6.1 Libraries and custodianship: developing best practice

Australia holds a unique position in relation to its use of protocols to augment standard legal definitions and the exclusion of Indigenous rights and interests that exist in documented material. Protocols remain perceived as relatively neutral cultural forms - protocols are part and parcel of the legal dynamics that they have been set against – they are not made up

⁹⁹ *Copyright Act 1968* (Cth) s41(2)

counter to legal experience, but are informed by and respond to formal legal failings or inadequacies. In this sense, protocols are a practical adjunct to law making processes, and demonstrate a shift to a postmodern ordering of the relations between society and legal networks. The shift to protocols is itself illustrative of current trends in intellectual property towards private law making, for example through agreements and the like, and consents – and the proposed *Copyright Amendment (Communal Moral Rights) Bill* 2003 is an example of the emphasis on consents.¹⁰⁰

Protocols are produced through a complex matrix of relations exercised through ongoing and changing cultural engagements that are always already invested with politics. Protocols are prescriptive – in that they prescribe particular types of behavior. But also have the capacity to convey a mode of behavior that institutions and individuals are presumed to follow. Protocols prescribe modes of conduct through emphasizing or normalizing particular forms of cultural engagement. Whilst this effect is not given, overtime protocols do have the capacity to influence change in ways that differ to stringent bureaucratic or legislative programs. However a key point of interest for protocols is that they offer choice as their differential – an individual, or even an institution either chooses to follow them or not. Nevertheless protocols are part and parcel of repositioning certain agendas.

The Aboriginal and Torres Strait Islander Library and Archive Protocols were developed in 1994 and 1995.¹⁰¹ They sought to provide a guide to libraries, archives and information services about interaction with Aboriginal and Torres Strait Islander people and communities as well as how to handle material with Aboriginal and Torres Strait Islander content. Specifically the protocols encouraged: the recognition of moral rights of Aboriginal and Torres Strait Islander peoples ‘as the owners of their knowledge’; issues arising from Indigenous content and perspectives in documentary materials, media and traditional cultural property; issues of access to libraries, archives and information resources amongst other things.

The protocol sought to chart a path for best practice that acknowledged and respected Indigenous rights in an area haunted by colonial pasts and practices – where Indigenous people featured as subjects of the archive rather than active participants in interpreting past and present cultural production. In a context where, as far as the law of copyright goes, Indigenous people own very little of the material found in such institutions, the protocol began a process of recognition and standard setting. It began to address certain historical power imbalances that law was really unable to deal with. The protocol prescribed a change of behavior – that Aboriginal and Torres Strait Islander people did have rights in relation to the material, and while these would not be recognized legally, the Institutions themselves could be proactive in recognizing these. Institutions could choose to be respectful and acknowledge differing and not necessarily legal rights. The step of encouraging reflection about rights and interests previously excluded because they were not legally recognizable and hence enforceable, was the explicit purpose of the Protocol. The Protocol has been effective in that it has raised the level of expectation about the actions of libraries, archives and

¹⁰⁰ For a summary of this legislation see: J. Anderson, “The Politics of Indigenous Knowledge: Australia’s Communal Moral Rights Bill” (2004) 27(3) *UNSW Law Journal* 585.

¹⁰¹ In conjunction with the Aboriginal and Torres Strait Islander Library and Information Resource Network (ATSILIRN).

information services in relation to Indigenous material. The current review of the Protocol current review, and the response to the AIATSIS/IPRIA Project on access and ownership of cultural material illustrates how important these issues are, and the extent that libraries and archives are at the forefront of developing new relationships and setting new benchmarks for best practice.

7. Conclusion: Rebalancing Copyright for Indigenous people

I want to conclude with a discussion about the development of some practical strategies to engage with these issues in the work being done at the Galiwin'ku Indigenous Knowledge Centre, Northern Territory, where I have been working with Joe Neparrꞌa Gumbula and others. The Galiwin'ku Indigenous Knowledge Centre functions to record and document current cultural practices as well as provide a place for the return of important historical recordings to the community. The kinds of problems of ownership and authorship that we engage with at AIATSIS tend to be replicated in Indigenous Knowledge Centres and other cultural centres that are being developed as cultural material is returned to communities. These problems arise because returned material is still not owned by the community and if communities want to make copies of it or put it on the Web, they must engage with all these problems of intellectual property, or to be more precise, copyright and the dilemmas of licensing in the digital environment. For example, the GIKC has hundreds and hundreds of photographs—some old and some more contemporary photographs—and whilst there are some very simple ways of dealing with some of the issues, the way in which they are tied to issues of funding, issues of training, and what the actual purpose of the space is become quite interconnected and complicates the path to resolution.

To work through the ownership problems at GIKC, we needed to develop a particular strategy, quite specific to the community. Whilst the legal questions are simple in many respects about who does own a particular item, they are complicated in the process of returning them to the community for use by the community. Questions arise: how are you allowed to reproduce, for example, a particular photograph, how do you put it into a computer, who then owns it, how do you document these processes, who do you contact if you would like to use it later on, or could you get a transfer of ownership of the photograph so you could use it whenever you wanted to. The problem with older material is that often the copyright owners are unable to be contacted: we have no idea of where they are, or perhaps who they are or what they think about use of their material. This is always a significant problem and points to the responsibility of researchers to maintain a particular ethical standard in how they do document Indigenous Knowledge and maintain their continuity with a community they have worked with over a period of time.

We decided at Galiwin'ku that we would develop quite a specific community intellectual property protocol and that this would emanate from Galiwin'ku; it would not emanate from larger organisations and then be imposed on Galiwin'ku. The protocol being developed is quite distinctly a Galiwin'ku document and it incorporates both Yolꞌu understandings of knowledge management as well as the intellectual property issues as well. It is starting to be a pathway in terms of dealing with issues that include both these legal strategies and also the Yolꞌu strategies of knowledge management.

As a starting point we are focusing on the material that is produced, for example, when researchers come in and take photos and film and sound recordings of the community. We want to develop something so that researchers have certain responsibilities and obligations to leave certain tangible productions with the GIKC so that the community knows that they have them and they can show their children—the purpose is not complex. In developing the protocol, we are seeking to bridge a gap between Yolŋu needs and systems and these quite rational systems of law and ownership and authorship and to re-jig them—dance around copyright, if you will—so that the community does have certain ownership rights, does have rights that are recognized, even if this is established through other areas of law such as contracts. The point is that when people do come into the community they are under an obligation to respect rights developed by the community.

This is creating a space for Galiwin'ku Indigenous Knowledge Centre to build different relationships with researchers and institutions. If GIKC has its own policy document that it is able to give to a researcher who comes into the community, the researcher knows that they have an obligation to treat the material that they record in a particular way in accordance with the site-specific issues. Similarly when Joe Gumbula goes down to deal with different libraries and archives, for example, the Donald Thomson collection at Museum Victoria, or the University of Melbourne, he has something that confirms to them that the GIKC has ideas about intellectual property issues, as well. This is a significant development, as there is reluctance on the part of organizations to hand back materials because of copyright questions. However, if the IKC is being proactive in how its dealing with these issues, then the institutions can see that there is room for a new and different relationship to be built between institutions and communities. This is a process, not without its flaws, but nevertheless a practical strategy that allows communities to have more rights to material when historically they have had none. The community is strengthened in the process and at the same time it raises the bar in relation to how institutions do deal with Indigenous Knowledge Centres. It is important and timely that these new relationships be recognized and developed through such processes. There is so much cultural material held in institutions. A lot of it is contained in collections that have not been documented. Not only do some institutions not even know what their collections hold, but some fear documenting what those collections hold because of the intellectual property implications once they do know what they hold.

The development of a site-specific protocol to assist Galiwin'ku to build on the material that it already has and also know what it can use and how they can use it without always having to go to the copyright owner has actually, given that it is in quite a remote location, put power back into the GIKC as a point of contact. People can go to the GIKC and find out about material rather than relying on an institution like AIATSIS who does not necessarily have that contact information to start with. The development and use of a Galiwin'ku protocol has helped to build these new relationships and push them forward. Using such a protocol can also contribute to a change in mindsets about what we expect intellectual property to do.

Intellectual property is a tool of control so it can work quite well to recognize rights and to abridge them in many ways. Of course it is about property as well and we have to ask questions about how we are making knowledge into property: Is that useful? Can it provide some sort of leverage to protect knowledge that otherwise wouldn't be protected? And I

think in certain instances it can provide a useful tool of leverage. The flipside to intellectual property, of course, is it is restrictive. It restricts and if somebody else has copyright rights they restrict others' use of it. As this paper has sketch, AIATSIS has some of these problems, as do other institutions in Australia. As well, overseas institutions like the Smithsonian have these issues and nobody is clear on how to deal with them. What the projects at AIATSIS and Galiwin'ku Indigenous Knowledge Centre have highlighted is that the only way to work through the issues, many of which I have explored above, is to get them out on the table and make a start.