

Anderson, Jane and Grace Koch. "The politics of context: issues for law, researchers and the creation of databases". *Researchers, Communities, Institutions, Sound Recordings*, eds. Linda Barwick, Allan Marett, Jane Simpson and Amanda Harris. Sydney: University of Sydney, 2003.

This paper was originally published online as a refereed conference paper through *Open Conference Systems* by the University of Sydney, Faculty of Arts in 2004.

The politics of context: issues for law, researchers and the creation of databases

Jane Anderson and Grace Koch

Field recordings generate dilemmas that need to be addressed by intellectual property law, researchers, and the creators of databases containing Indigenous knowledge. Firstly, format changes such as digitisation provide legal challenges in accommodating the various rights and interests brought about by such changes. Secondly, ethical issues arise for researchers as they act at the interface between Indigenous people and the field recordings that they make. For instance, when researchers lodge their recordings in cultural institutions, they become responsible for providing an accurate interpretation and clarification of the original context of the recordings. Such information is fundamental in helping to determine the rights and interests held in the material, both at the time of the recording and in the future. Finally, for database designers and users, complex questions arise about the nature of database design and configuration as these directly affect the organisation and hence representation of Indigenous cultural material.

This paper is based on a case study of field tapes recorded in Central Australia in 1976. Discussion is divided into three sections, each of which includes relevant material from the case study. The first considers the challenges for the law in accounting for origination along with the dilemma of fixing ownership and private rights in the recording. This leads to the next section of the paper examining the rights and responsibilities of the researcher in relation to the people recorded and to archives, both for the original recordings and for subsequent formats, such as digitised copies. The final section raises pertinent concerns about what new powers could be at stake in the creation of databases containing Indigenous knowledge.

Rather than assuming the distinct and separate nature of these concerns, the paper demonstrates that these issues are interrelated as part of an historical and contemporary discourse addressing the rights of Indigenous people in cultural material held in archives, libraries and other institutions. It advocates cross-disciplinary conversations in order to provide new opportunities for shedding light on the politics of interaction between law, individuals and new forms of technology. Although the examples in this paper are drawn from an Australian context, the same types of issues are experienced throughout the world by various archival institutions. Thus, this paper offers a timely exploration of the

intersection of problems facing the law, researchers, and Indigenous database compilations and collections.

1. *Background*

The case study we present consists of recordings made with people of the Kaytetye language group from Central Australia near Barrow Creek, Northern Territory. They were the first field recordings made by Grace Koch in 1976 as part of her work at the Australian Institute of Aboriginal Studies (now known as The Australian Institute of Aboriginal and Torres Strait Islander Studies, to be referred to as AIATSIS from here on.) The tapes contain a performance of the Kaytetye Akwelye, or Rain song series. These songs are identified with the powerful rainmaking sites in the Arnerre land estate, which is part of Neutral Junction Pastoral Lease, west of the homestead of that property. The songs refer to a series of sites that can be traced along a track going from west to east, travelling close to the Kaytetye Tara camp area, where the recordings were made.

Since 1974, the linguist Harold Koch had been recording word lists and grammatical material with Kaytetye men and Grace Koch had accompanied him during the first part of his work. Two years later the senior Kaytetye women from Tara asked that Grace come out especially to make recordings of their songs during the performance of a full Rain Dreaming ceremony. Koch made the assumption that the women had asked her to record the material because they too, wanted a record to be made of the women's part of the ceremonies and because they wanted their part of the ceremony to balance Harold's recordings of men's knowledge.

According to the understanding of the Kochs at that time, ceremonial life, particularly initiations at the camp at Tara, had been suspended for six years during the presence of an Arrente pastor, but after his departure in the mid-1970s, the ceremonies had been reinstated.¹ Kaytetye people at the neighbouring Warrabri² settlement, where a number of ceremonial leaders resided, took an interest in this cultural revival activity at Tara. Two months before Koch's arrival at Tara, Kaytetye women from Warrabri had come to the

¹ A later interpretation stated that the missionaries had not restricted ceremonial life in any way. This differing view, from someone who was a child at the time, highlights our problem of establishing an accurate account of the 'original' context.

² Warrabri, now known as Ali Curung [Alekenge], is located approximately 60 km north of Barrow Creek, NT and is situated within Kaytetye territorial land.

community and had performed a Rain Dreaming ceremony as a type of teaching exercise. After that the Tara Kaytetye people were highly motivated and anxious to mount their own ceremony. This suggested the importance of the educative elements of the ceremony and the desire by the Kaytetye people to ‘remember’ this ceremony through repeated performances. It was one of these that Grace Koch recorded.

At the time of the taping, other social influences were apparent that impacted upon the recording context. For instance, pay cheques from the government had arrived, resulting in a temporary migration by many Kaytetye people to Alice Springs for shopping and visiting relatives. As so many people were away, the Tara Kaytetye women were aware that they could not present a proper or full performance with the remaining people. Nevertheless, the senior women decided that they would arrange a ‘special’ singing event for the recording. The five hour performance was sung away from view of the rest of the community in a tin shed which had been used for general meetings and as a church. The senior ‘owners’ and ‘managers’³ of the song series participated in the singing, and two other knowledgeable women, who had been painted and who were wearing cockatoo feather headdresses, danced short sequences throughout the performance. Some older women stood outside the shed to discourage visitors. Interpreting the placement of the women outside the shed to discourage visitors and the limited women present, Koch assumed that there were restrictions on who could see this performance and consequently who could listen to it.

In terms of the physical act of recording the song series, Koch observed how the women were sensitive to the tape recorder. The women watched to see when the tape was coming to an end and used sign language to keep background noise to a minimum. In addition, some of the women had brought their own cassette recorders to make their own recordings of the performance.

In this context, Koch made several assumptions about the recordings.

1. That the women wanted to make their own records of their cultural material
2. That the performance and the recorded version might later function as a part of a ‘cultural revival’ (revival of Rain singing) for the Kaytetye people living at Tara

³ Although the system of owners and managers can be very complicated, generally owners of a ceremony receive their rights from their fathers’ traditional land and the managers get their rights from their mother’s country or by other negotiable means.

3. That the recording would provide data for research
4. That, although the performance was out of its normal context, the recording of the performance had direct sanction within the community because the main female ceremonial owners were involved in the performance and the recording

With this example in mind, let us initially consider some preliminary observations about intellectual property law and then move on to how this applies to the Kaytetye recordings.

2. Aspects of intellectual property and the Kaytetye recordings

2.1 *Rise of interest in intellectual property law*

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 the purpose and scope of intellectual property law has been defined internationally through *The Convention Establishing the World Intellectual Property Organization 1967* (WIPO).⁴ According to the Australian *Copyright Act 1968* (Cth), 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.” (McKeough et. al. 2002: 3)

As is commonly cited, intellectual property laws protect the expression of the idea – not the idea itself. Judicial judgement and frameworks of classification are integral in deciding at which point an idea is actually expressed and thus legally recognisable (and protected). For the Kaytetye sound recordings the idea is expressed when it has been recorded or, in other words, ‘captured’ in the tangible form of the sound recording. This requirement of ‘capturing’ the intangible indicates a constant tension in intellectual property law: granting property rights to something that is intangible and identifying the metaphysical dimensions that make up the ‘property’. This logic is reflected in the way that the *Copyright Act 1968* (Cth) provides for ownership of sound recordings. For instance the *maker* of the sound recording is the copyright *owner*.

⁴ 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).

Intellectual property law and its effects have come into public awareness and generated active discussion in 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. (e.g. Davies 1996: 1, Dodson 1996, Blakeney 2000:251, Sackville 2003:711, Brown 2003). In Australia this interest in the intersection of intellectual property and Indigenous knowledge is directly tied to the copyright and Aboriginal art cases that were conducted in the 1980s. In particular they concern the reproduction of individual and community owned designs for commercial purposes, such as t-shirts, carpets and other marketable items.⁵ These cases were significant as they addressed the extent that Indigenous knowledge could be included within the intellectual property discourse. Importantly they emerged from discrete instances of political, governmental, legal and individual influence.⁶ Means for protecting elements of Indigenous knowledge have also been investigated at the international level, at least since 1976.⁷ For example, the focus by the World Intellectual Property Organization on ‘traditional knowledge’ illustrates how embedded Indigenous concerns are within the intellectual property discourse.⁸

The Kaytetye recordings were made in 1976, ostensibly before the popular rise in interest in intellectual property discourse, therefore neither Koch nor the Kaytetye women were thinking about intellectual property law or the legal rights that were determined through the recording of the performance in 1976. Consequently, difficulties now arise in identifying the Indigenous rights and how these affect the facilitation of future access to the material. For example the difficulties include:

⁵ *Yanggarnny Wunungmurra v Peter Stipes* (1983) Federal Court, unreported; *Bulun Bulun v Nejlam Pty Ltd*, (1989) Federal Court, unreported; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Milpurruru v Indofern Pty Ltd* (1994) 30 IPR 209; *Bulun Bulun v R and T Textiles* (1998) 41 IPR 513.

⁶ 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).

⁷ *Consider the Tunis Law on Copyright for Developing Countries 1976.*

⁸ 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, 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: <http://www.wipo.int/globalissues/igc/documents/index.html>.

- remembering what the ‘original’ intentions for the recording were;
- respecting the unique social and political circumstances at the time of the recording;
- knowing what the restrictions on hearing the material may have been;
- accommodating for possible changes in these conditions.

Importantly, these difficulties are not unique to the Kaytetye recordings but exist as current issues facing cultural institutions throughout Australia in managing access to extensive collections of field recordings. Before elaborating on these in more detail, it is necessary to briefly sketch some of the basic problems facing the western legal framework in including Indigenous knowledge.

2.2 *Position of Indigenous knowledge within intellectual property law*

The position of Indigenous knowledge within intellectual property law has been critiqued from a number of perspectives.⁹ Generally, the argument is that Indigenous knowledge does not necessarily fit the forms of classification and identification required to ‘identify’ intellectual property subject matter. As Mick Dodson has described the problem:

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.* (Dodson 1996:32) (Emphasis added)

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 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. The law could then move away from troubling questions about determining a right of property in something that could not be seen and that had no clear boundaries.¹⁰ Arguably however, the lack of clear

⁹ This has included critiques from both legal and non-legal scholars.

¹⁰ 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, *Copyright and Culture: Australian Law and Controversies* (forthcoming 2003).

boundaries is a characteristic of all knowledge and so the problem persists in current processes for determining intellectual property rights.

Following the above 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 them upon their engagement with the market, thereby giving 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. (Arup 2000: 243)

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.¹¹ 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 Kaytetye songs and the necessary presence of the traditional ‘owners’ and ‘managers’ during the performance. Let us now move on to examine how the Kaytetye recordings exist within copyright law.

2.3 *Legal protection and ownership of recordings*

The sound recordings of the Kaytete Rain ceremony are protected legally for a period of fifty years from the date the recording was made, as stated by Australian copyright law. AIATSIS is the legally recognised ‘author’ of the sound recordings because it employed and hence funded Grace Koch to do the work. AIATSIS, through Koch, was responsible

¹¹ However as the carpets case *Milpurruru v Indofurn Pty Ltd* (1994) 30 IPR 209 demonstrated there is room within the law to consider issues 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 as a given for all Indigenous communities.

for making the recording and thus transforming the performance into a tangible form – the sound recording.

Copyright, in particular, has two key forms of classification that help identify intangible subject matter: namely ‘originality’ and ‘authorship’. These are often cited as the primary instances of incommensurability with Indigenous knowledge schemas because they are dependent upon the identification of an individual as an author.¹² The author is the person who has created a work.

Obviously these concepts of ‘originality’ and ‘ownership’ raise great difficulties when, according to Kaytetye belief, the songs were, for the most part, handed down through generations where the songs were given in dreams by an ancestral rain figure through a mediating spirit to unidentified people long ago who were, nonetheless, traditional owners of Arnerre country. The concept of originality, generally understood as a new work that has not been copied from anyone else, also causes problems in relation to the Kaytetye Rain songs, as it cannot be determined when and if they ever were new and ‘original.’

Whilst the Copyright Act contains certain provisions that relate directly to performers’ rights these are only for performances that took place on or after October 1989.¹³ This means that the actual performance, in 1976, of the Rain Song Ceremony is not protected under this section of the Copyright Act.

2.4 *The cultural politics of intellectual property law*

Arguably, within its own terms and through its own modes of classification, the law does address issues of cultural difference. The new emphasis on the inclusion of cultural topics within legal study indicates a conscious sensitivity to the position of such issues within the law. As Austin Sarat and Jonathan Simon explain, the law has been forced to

¹² For an influential analysis of this emergence see M. Foucault, “What is an Author?” Rabinow, P. (ed) *The Foucault Reader: an introduction to Foucault’s thought* Penguin Books: London, 1984. Mark Rose has extended attention to this emergence within the context of copyright. See M. Rose, *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge, Massachusetts, 1993.

¹³ Part XIA of the *Copyright Act 1968* (Cth). Since at least 1996 proposals have been made to extend the rights of performers in keeping with the *WIPO Performances and Phonograms Treaty* 1996. As part of the Free Trade Agreement negotiated between Australia and the United States in 2004, Australia has agreed to become a signatory to the treaty. The new rights will not come into effect until the Copyright Act is redrafted.

consider the world beyond its boundaries through specific moments where claims of legal remedy also incorporate arguments regarding cultural identity (Sarat and Simon 2001: 6). Thus it is important to remember that the law cannot exist apart from cultural and political issues and that consequently the law is influenced by them.

The changing cultural and political landscape has brought about new challenges, not only for the law, but also in the area of copyright for cultural institutions and archives that store extensive collections of Indigenous cultural material. These challenges address themselves to the multiple interests that intersect in the documentation process, as we can see in the Kaytetye example.

Diverse questions arise about the legal ownership of the recorded material as well as ownership of the performance. In this sense it is important to recognise that ‘ownership’ can also be understood as a mechanism of control exerted by the Indigenous owners. Ownership of ceremonial material itself is somewhat fluid; it passes on through time to different people through kinship ties and in other cultural ways. With this in mind, what are the implications for control of the recorded form? If there are any cultural restrictions on the material, questions then arise about who may listen to the recordings and who may have copies. On one hand the answers do rest on what the law says, but on the other they are also dependent upon an interpretation of the origination of the recordings for the differentiated nuances of cultural ownership. Of course these elements are complicated by the changing forms that the recordings take, and the subjective interpretations of the field recorder. Issues of law move into the realm of ethics as well, and it is to this that we now turn.

3. *Researchers, the law and ethics*

3.1 *The Kaytetye recordings*

According to standard archival and ethical practice, Koch lodged the Kaytetye Rain song series tapes with restricted conditions being placed upon them for access because she assumed that to be the wishes of the traditional owners. Work copies were made for Koch, who partially notated and analysed the music. She returned to Tara a year later and played these work copies back to the women in order to elicit the song words, and these were given to the senior owners of the Rain songs. The elicitation process was recorded also on this second visit. Following this engagement with the women, there was a request

from the community for copies of all tapes made by Koch with the women. Those were consequently sent in cassette form to the Thangkenhareng Cultural Centre at Barrow Creek.

To Koch's surprise, two Kaytetye women, one of whom had performed the Rain Dreaming songs for her, sang the Rain Dreaming series on air for a program broadcast through the Central Australian Aboriginal Media Association in 1985. The Rain Dreaming series was heard all over central Australia. It appeared that the restricted nature of the song series had changed, or was in the process of changing and adapting from that initially interpreted by Koch.

3.2 *Changing nature of restrictions*

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 Aboriginal community; that is, the community itself dictates and orchestrates the fluid nature of restricted material.¹⁴

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 (Barwick 2000: 328). 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.

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

¹⁴ 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.

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?¹⁵ 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.¹⁶

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.

3.3 *Researchers and archives*

Whilst the law is involved in determining rights in terms of exclusive possession, both of the tangible recording and intellectual property rights vested in that recording, the researcher’s instructions about access to field recordings can also cause problems in relation to archives and the pressures they have to make their holdings available. The Kaytetye recordings exemplify some of the possible complexities.

As stated earlier, Koch’s assumption that the recordings were restricted was based upon the conditions that surrounded the recording, such as the women standing outside the shed and discouraging people from coming in. Therefore when Koch put the tapes into the archive, she placed restrictions on access. The broadcasting of the songs challenged

¹⁵ 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.

¹⁶ This point has been developed in consultation with Myfany Turpin.

those conditions of access, demonstrating the changing nature of the song series. But because the song series, or part thereof, had been played in the public domain, was the recording then fully unrestricted or were there still conditions that needed to be respected? Restrictions, even though they may not be necessary now, remain until these questions are answered. In this regard, Koch is still awaiting the final word from the remaining traditional owners before changing the access conditions. This example shows how important it is for archives that the researchers maintain links with people they have recorded so that access issues may be clear. This importance is highlighted when recordings take a form different from that originally deposited in the archive.

3.4 *Digitisation issues and format change*

In 1998 some 20 years after the initial recordings were made, researcher Myfany Turpin, who had been working with Kaytetye women from Neutral Junction in assembling a Kaytetye dictionary, planned to do research for a PhD thesis on Kaytetye women's songs. Turpin and Koch met in 1998 to explore the possibility of Turpin using Koch's field recordings as part of the data for her thesis on the Kaytetye Rain songs. Turpin discussed playing Koch's Rain song tapes to the women in the community. Because Koch knew that the remaining Kaytetye owners of the Rain songs would be listening to the tapes, she provided Turpin with copies of both the tapes and of her field notes.

In 1999 the women requested that Turpin work with them to make a CD and a cassette of their Rain songs. For this purpose Linda Barwick and Turpin made a digital recording in 1999 which would form the basis for a CD compilation of all the different Rain song texts from three different sets of recordings. With agreement from all parties concerned, Turpin digitised the Koch version of the Rain song tapes along with her own and the ones made with Barwick. This work was done in conjunction with Alison Ross, one of the Kaytetye owners of the Rain songs.

With this compilation, several layers of issues regarding access conditions arise due to the differing origination circumstances of the recordings. For instance, Koch's recordings were made before a private audience and were done for research purposes – as it was prior to 1989 there were no performer's rights in the recordings; Turpin's were done in both private and public contexts, also for research purposes; and the ones made by Turpin and Barwick were done with the production of a CD in mind. As both Turpin

and Barwick recorded performances around the period of 1999 there were also performer's rights (as found in the Copyright Act) associated with these recordings. In the consultation process for the compilation, the Kaytetye women agreed that Koch's recordings should be part of this CD even though Koch's recording was primarily of a private performance.

In September 2003, the Myer Foundation provided a grant to complete the compilation and the accompanying booklet. The published compilation, *Akwelye Awelye: Kaytetye women's traditional songs from Arnerre Central Australia*, is ostensibly a collection of the 'best' performances (as agreed by the traditional owners) of each of the 48 rain song texts made in different historical periods. It was published by the Papalu Aparr-kari language and culture centre in Tennant Creek in February, 2004. As is stated on the recording, the copyright of the compilation (as a new work) is held by "the Singers".

Obviously, in order to create the compilation CD, Koch's 1976 reel-to-reel recordings had to be digitised. Legally speaking, a new "communication" or product has been created, and rights and responsibilities for Koch's recordings as part of a new work have changed. For this CD, and depending upon the contractual arrangements that have been entered into, control now rests with the singers, the Myer Foundation as funding body, Papulu Aparr-kari as the publisher, and Myf Turpin and Alison Ross as compilers and editors. When a copy of this new product is lodged with an archive, conditions of access and copyright will have to be renegotiated.

AIATSIS (through Koch) remains the copyright owner of the 1976 recording but has no right in the new communication product of the compilation as a whole. However, if an infringement arose where only the 1976 recordings were copied from the compilation, AIATSIS would be the copyright owner infringed upon. Alternatively, if a section of the 1976 recordings were copied alongside various other parts of the compilation, determining who the infringed copyright owners were would depend on how substantial the copying of the 1976 recordings had been. This could only be determined within a court. If this appears complicated and unclear – that is precisely because the new rights that are generated in relation to the compilation that draws upon existing works with current copyright is far from clear in the Copyright Act itself.

However, no new copyright and access negotiations would have had to have been carried out if Koch's tapes had been digitised solely as part of the preservation program of an archive. In that case, no new access conditions would be necessary for the digitised copies. Yet the dilemma exists; the original tapes are under a more restricted set of access conditions than the new compilation CD which holds some of the same material.

The point is that these are complicated issues. They are as unclear in the law as they are for researchers, Indigenous people and archives. Our intention has been to illustrate the layers of complexity in order to foster reflection and further contemplation.

We leave this set of complex issues to reiterate the challenges faced by researchers. First of all, they need to decide how to account for the changing nature of their recordings, once research has been completed. Questions arise about their ethical responsibility for maintaining ongoing relationships with communities so that the changing nature of the recordings can be monitored in determining appropriate conditions of access to them. The need for this relationship is illustrated by the example of problems facing cultural institutions around Australia and overseas where the depositor's conditions, the varying nature of these and the types of copies of material that are being made and circulated, compound the already challenging nature of the intellectual property issues.

At this juncture, we need to recognise that for the researcher, their field recordings generate much more material than the audio carriers themselves. Transcriptions, translations, music notations and field notes are only some of the types of added materials produced in the course of research. In order to fulfil their role as responsible repositories, archives need access to this material as well. It follows that databases can most efficiently serve as the mechanism whereby the recordings and their documentation can be brought together, and it is to an examination of legal and ethical issues raised by databases that we now turn.

4. Ethical and legal challenges for database creators and managers

4.1 Databases and the law

Owing to significant advances in technology, databases are able to hold a great deal of material. As we have just mentioned, a significant proportion of cultural material relating to a particular region or community can be put together within the space of one

database. For example, the Kaytetye recordings, both the originals and the new compilation CD, may eventually appear in some form in a database such as the one established for the archive that is sponsoring this workshop, PARADISEC. We now move to a brief discussion of some issues that arise when databases serve as an intersection between Indigenous cultural material and the digital domain.

In terms of copyright, the creation of a database, as a compilation, is an act of originality and authorship and is thus protected under the Copyright Act as a literary work.¹⁷ The content of the database can be owned by individuals other than the creator of the database,¹⁸ however unless otherwise stated, the act of compiling information confers copyright.¹⁹ In copyright law, communal ownership of the content of the database is not recognised; however the law does recognise joint-ownership.²⁰

A significant problem arises given the extent of databases being generated within communities and for communities where clan or other types of joint ownership are recognised as part of their traditional law. Unless explicitly stated, ownership of the database will be vested with the person who made the database – that is the person or people who physically exerted labour in its compilation. For song series, such as the Kaytetye Rain songs, the primary difficulty arises here because communities who may culturally ‘own’ the songs are still disadvantaged in terms of owning the database that holds their cultural material because they may have a minimal role in actually making that database. Thus it is not only the actions and responsibilities of the researcher but also the archival institutions that are intrinsically involved in mediating both legal rights and those of the community.

¹⁷ *Copyright Act 1968* (Cth) s10. A literary work includes:

- a) a table, or compilation, expressed in words, figures or symbols; and
- b) a computer program or compilation of computer programs

¹⁸ For example by an employer.

¹⁹ The case *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 51 IPR 257 found that while facts themselves are not protected, the published form taken by the facts suggests intellectual effort in compiling those facts. This case found that copyright exists in a telephone directory.

²⁰ *Copyright Act 1968* (Cth) s10. A work of joint authorship means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.

4.2 *Comments on the logic of databases*

Given the centrality of databases to this conference, let us turn to some recent work by Arun Agrawal, which reflects upon the logic of databases and Indigenous knowledge (Agrawal 2002:287). Although Agrawal is largely interested in the formation of databases encoding agricultural and environmental conservation material, his conclusions are nevertheless relevant to this discussion as they provide critical reflection upon an increasing national and international trend.

Agrawal argues that the implicit logic of database creation encompasses three processes. The first, *particularisation*, requires that Indigenous knowledge targeted for the database be separated from its full context. The second process is *validation*, where the chosen data is tested according to the purposes set by the database creation and hence the framework. For example, the material needs to ‘fit’ within the already established structure and, hence, the content of the database. This step of validation includes abstraction, where only that part of the knowledge that can be transferred to the database is entered. The broader context afforded to the material will never be fully accounted for within a database – for instance, in the context of language, the specific nuances conveyed through hand gestures, and which may accompany a particular phrase will not find expression within this ‘new’ context. Finally, the data is catalogued and archived onto the database and circulated for wider consumption, which requires a process of *generalisation*. (Ibid. 290-291) The total organization of the database lifts content out of its context and places it into a new one, thus making a new object.

With regard to the increasing proliferation of databases for Indigenous knowledge, Agrawal’s observations highlight that databases are not neutral forms. In this sense, the point is to draw attention to the logic of databases, showing that there are limitations when including Indigenous knowledges. When a recording is made, the tangible form of the knowledge exists as a record of a particular moment in time. When a sound recording is put into a database, there is a danger that it will become separated from its distinct political, cultural and social contexts – that it will be represented as ahistorical. The point of highlighting Agrawal’s thesis has been to emphasise the importance of recognising the differing logics inherent in any database system that inevitably privileges some information over others.

5. *Conclusions*

This paper illustrates the importance of generating new types of relationships between the law, researchers, Indigenous people and communities and creators of databases. Such relationships become especially vital in light of the amount of money now being spent on telecommunications networks within Australia and the formation of Indigenous knowledge centres seeking to repatriate cultural materials in digital form from existing archives. This paper emphasises the diversity of these needs within a national and international context.

Using the example of the Kaytetye Rain song sound recordings, the paper suggests that within the present confines of the law, recordings of Indigenous cultural material pose challenges in accounting for origination and fixing ownership and private rights in the recordings. Especially, it encourages reflection upon the implications of fixing in time knowledge that is constantly evolving.

For researchers, challenges arise in accommodating changing access conditions to reflect fluid political and cultural environments and in maintaining an ongoing engagement with the Indigenous people with whom they work.

For database designers, it is crucial that they recognise that, while providing a way to organise and preserve digitised material, it is impossible for them to represent the context of the original material. Also, the very nature of such databases is to affix an overlay of hierarchical organisation that necessarily privileges some types of information over others. With the mention of these challenges facing both the law and the creators of databases that store the knowledge, we circle back to the initial problems considered at the beginning of the paper in relation to accounting for 'original' contexts and allowing adequate space for the recognition of the dynamic nature of these. Researchers are integrally implicated in all of these processes.

It is vital that there be cross-disciplinary interaction amongst legal practitioners, researchers who have made field recordings, Indigenous people and technical experts in working with new forms of technology and database creation. The issues raised in this

paper need to be examined by experts drawn from the above-mentioned groups so that a workable set of remedies can be agreed upon where difficulties arise. The current issues are not a concern for the law alone, but as this paper has illustrated, involve an intersection of overlapping interests. It is only in re-examining the problems set for the law, for researchers, for Indigenous people and increasingly for creators of databases that a new politic for interaction will be possible.

References

- Anderson, J. *The Production of Indigenous Knowledge in Intellectual Property Law* PhD Dissertation, University of New South Wales, 2003 (unpublished).
- Agrawal, A. "Indigenous knowledge and the politics of classification" (2002) 54 (173) *International Social Science Journal* 287.
- Arup, C. *The New World Trade Agreements: Globalizing Law Through Services and Intellectual Property* Cambridge University Press: Cambridge 2000.
- Barwick, L. "Song as Indigenous art" Kleinert, S., and M. Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* Oxford University Press: Sydney 2000.
- Blakeney, M. "The Protection of Traditional Knowledge under Intellectual Property Law" (2000) 6 *European Intellectual Property Review* 251.
- Bowrey, K. *Copyright and Culture: Australian Law and Controversies* (forthcoming 2003).
- Brown, M. *Who Owns Native Culture?* Harvard University Press: Cambridge, Massachusetts, 2003.
- Cubillo, F. "The politics of the secret" Kleinert, S., and M. Neale (eds), *The Oxford Companion to Aboriginal Art and Culture* Oxford University Press: Sydney 2000.
- Davies, T. "Aboriginal Cultural Property?" (1996) 14 (2) *Law in Context* 1.
- Dodson, M. "Indigenous peoples and intellectual property rights" *Ecopolitics IX – Conference Papers and Resolutions* Northern Land Council, Sydney 1996.
- Foucault, M. "What is an Author?" Rabinow, P. (ed) *The Foucault Reader: an introduction to Foucault's thought* Penguin Books: London, 1984.
- Marika, W. "Copyright on Aboriginal Art" (1976) 3(1) *Aboriginal News* 7.
- McKeough, J., K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition) The Lawbook Company: Pymont, Sydney 2002.
- Rose, M. *Authors and Owners: The Invention of Copyright* Harvard University Press: Cambridge, Massachusetts, 1993.

- Sackville, R. "Legal Protection of Indigenous Culture in Australia" (2003) 11 *Cardozo Journal of International and Comparative Law* 711.
- Sarat, A., and J. Simon, "Beyond Legal Realism: Cultural Analysis, Cultural Studies and the Situation of Legal Scholarship" (2001) 13(35) *Yale Journal of the Humanities* 1.
- Sherman, B., and L. Bently, *The Making of Modern Intellectual Property: The British Experience 1760-1911* Cambridge University Press: Cambridge 1999.
- Turpin, M., and A. Ross, "Akwelye. A Central Australian song series: meaning and musical structure" Paper given at Musicological Society of Australia Conference 18-22 April 2001.
- 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, Switzerland 2001.