

Discussing ‘fair use’ of archived recordings of minority music from the mountains of southwestern China¹

Catherine Ingram, with Wu Meifang, Wu Pinxian, Wu Xuegui, Wu Zhicheng

‘The songs from our region are known by the whole county—national anthems for the whole county... We don’t have any control over how our songs are used.’

(Kam song expert, 2011)

‘About thirty years ago, I bought a cassette recorder for 300 *yuan*’², recounted Kam³ village song expert Wu Zhicheng in the discussion my four Kam friends (named above) and I videoed during June 2011 to prepare this paper⁴.

‘Why were you willing to buy such an expensive machine back then?’ I asked.

‘I liked that [to record and listen to songs], I liked it,’ he replied.

‘Every second night he was calling the three of us to come and record!’ added Wu Pinxian, laughing, and then telling us stories about who fell asleep during the recording sessions and what songs they all sang.

In the last thirty years, copies of those cassette tapes, other tapes, and more recently VCDs⁵ and DVDs of Kam singing, have circulated throughout Kam minority village communities in the mountains of rural southwestern China. Almost every Kam

¹ Thanks to Nick Thieberger for help locating several useful publications on issues raised in this paper, and to Paul Swoboda for various technical advice. Thanks to Cathy Falk, Wu Jiaping and two anonymous reviewers for many helpful comments on an earlier draft of the paper.

² 300 *yuan*, in mid-2011 equivalent to \$A43, would have equated to a very substantial sum of money in the 1980s — perhaps approximating the buying power of 3000 *yuan* (\$A430) today.

³ Over 8% of the population are officially classified into fifty-five minority groups, one of which is the Kam (known in Chinese as Dong 侗).

⁴ These videoed conversations will be archived in the Kam collection discussed in this paper. A brief contextualization of the relationships underlying this discussion is in order. Since the first days of my research in Sheeam in 2004, I have gradually developed close relationships with all four Kam friends with whom I share authorship. Wu Meifang, Wu Pinxian and Wu Xuegui, all women aged in their sixties, are my main song teachers in Sheeam, and we have also previously collaborated on a number of scholarly projects (including Ingram *et al.* 2011). Wu Zhicheng, their close friend and one of the most experienced male song experts in the region, has also given much assistance in my research, and we have collaborated on several extensive translation projects (as yet unpublished). Note that I use Chinese conventions of name order, with surname first.

⁵ VCDs (video compact discs) contain 40-60 minutes of low-quality MPEG-1 video burnt onto a CD. VCD players are extremely popular in China, including throughout rural areas (see also *Super Video* 2002, de Kloet 2005, Rees 2003: 146, Fishman 2005: 194-201).

family now has a collection of discs, and many middle-aged and older villagers in particular watch the discs on a regular basis. In the last few years, some Kam song recordings have also been uploaded onto *Youku* (优酷 www.youku.com.cn; a Chinese equivalent of the online video-sharing site YouTube that is currently blocked within China). During 2010 and 2011, some Kam villagers in the Sheeam region, my main fieldsite and a Kam region in southeastern Guizhou Province well known for its singing traditions⁶, viewed those online video recordings and discussed them with each other and me. In Sheeam, this was made possible from 2010 onwards by the inception of several public internet bars and the widening of private internet access. In the same period, many villagers aged from their late teens to sixties were using their mobile phones to make recordings of Kam songs, to help them learn songs in preparation for upcoming performances.

This brief overview of the creation and circulation of recordings of Kam minority music within Kam areas gives part of the background context for this paper. The paper focuses on one particular group of Kam recordings—an online collection of archived recordings of Kam music to which access is currently restricted to only members of the community and me (depositor and main author, Catherine Ingram). It presents the very beginning of discussion with members of one Kam community about potential future wider access to that online collection, and developed from my wish to record and convey Kam villagers' views and concerns regarding potential future 'fair use' access to those recordings. The paper aims to provide valuable first-hand insight into custodians' own responses to contemporary archival practice, a crucial point of view often absent from discussions of the archival management of digitised recordings of traditional cultural expression (TCE). The insights offered below were given by Wu Meifang, Wu Pinxian, Wu Xuegui and Wu Zhicheng during a videoed discussion with me on 13 June 2011 that was conducted in the Kam language.

This paper does not claim to present views that are representative of the entire custodian community, and the discussion recorded below does not represent ultimate decisions made by that community. Rather, it is intended to highlight the issues likely

⁶ Sheeam is known in Chinese as Sanlong 三龙, and is a region of twenty villages in Liping county, Guizhou province. For details about Kam areas, Kam language and Kam culture see Ingram (2007, 2009a, 2009b, 2010a, 2010b, 2010c, 2011, forthcoming) and Ingram *et al.* (2011).

to be of concern to key cultural custodians within such communities, and to provide a means of initiating dialogue about those concerns with the archive in which the collection is held. It is also intended to locate those current concerns within a global context. In a broader sense, a careful study of the issues raised in this paper offers valuable insights that may be useful to custodian communities, fieldworkers and archives, particularly those dealing with digital access to recordings of TCE.

Below, after giving a general description of the archived collection and the main potential future terms of access (that known as 'fair use') under discussion, I present my Kam friends' views and analyses concerning such wider access to this important collection of recordings. I then consider these Kam views within the context of current cultural, political, and socio-economic dynamics that influence Kam minority communities, and also in relation to particular cases involving recordings of traditional musics from the Asia-Pacific region. Finally, I suggest some of the most important issues to consider in accommodating both Kam concerns and Western archival requirements if the negotiation of future wider access to the collection continues.

1. The archived collection of Kam minority recordings

The sustainable digital archived collection of Kam minority music recordings discussed in this paper is held with the Pacific And Regional Archive of Digital Sources in Endangered Cultures (PARADISEC)⁷, and the materials in the collection were recorded by Kam villagers and me during my almost two years of doctoral and postdoctoral fieldwork in rural Kam areas since 2004. According to current estimates, the collection will eventually hold over 180 hours of video recordings and about 130 hours of audio recordings⁸. To my knowledge, this is the only archived collection of recordings of the musical activities of this group, and is thus greatly significant to future generations of Kam people. While most recordings in the collection are direct recordings of Kam music-making, the collection also comprises other types of video recordings that contextualise many of the topics raised within the songs, or that elaborate aspects of the

⁷ See <http://www.paradisec.org.au>.

⁸ Hundreds of photographs, scanned copies of fieldnotes, and accompanying metadata will also be placed in the archive.

history of Kam musical culture. Background discussions without particularly personal content are also retained in the recordings uploaded.

Video recordings of Kam music-making	Other types of video recordings
<ul style="list-style-type: none"> • Kam music-making at New Year and other celebrations: big song singing, circle singing and Kam opera in traditional New Year celebrations, wine song and blocking the road songs sung to welcome guests, songs sung at weddings, engagements and celebrations of new houses • Performances at staged festivals • Singing while walking or working on the mountains • Song chanting and song learning/rehearsing • Specially organised ‘recording sessions’ • Musical instrument making • Other interviews and discussions about music 	<ul style="list-style-type: none"> • Cotton spinning and the process of setting up a loom and weaving cloth • Growing indigo and processing it for use as a dye, and the indigo dyeing process • Special methods of food collection, cooking, preserving such as traditional Kam <i>baet wit</i> (fish preserved with salt and chilli); collecting, processing and cooking fern root cakes • Rituals and chanted ritual <i>deeuu</i> (narrative poems) • Agricultural tasks • Landscape and plants • Discussion of historical features of the landscape such as tombs, old buildings, places for making offerings • Oral histories

Figure 6: An overview of the content of video recordings included in the archived Kam collection under discussion. The collection includes direct recordings of Kam music-making as well as video recordings of other topics which provide a context for or deeper understanding of Kam musical culture.

Due to the major socio-cultural changes that have occurred within Kam villages over the previous two decades, the future of much of the music-making featured in these recordings is uncertain. This is one reason why the creation of this sustainably archived collection has been enthusiastically supported within Kam communities. According to the terms of agreement when these recordings were made, recordings from Sheam and many nearby areas could be archived but access to the recordings by anyone other than myself and members of Kam communities was not permitted⁹.

There are three main reasons why I did not previously discuss wider online access to the collection with my teachers and other Kam community members. Firstly, besides the fact that until 2010 the internet was not widely used in my fieldsite, the technology previously available was not sufficiently developed to allow video

⁹ The written, bilingual (Chinese and English) agreement between myself and representatives of the Sheam community concerning my research data includes several clauses governing permitted access to the archived collection. I drafted the initial document, which was then discussed, revised and signed by leading song experts and village committee representatives. Where possible, I also discussed archiving of materials with individuals involved in each recording session, and audio- or video-recorded our discussions.

streaming to users. Consequently, Kam people themselves had no opportunity to visit online most of the material in the archive before making it accessible to others¹⁰.

Secondly, I felt unable to properly explain to the Kam people I worked with the possible implications of wider access to that collection. Moreover, despite having developed enough fluency in Kam (a Tai-Kadai family language completely different from Chinese) to conduct daily life and research almost exclusively in that language, and to take part in Kam singing performances, I did not feel confident of my ability to use Kam to clearly discuss this issue, the nature of a digitally archived collection, or how it can be available on the internet.

Finally, throughout my research during 2004-2008, the focus of the communities I worked with was to create recordings that could be viewed immediately by the singers involved, and could be preserved for viewing at a later date and by subsequent generations. Communities did not indicate that they were interested in making an archive of recordings that would be available for wider viewing. As depositor, I was encouraged by the archive host (PARADISEC) to consider allowing wider access to the collection, but it was not essential to the archive agreeing to host the collection.

2. The archive host and potential 'fair use' of the archived collection

In 2009, I was approached by PARADISEC staff about the possibility of video material from the Kam collection being used for special treatment as a video data trial. The aim of this trial was to develop a generalisable quality controlled production workflow for video, and ideally required part or all of the Kam collection to be more widely accessible under a 'fair use' agreement¹¹. By the time of my subsequent field trip to China (December 2010 to June 2011), computers and the internet had begun to become more familiar to many Kam villagers, potentially easing some of the difficulties I had previously felt in discussing wider access to the archived collection with Kam people. Consequently, during my 2010-2011 fieldwork I hoped to be able to convey the request

¹⁰ However, copies of all requested recorded material had been returned to Kam villagers on VCD and DVD.

¹¹ At the time of writing the trial has yet to occur — in fact, accessible audio or video files held in other collections in the archive remain available only by mailed-out CD or DVD (although accessible metadata is searchable online). Since the format for potential future streaming has not, to my knowledge, been determined, in this paper I do not deal with issues relating to the signal quality of potentially accessible data.

from the archive to the Kam singers and song experts I worked with. I also noticed Kam people speak more frequently about the idea of publicising Kam singing, and through permitting wider online access to the collection this would potentially be possible—at least to a limited degree. The joint production of this paper has provided a means of documenting and analysing the beginnings of that process of discussion of broader archival access.

The selection of which ‘fair use’ agreement might be adopted to govern potential users’ access to the collection through the PARADISEC website would be made by the depositor (obviously, according to the wishes of cultural custodians), not the archive itself¹². Two likely licence options are the Creative Commons Licence Deeds entitled ‘Attribution-NonCommercial-ShareAlike 3.0 Australia’ (in short, CC BY-NC-SA 3.0) and ‘Attribution-NonCommercial-NoDerivs 3.0 Unported Australia’ (CC BY-NC-ND 3.0)¹³. In brief, under such deeds the user is free to copy, distribute and transmit downloaded files, but must agree that the ways she/he shares the accessed material properly attributes the author and does not result in commercial gain. In the case of the former licence, the user is permitted to alter or transform the material provided the resultant product is only shared under a similar ‘fair use’ licence. However, the latter licence permits no derivatives—meaning that altering, transforming or building upon the work is not allowed¹⁴.

3. Kam views of wider access to the collection

The four Kam friends with whom I had initial discussion concerning potential wider access to the collection are all recognised as song experts (in Kam, *sang ga*) within the Sheam region. The role of song experts can be considered equivalent to the highest level of custodianship and ability within Kam musical traditions. Song experts have primary responsibility for teaching songs—particularly the important Kam ‘big song’ genre inscribed on UNESCO’s (United Nations Educational, Scientific and Cultural

¹² Nick Thieberger, PARADISEC Project Manager, personal communication, 24 October 2011.

¹³ These creative commons licences are detailed at <http://creativecommons.org/licenses/by-nc-sa/3.0/au> and <http://creativecommons.org/licenses/by-nc-nd/3.0/>; a range of CC licences are discussed at <http://creativecommons.org>. See also Janke and company (2002: 16-17), Felten (2003), Marshall (2004: 197-202), Fitzgerald *et al.* (2006: 101-05), Story *et al.* (2006: 167-71) and *Arts Law* (2011).

¹⁴ For further discussion of fair use and cultural commons, see Greenfield and Osborn (2004), Tushnet (2004), Madison (2005), Jackson *et al.* (2005), Curtis (2006), Cobcroft (2008), Madison *et al.* (2010) and Burri (2010).

Organisation) Representative List of World Intangible Cultural Heritage in 2009¹⁵—and must know a very large repertoire of songs. They must have good knowledge of the meaning of the lyrics to those songs (including some knowledge of words referred to as ‘old Kam’ that are said to derive from an archaic version of the Kam language no longer spoken), and are deferred to in the context of village singing activities when debates or other types of decisions concerning Kam songs occur. Kam song experts usually have excellent memories and are amongst the members of Kam communities who share the greatest love of Kam musical culture. Consequently, consultation with song experts had to be the first step in discussions of wider access to the collection.

In our initial discussion in June 2011, Wu Meifang, Wu Pinxian, Wu Xuegui and Wu Zhicheng raised a range of issues concerning potential wider access to the collection of recordings from the Sheeam region (these make up at least 80 percent of the musical recordings in the collection). These issues can be generally divided into two groups: possible benefits that might result from wider access, and concerns about problems that might arise.

4. Custodians’ views: possible benefits of ‘fair use’ access

Wu Meifang, Wu Pinxian, Wu Xuegui and Wu Zhicheng generally believed that the main benefit of ‘fair use’ access to the collection would be to provide useful publicity for Kam musical traditions. However, discussions of this benefit were always accompanied by concerns over whether or not publicity would rightfully accrue to their own Kam region, and whether it might also cause a loss of control over the perceived ‘possession’ of local tradition. The excerpted dialogue below illustrates these points¹⁶:

SE (Song expert): Our aim is publicity, to have the songs known more widely. Because if they are more widely known...

(recording is unclear, many people speaking at once)

¹⁵ See *Grand Song* (2009).

¹⁶ Dialogue quoted in English in this paper is a free translation from the original Kam; in a few instances I retain the original Kam words and provide further explanation in a footnote or within square brackets. Additional contextual information also occasionally appears within square brackets. Unfortunately, space prevents also providing transcribed dialogue in Kam. At this initial stage of discussions I have elected not to attribute individually my Kam friends’ comments that are presented in this paper.

SE: Speaking honestly, there's the example of when we went to Yandong [a nearby Kam village] for song teacher training. *Ga Numleng* ['Cicada song', a big song] is from Sheeam, and they wrote that it is from Sheeam in the printed materials we were given. But now, after a long time, they don't write Sheeam anymore as the place of origin. Before, they did.

CI (Catherine Ingram): For example, if Han Chinese¹⁷ or foreigners know about your songs, is that good or not? What would people here say?

SE: If Han and foreigners know of our songs, that's definitely good.

SE: If they know of the songs, it's fine as they don't have the ability to learn the songs¹⁸. So those people knowing about the songs is just a type of publicity.

SE: They aren't able to learn the songs, so they won't say those are their songs. But for Kam people, they are able to learn them, and after they do they will [often] say those songs they have learnt are their songs.

SE: For the four of us, the main thing is to publicise our songs so that others know about Sheeam songs.

SE: So they know what types of songs we have, and how good they are.

CI: Well I often go to different schools or universities and give lectures about Kam culture. If there's a way I can tell the people I speak to 'If you use the internet and access this online archive you can hear Kam songs,' then people all over the world will know of you.

SE: They will know about Sheeam songs, won't they? ...

SE: This is what I am always afraid of. You [CI] say they are *ga Sheeam* [Sheeam songs], but after they get publicised elsewhere people in other places will learn them and say they are their songs, they won't write that they are from Sheeam. That could happen in the whole county. Take for example those really long songs you have written down. Other people probably don't know them, but they will say those are their songs, and get them from our online archive. And then if they make a recording of the song

¹⁷ Han Chinese is the official *minzu* ('ethnic' or 'nationality') identification of more than 91% of China's population.

¹⁸ Here, by 'learning the songs' I think the speaker means being able to sing them in a true Kam style, and particularly with Kam pronunciation and vocal quality.

and put it online somewhere else, they will claim it is their song... even though in the archive you write that it is from Sheeam.

CI: Now, they put everything on all kinds of places on the internet, where you don't have any control. But with allowing fair use access to this online archive, you do have some control. For example, after we went to Pilin to give a performance, they put the video on the internet and we didn't have any control of that.

SE: Did they write that it was singers from Sheeam?

CI: Maybe they did, maybe they didn't, I don't remember, anyway they can just write whatever they choose.

SE: If we make our songs available through the online archive, others might say a song is good, and learn it, and say 'it is mine.'

SE: It's like what other Sheeam villagers always say to us, 'When you went to Sao [the Kam village known in Chinese as Zhaoxing], the songs you performed were ours, the people were from here, and they wrote that the singers were from Sao [in various publicity on that occasion and subsequently].'

SE: The clothes were from here, the people were from here, and they said we were singers from Sao.

(All join in)

SE: They wrote that Sheeam singers were from Sao, it is not right.

SE: And people here, they all said, 'The people are from here, the songs are from here, why write Sao?'...

CI: So why do people always do this in relation to Sheeam?

SE: Well, we know this, we have seen this phenomenon, people here say this. That's the truth.

In short, my Kam friends were interested in publicising their songs as long as the publicity acknowledged the rightful owners of the songs, and as long as it meant they retained control over who was permitted to sing those songs. However, their own past experiences had demonstrated to them that after the songs had been heard or obtained by others they had little control over these two factors.

5. Custodians' views: possible problems concerning 'fair use' access

In discussing possible problems regarding wider access such as that permitted through a fair use agreement, Wu Meifang, Wu Pinxian, Wu Xuegui and Wu Zhicheng raised concerns about potential loss of song ownership and loss of control over the use of the songs. Their comments about these issues, some of which are quoted above, were related to the cultural and symbolic capital associated with Kam musical traditions. These comments parallel Seeger's statement regarding the ways that many communities view others' use of their music and the economic capital involved:

A few communities [around the world] do not want their music used by anyone for any purpose. Other artists and communities object when someone takes their music and makes money out of it, while they do not. They do not object to a researcher or tourist recording or photographing a public performance for their personal use. The problem arises when that document is used to make a profit, and above all when the commodified product neither credits the original producers nor gives them a share of the profits. In fact, many artists around the world think everyone is getting rich on their music but them, and distrust is widespread. (Seeger 2004: 163-64)

My Kam friends were also concerned about local perceptions regarding their role in permitting access to the repertoire of songs from their region. In particular, they stated that they might incur criticism from the whole community for their actions—perhaps because there is no precedent within Kam communities for authorising archival access that might serve as a model for the process. Furthermore, my Kam friends regarded this situation as related to a general low awareness regarding the relevance and/or value of archives and research, at least in some contexts. However, their concern regarding local perception probably has particular gravity because it calls attention to sensitive issues—those regarding which people have permission to teach and learn which Kam songs. These sensitive issues are present in daily village life, but rarely manifest to the extent that they did in discussions of archive access, as is explained below. Consequently, Kam song experts felt that being responsible for permitting access to an online archive placed them in a very difficult position within their own communities.

I suggest that the varying and somewhat contradictory perspectives raised in the following excerpts from our discussion reveal important aspects of Kam musical culture

and the potential problems of its access by others, and that such aspects are important beyond my participation in Kam musical traditions. While my Kam friends repeat and distance themselves from some villagers' claims that I might facilitate others learning the songs and thereby gain a lot of money (reflecting Seeger's observations above; see also Zemp 1996: 38-39), or that the songs are 'possessions' which, once 'given' to me or others would leave the custodians bereft, they also point out that many villagers comment on how fieldwork has been beneficial for bringing publicity to the area. These comments are strongly informed by the Kam view of songs as a form of capital, as is further explained below.

CI: Where do you think the most important problem is? Can you say it again? Like you just said before.

SE: Me? I am just afraid like what I said, afraid that people here will criticise us that we taught the songs to others.

SE: And now other people have taken those to be their songs.

SE: Now, if we are speaking really honestly, some others in the village say to us, 'Hey, you teach all the songs to her [CI], she will take them to a foreign country and she will get a lot of money.' Like I already said to you today. They don't understand. People here don't understand.

SE: They don't understand.

SE: Well, there are some people who do things like this: we sing one of our songs, they take that song and use it, and then it is no longer identified as our song. For the whole county performances, that's what Wu Yuanlong [a Kam composer in the professional county performance troupe] did when he took our songs and changed them. Then after the song is artistically processed¹⁹ the performers will say that it is their song.

¹⁹ 'Artistically processed' is my translation of the Chinese expression *yishu jiagong* 艺术加工 which is regularly used within the Kam language. In brief, most 'artistically processed' songs utilize the lyrics and melody typical for a rendition of a particular song within the 'village tradition,' but their musical and/or lyrical elements are altered — occasionally quite radically — to produce a new version of the song. Artistic processing is most commonly carried out by members of professional performance troupes, or by other professional musicians to prepare songs for staged performances. To most Kam villagers, artistically processed songs are not considered suitable for or worthy of performance within the context of village performances. See Ingram (2009b, 2010a: 5-6, 2010c) and Ingram *et al.* (2011: 79).

(Another SE confirms)

SE: That's what has happened in Liping—there are Sheeam songs sung everywhere.

SE: And those people who sing them will say that those are their songs. Like you, coming to get²⁰ our songs. Maybe people will say they are your songs, and then they won't be identified as ours.

SE: For example, if people say they are Australian songs.

SE: And then people will criticise us.

CI: You mean people here will criticise you, if you give [teach] the songs to me?

SE: Yes, well we are afraid of that.

SE: Yes, there are some people who are like that. Who say that after the songs are taught to you then you will say, 'they are my songs' and you won't say they are Sheeam songs.

CI: They don't know that I am always publicising your songs and saying your songs are the best. They don't know.

SE: Like the [official] said to us: 'You teach songs, always keep a few songs, don't teach all our songs to her [CI].' They always have a conservative view like that. As for us, we don't think like that.

SE: We have Kam songs and culture here, but no-one helps us to publicise it so it can become known elsewhere.

SE: That's right. But there are many people who say, 'Teacher Ying [CI] came to your place, you are really helped by Teacher Ying.' When we were on the bus, people said the same thing, 'It is thanks to Teacher Ying who helps to publicise our place and our music and culture.'

The views my Kam friends express above are particularly related to the structure of Kam musical and social culture. As I have detailed elsewhere²¹, Kam songs are traditionally considered to be a form of cultural and symbolic capital. The recent changes to Kam musical culture—which include the ability to preserve it in recorded form—actually appear to be further strengthening this long-standing point of view.

²⁰ The Kam word *ao* ('get') is used to refer to both learning songs and obtaining songs. Such an expression may also reflect the Kam concept of songs as a form of capital, as described in this section.

²¹ See Ingram (2007, 2010c, forthcoming).

Even within the one Kam village, some singing groups closely guard access to the songs that only their group knows or knows well; some older people prefer to teach certain songs only to younger members of their own clan, thereby continuing to maintain the clan's cultural capital and promote the status of that clan. In the various original contexts for Kam song performance, songs are frequently performed as a kind of dialogue between two individuals or two singing groups. It is the singer or group of singers with the largest number of good songs (usually, these are songs with lengthy or meaningful lyrics) who is/are considered to be the best. Moreover, in many contexts the ability of the singer or singing group, and the capital that that individual or group acquire through singing, are considered to be associated with the group's or individual's clan, area of the village, entire village or even whole region. For this reason, activities related to singing are not infrequently a matter of importance for many more people than just the singers directly involved.

The original performance context for most Kam singing, and the ideas associated with such performances, make comprehensible the varying concerns expressed by my Kam friends regarding song attribution and ownership—including their concern regarding the gravity of possible community criticism if they were held responsible for any activities that undermined local song ownership. Although at points these concerns were expressed in relation to the global context, they were most strongly put regarding access becoming available to other Kam people. While this may be because Kam villagers' previous experiences in this regard are entirely within the local context, it may also suggest identification of a problem because potential fair use access is not discriminatory amongst users.

Finally, my Kam friends did not relate potential fair use of the collection to the current availability of Kam recordings. Although the reasons for this did not emerge in our discussion, perhaps the current online accessibility of Kam song recordings (which includes some of their own recordings), and the plethora of Kam song recordings already available and described at the opening to this paper, were seen as differing in important ways from wider access to the collection archived with PARADISEC. Differences that include a different scope of access possible, a different range and format of recorded materials accessible, a difference in ease of access, and/or my Kam friends' own role in the process of allowing access, may have contributed to such

perceptions. Since permitting online access to this archived collection has no precedent, perhaps my Kam friends share with me the feeling that allowing such access requires some leap of faith. The discussion on which this paper is based was the first occasion any group of Kam community members and I had discussed potential wider access to the archived collection, and pursuing finer details of perception of these new issues was not realistic at such an early stage. Nevertheless, identification of likely issues involved, such as those outlined above, provides an important initial insight into current Kam thinking about this issue.

6. Influential cultural, political, and socio-economic dynamics

In order to suggest possible ways that both Kam concerns—such as those of my Kam friends as outlined above—and Western archival requirements might be accommodated to promote further discussion about wider access to the Kam collection in question, some additional contextualisation is needed. Below, I first briefly situate my friends' statements within the main influential cultural, political and socio-economic dynamics relevant to their communities, and with which they themselves are generally familiar. Then, I go on to provide a necessarily brief broader contextualisation of those dynamics and describe certain prior events involving recordings of traditional musics from the Asia-Pacific region.

As some of the preceding excerpted dialogue suggests, many Kam people feel that the current cultural and socio-political environment does not permit them full control over their cultural heritage. This was exemplified through my friends' description of how their performance of songs from the Sheeam region that took place in the Kam village of Sao was, on at least one occasion, publicly and erroneously credited to Sao village. It was also exemplified through my friends' contention that once their songs had been artistically processed or had moved into wider circulation amongst Kam communities, the Sheeam region was often no longer attributed as the place of origin of those songs. From other comments during our discussion and throughout my fieldwork, it was clear that other people often altered Sheeam songs once they had learnt or 'obtained' the songs. Whether this alteration was in ways that people in Sheeam did not feel was an improvement, or for reasons that they thought were invalid, in either instance Sheeam villagers did not generally feel they had the

power to oppose the alteration (see Ingram *et al.* 2011 for further discussion of varying views of such Kam 'cultural development,' as the process of such artistic processing is often referred to in Chinese-language discourse). These concerns surrounding heritage possession are further exemplified in the excerpted dialogue below, relating a story that I had heard told a number of times:

SE: Like when we went to the meetings for the Intangible Cultural Heritage (ICH) Application for Kam big song [held in the provincial capital of Guiyang in 2003], and you [referring to another SE] said, 'We don't have any songs to sing, the whole county has sung all our songs, they have 'artistically processed' our songs, we don't have any others.' Then the officials said: 'We will return *Ban bao juuee* ['Friends say you are proud,' a big song] to you to sing.' Then they just gave back *Ban bao juuee* to us.

SE: That night we went there [to Guiyang], right after we got there the organising officials said, 'Okay, let's sing the songs!' They asked the group of singers from the Kam village of Koujiang to sing first. And we all looked bad, really brown from the sun, we had just finished planting rice. So the Koujiang singers sang first...

SE: And we were old and young all together [in our singing group]...

SE: The eight of us went. Us two old people... (continues to list the names of the six younger women who also participated)... The officials said to us: 'Okay, it's your turn, sing the song that's really your best, the most representative from your area, with a good *wair say* [upper vocal line] and so on.' We didn't know what song to sing, and so we sang *Ni nuet yang yang* ['The second month is warm,' a big song], *day sum!*²² They said, 'That's for men!²³ So sing another song, what else do you have?' I said, 'How can we have any songs to sing? You arts troupe people have used all our songs, how can we have any songs to sing? All our songs have been taken by you, you have all our songs.' The people from the arts troupe said, 'Well, you sing *Ban bao juuee* better than us, so you sing *Ban bao juuee*.' They gave it back to us! So then we sang *Ban bao juuee*.

SE: They returned it to us to sing.

²² Literally translating as 'die early', *day sum* might be considered as roughly equivalent to the expression 'bloody hell.' It is probably used here to emphasize the fact that they couldn't sing other, more suitable songs from their repertoire because those songs had been 'taken' by the arts troupe, who would then sing them in artistically processed form.

²³ Actually, in the Sheam villages where this song originates it is sung by both women's singing groups and men's singing groups.

(They list six songs from Sheeam that everyone in the whole county knows to demonstrate the number of other Sheeam songs that have also been popularised through being used in this way by the arts troupe and/or in various staged performances that the troupe members organised.)

SE: The songs from our region are known by the whole county—national anthems for the whole county!

(Everyone laughs)

SE: [The Kam composer Wu] Yuanlong wanted to learn *Shyao soy bin gen* [‘You all sit on the bench,’ a Kam wine song from Sheeam] ...

(One SE tells a story about how they sang it to him, Wu Yuanlong went away and altered or ‘artistically processed’ it, then sang it back and asked them if he changed it well. The story is intended to illustrate Sheeam villagers’ lack of agency in the process of altering and popularising Sheeam songs.)

SE: We don’t have any control over how our songs are used.

SE: *Ga Yuanlong* [Wu Yuanlong’s songs], they are our songs!

An important socio-economic dimension to the notion of fair use concerns the terms of access to which users would need to agree, and the possibility of using legal methods for dealing with violations of that agreement. This requires awareness of the laws of China, Australia, and any potential users’ own country (as noted by Newman 2012: 436). In one of the few English-language articles to offer a relatively recent overview of the laws governing music use within China²⁴, Rees explains that:

As a Communist country in transition to a market economy, with a copyright law dating back only to 1991 and a history prior to that point of the uninhibited borrowing and adaptation of folk and other musics for political and entertainment purposes, China is in a state of legal and moral flux—in ways that can directly affect the musicians and scholars who work with traditional music. (Rees 2003: 138)

²⁴ See also Rees (2009: 54-55) and Story *et al.*’s (2006: 59-60) description of the historical absence of notions of copyright in Chinese literature. More recent amendments to China’s copyright law took effect on 1 April 2010; the law makes no mention of fair use or fair dealing. Article 6 of this law states that ‘Measures for the protection of copyright in works of folk literature and art shall be formulated separately by the State Council’ (*Copyright Law of the People’s Republic of China* 2010); this may refer to or have resulted in China’s 2011 ICH Law discussed later in this section.

Yet Rees notes that despite the enactment of several laws and increasing awareness of the notion of intellectual property, at the time of writing music piracy was rife and was not contained through legal channels (2003: 146-48; see also Mertha 2005). Today, while issues such as intellectual property and copyright are well-recognised topics of scholarly and public discussion within China, it appears that discussion of the concept of 'fair use,' referred to in Chinese as *heli shiyong* (合理使用), is still at a relatively early stage²⁵. Fair use is mentioned in relation to ICH in China's *Intangible Cultural Heritage Law*, which was enacted on 25 February 2011 and only came into force on 1 June 2011. Article 37 of the law states that:

The national government shall encourage and support exploitation of ICH resources for their unique values. From a basis of adequate protection, ICH Representative Items²⁶ shall be exploited under fair use to develop cultural products and services with local and ethnic features and with market potential. Organisations exploiting ICH Representative Items shall support Transmission Representatives²⁷ to develop cultural transmission activities, and such exploitation shall comprise protection of any material objects involved and the locations of these items. Government at county level and above shall grant aid to organisations that make fair use of ICH Representative Items, and these organisations shall be given a legal right to enjoy favorable tax policies of the state. (*Intangible Cultural Heritage Law of the People's Republic of China 2011*)

The main areas of Chinese-language scholarship in which discourse concerning fair use is somewhat developed appear to be the studies of the fair use of works with a known author (see, for example, Liu 2010, Wen & Zhao 2010) and fair use access to digital libraries (see, for example, Zhang 2009). This is not meant as a criticism of Chinese scholarship, but rather to suggest that since fair use—and particularly the fair use of TCE—is not a major issue of scholarly concern, should a case involving it arise

²⁵ A 2011 article entitled 'A Preliminary Discussion of Technological Measures of Protection and Fair Use' (Jia 2011) being a case in point. Even in Rees' 2009 chapter entitled 'Use and Ownership: Folk Music in the People's Republic of China,' while she discusses copyright laws relating to folk music, the issue of fair use does not arise.

²⁶ 'Representative Items' refers to the several hundred items on China's National Register of ICH.

²⁷ 'Transmission Representatives' (in Chinese, *daibiaoxing chuanchengren* 代表性传承人), are people throughout the country nominated by government departments who receive an annual stipend according to their level of nomination (prefectural, provincial or national level). Custodian communities do not have a role in selecting these individuals, and Kam representatives appear to be selected more on the basis of their activities outside Kam areas than within their own communities. Their task is, presumably, to ensure the ongoing transmission of local culture.

the current likelihood of it being supported through the Chinese legal system is low²⁸. As Wang and Zhang caution regarding the implementation of fair use regarding online sources, ‘In the online environment, the boundaries of the law are blurred’ (2010: 53).

Although several online databases offer wide access to recordings of TCE²⁹, I was unable to locate any study of prior examples of fair use access being permitted to an archive of TCE, as is proposed for the Kam collection under discussion. Story *et al.* (2006: 170-71) and Cobcroft (2008) both give examples of musicians who have found that placing their recorded musical works under creative commons licences has been beneficial in various ways. However, within most legal frameworks worldwide the music featured in those case studies has a different legal status to TCE as it is of known authorship (thus musicians have a choice that is unavailable to performers of TCE: to make their music accessible under fair use licence, or to make it accessible under typical copyright arrangements—at present, the various copyright laws worldwide are only applicable for works with an identified author)³⁰. Much more importantly, the music featured in those examples is not directly related to, considered to be the possession of, or believed to represent an entire community.

Although prior studies of fair use access to archived recordings of TCE are currently lacking, there are numerous scholarly studies of cases where recordings of TCE that are accessible through commercial release have been re-used to the benefit of people other than the custodians of that music, and these provide instructive insights. In many instances, as Feld comments,

²⁸ Nevertheless, as Rees points out in her discussion of copyright in relation to the Wang Luobin controversy and Lijiang’s Dayan Ancient Music Association (2003: 151-63), there are clear examples of contexts other than those involving fair use where many Chinese scholars have been very vocal concerning legal protection of TCE.

²⁹ These online databases include the Tibetan Endangered Music Program (<http://www.plateauculture.org>), the Cambridge- and Yale-supported World Oral Literature Project (<http://www.oralliterature.org>) and Digital Himalaya Project (<http://www.digitalhimalaya.com/collections/music/>), Leiden University-supported Verba Africana (<http://www.hum.leiden.edu/research/africanliteratures>), and the ELDP- and SOAS-supported VOGA (Vanishing Voices of the Great Andamanese; <http://www.adamanese.net/>).

³⁰ Here, an extremely rough sketch of copyright law as it relates most pertinently to TCE may be useful for some readers. The following points are drawn from Newman (2012: 435-40): copyright ‘comes from national law and not from international law nor from some universal natural law ... However, in reality, the copyright laws of different countries are essentially the same’; original works are copyrighted ‘the moment that they are fixed, i.e. reduced to “tangible form.”’ Copyrighted works must have an identified author and cannot be something ‘passed down through the generations. Folktales, traditional tunes, proverbs or centuries-old aphorisms are not copyrightable’; nevertheless, ‘a creative rendition of a tale by a master storyteller could qualify for copyright. And even if the folktale itself or the performance of the folktale did not qualify for copyright protection, a sound recording of someone reciting the tale would be copyrighted and subject to standard rules.’

The primary circulation of several thousand, small-scale, low-budget, and largely non-profit ethnomusicological records is now directly linked to a secondary circulation of several million dollars worth of contemporary record sales, copyrights, royalty and ownership claims, many of them held by the largest music entertainment conglomerates in the world. Hardly any of this money circulation returns to or benefits the originators of the cultural and intellectual property in question. (Feld 1996: 27)

Two of the most well-known cases in the Asia-Pacific region that demonstrate Feld's remarks are those involving the bands Deep Forest and Enigma. The self-titled CD Deep Forest, released in 1992, 'was a great success. It sold over two million copies in the succeeding years, and selections were also apparently used in a number of commercials for large companies, including Sony, Porsche, and Coca-Cola' (Seeger 2004: 164-65). According to Billboard sources cited by Mills (1996: 59), '[i]t remained on Billboard magazine's 'top album' chart for 25 weeks, sold over two million copies by May, 1995, and received a Grammy nomination.' Researchers such as Zemp (1996), Feld (1996), Mills (1996) and Seeger (2004) have described and commented upon the many complex aspects of this case. In short, it appears that while the band's recording company probably paid for the legal rights to sample music from Africa and the Solomon Islands on this album, because of the legal structure surrounding the recordings none of this money would have reached the musicians involved. There is, moreover, no mention on the CD cover to acknowledge the Solomon Islands song and singer featured on the band's main hit, 'Sweet Lullaby.' In addition, the liner notes incorrectly cite the support of Hugo Zemp for the use of his recording, the band failed to respond to Zemp's letters of concern regarding the situation, and examination of the income of the African Pygmy Fund during this period reveals no evidence to support the claim made by the band on the CD cover that the profits would be paid to this fund to support those communities (Feld 1996: 26).

The second case, concerning Michael Cretu (who works under the band name Enigma), involves his hit song 'Return to Innocence,' released in 1993 (Guy 2002: 196-97). As Guy states,

Over two minutes of Cretu's four-minute-and-fifty-second-song feature the voices of [Amis singer] Kuo Ying-nan and his wife, Kuo Shin-chu. Cretu,

however gave no indication of the source of his materials. The CD liner does not give the names of the [Taiwanese] aboriginal singers, it does not indicate where the music originated, nor does it name the recorded source from which the sample was taken. (Guy 2002: 197)

Guy comments that the album *Cross of Changes* on which the song was released ‘remained on Billboard’s Top 100 for 32 consecutive weeks and sold between five and seven million copies’ (2002: 203). The song itself earned unknown sums of money through sales of CDs, royalties, and licensing for films and television. As Guy describes it, ‘[o]ne of the most ironic uses of “Return to Innocence” was its selection by the International Olympic Committee in its promotional video for the 1996 Atlanta Games’ (2002: 203). It appears that, as in the previous case, Cretu paid for the right to use samples from the Kuo’s recordings. However, it was only with the backing of a Taiwanese record company, who in turn hired a lawyer to represent them in US courts, that the Amis singers involved received any recognition or compensation for their contribution to the recording (Guy 2002, see also Taylor 2001 and Tan forthcoming).

I cite these two cases because they both involve music from the Asia-Pacific region, and show the complexities involved with asserting the rightful legal status accorded to recordings of TCE. While the legal status of the materials in these examples is different from that proposed under a ‘fair use’ access, given the legal and moral complications arising in these cases—and the financial cost in asserting rights in those areas—I see no reason to assume that similar legal, moral and financial problems could not also occur under the terms of a ‘fair use’ agreement. As Seeger notes, referring to the ethnomusicologists involved in making the recordings featured in each instance, ‘[t]he cases reveal that people with the best of intentions can find themselves powerless to reverse exploitative uses of the materials they have acquired on the understanding that they were not to be used for commercial purposes ... The public is often deceived as well’ (2004: 167). On the other hand, the positive effects of individual cases involving the creation of commercially available recordings of TCE are mentioned by some researchers (see, for example, Feld 1992, Neuenfeldt 2001 and Christen 2005), but I am unaware of any studies which attempt to overview the situation as a whole. Others, such as Story *et al.* (2006), argue that in many situations copyright itself primarily acts to defend the economic interests of those holding the rights, and who are often not—or not solely—the individuals involved in creating the work in question.

They point out that ‘copyright is a “created” legal category which is of rather recent historical lineage, involves the state establishing a limited monopoly “right” usually owned by large corporations... and was simply absent from most parts of the South, where more than three quarters of the world’s population lives, until very recently’ (2006: 178). An overview of this situation regarding commercially available recordings of TCE would seem to indicate that while release of such recordings may bring benefits, even the usually minimal legal protection (such as recognition of whose recordings have been sampled) is by no means assured. Paralleling some of my Kam friends’ concerns regarding fair use access to the online Kam collection, the results of making recordings of TCE widely available even under current types of commercial and legal protection cannot be predicted.

7. Conclusion

Drawing upon the concrete study at hand, I conclude by raising three initial areas for further consideration in attempting to find ways that both Kam concerns and Western archival requirements might be accommodated to permit wider access to the archive. As with the discussion contained within the paper, the following three areas or issues may not be necessary to final deliberations regarding the entire process of negotiation, but rather are intended to assist with continuing the dialogue with cultural custodians concerning archive access as it stands at present. Ultimately, as is well known by many fieldworkers and cultural custodians alike, it is ongoing communication and negotiation that are most important in processes such as these, and a process of negotiation usually requires ongoing flexibility and consultation to be deemed successful by all stakeholders.

Firstly, in this case and presumably many similar situations, any accommodation of both custodians’ and archive requirements and concerns needs to be based upon a clear understanding of who within the custodians’ community takes responsibility for agreements regarding archived materials, and the recognition of any particular local responsibilities that that might entail. This may not necessarily be problematic; as Kansa notes, assuming such responsibility can in fact benefit particular groups:

Providing an online context for local knowledge systems has the potential to help marginalised communities express and reassert identity, autonomy

and represent themselves and their knowledge to the broader world community. Communities that have access to vital information and are better able to coordinate action are much more likely to be able to assert themselves and guard against cultural misappropriation. Therefore, development strategies that assist indigenous communities in using and governing their own digital communications resources should complement TK [traditional knowledge] protection. (Kansa 2009: 244)

In some situations, local communities may already have their own independent authorising body, and systems for such responsibility may already be in place and widely recognised. As Burri states,

These efforts [in the use of digital media] must, however, be reinforced in order to enable true participation and involvement of indigenous peoples in the communicative processes of the digital ecosystem. The role of the state as a facilitator in this respect—as a provider of infrastructure and a disseminator of education—could be critical. These efforts would need to be supplemented by civil society initiatives, broader capacity building, and participatory frameworks at the national, regional, and global levels with the ultimate goal of allowing indigenous communities to make informed choices about their culture, identity, and development. (Burri 2010: 46)

However, in China, minority groups such as the Kam do not have official representative bodies that are independent from government organs, and as detailed above, the relationship between local communities and state representatives is complex³¹. Instances such as the discussion over song performance at the 2003 meeting for ICH recognition of big song demonstrate that local groups are sometimes willing and able to assert their needs, and do have a degree of agency that can legitimately be exercised (see also Ingram *et al.* 2011). The extent of this agency is a grey area—a situation that can both serve and hinder local needs. Nevertheless, it is difficult to determine the degree of responsibility that local community members can be expected to assume in their dealings with a non-Chinese-based archive, and whether or not assuming that responsibility might have the potential to positively or adversely influence daily life for the members of local communities.

³¹ This situation is not unusual; as Story *et al.* note, '[o]ne must be aware that the politics of indigenous communities is complex and it is not necessarily the case the governments within the global South speak for the indigenous communities within their borders... The complexity of sovereignty questions makes it difficult to know who can speak for traditional communities' (2006: 68).

Secondly, I suggest that parties interested in participating in such dialogue regarding access might best enter such dialogue not only willing to understand each others' perspective and priorities as far as is possible³², but also aware that the process may result in flexible compromises that may involve an approach or means of conceptualising that the group or organisation has never previously considered. As Kansa suggests in his article 'Finding Common Ground in the Digital Commons':

'One size fits all' solutions are unlikely to be found, and highly particular frameworks need to be developed for virtually every community wanting to express traditional heritage in digital environments. Fortunately, such niche-customisation is not as infeasible as it sounds. Demand for flexibly structured, community-building and collaborative tools extends well beyond indigenous communities and has motivated the rapid development of many open source social software community content management systems. (Kansa 2007)

However, parties also need to be aware that such conceptualisation may introduce entirely new approaches to the idea of musical culture, and that the result of such changes is difficult to predict. Researchers who hope to exert minimal influence on local cultural conceptions may hence find themselves under conflicting obligations.

Thirdly, I suggest that archives willing to permit fair use access clearly demonstrate to custodians the organisation's support for and knowledge of the process, including outlining how communities can have direct contact with archives should they wish to have independent control over the terms of access. While the fieldworker obviously also plays a role in this task, she/he needs a clear position from the archive that can be explained to or advocated for within the custodian community, and/or can be used by community members to develop viable alternatives. I suggest that that position could be articulated in various ways, but that ideally those ways would not wholly depend upon the fieldworker verbally representing the archive's intentions. For example, the archive might provide written information in an appropriate language that

³² Niles' comments on the preparation of legislation are also instructive in this regard: '[a]ny group considering the preparation of laws for the protection of intellectual, biological and cultural rights should undertake a careful review of traditional counterparts. Unfortunately [in Papua New Guinea] there is no detailed data of this kind, at least in the area of music. Documentation of the rules and practices is of prime importance... Knowledge will, hopefully, provide a basis for legislators to make informed suggestions about drafting laws to reflect these important precedents' (2000: 121). These might be equivalent to what in the Australian context is sometimes defined as 'customary laws' (see, for example, Janke 2008: 23).

clearly outlines the fair use agreement advocated by the archive, states the archive's responsibilities to custodians throughout the process, gives reliable case studies of other communities' experiences of fair use access to archived recorded collections, and explains how the archive can be directly contacted should the custodians wish to do so. This protects both the archive and the community, and also clarifies their relationship. Ideally, this information might also be available through the online archive in the same format that information would be available to potential users under the access agreement (for example, a short video dubbed in the target language that can be streamed online by custodians), or ways that closely replicate that format (for example, the aforementioned video available on DVDs). This information would be extremely useful to custodians in debating within their communities about the type of access that might be suitable for their situation, and would demonstrate to the community that the archive recognised the gravity and importance of the community's decision to allow access at all. It is also particularly important for future communications between the archive and the community, such as any that may be necessary after the depositor's death³³.

As the presentation of initial discussions of broadening online archival access in this paper has illustrated, a range of important issues must be considered in debates regarding fair use access to archived TCE recorded collections. More particularly, the discussion in this paper indicates that some of these important issues are of special relevance to cases involving permitting wider access to recordings of TCE. In this and many similar cases the debates about such access cannot be expected to be short or straightforward. Nevertheless, the sometimes-difficult process of conducting those debates offers one opportunity to contribute towards creating the conditions for a culturally diverse and socially equitable future.

³³ I suggest that a truly sustainable archive would promote sustainable dialogue with custodian communities as part of promoting sustainable archiving formats. The issue of how to establish and sustain such dialogue into the future is extremely complex, but archives might begin with offering researchers and custodian communities a variety of models which can be used to initiate these important discussions alongside discussions of potential future access as outlined in this paper.

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