

(Colonial) Archives and (Copyright) Law

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I was told that the room was full.

A sample of the photographic collection held in the archive had just been shown on the screen hanging from the ceiling. Soft murmurs filled the void of silence that existed during the display. As the screen was folded away, a junior staff member fumbled over the equipment being set up to play a sample of the sound-recordings also held within the archive. In a corner a small and distinct group of people were sitting and growing increasingly uneasy. The meeting of parties identified through the intentionally vague term 'relevant stakeholders' had been convened to discuss the opportunities that might come from making the collection more accessible to the public. I have heard that not everyone in the room was comfortable with the trajectory of this kind of discussion.

The photographs and the sound recordings that were played have different meanings depending upon perspective. To many in the room they were (only) historical documents recording moments in time – but they also

*represent a form of study
a way to measure stages of humanity
an index
for classification
for charting progress
for documenting difference*

The desire for increased circulation says much about the status and the authority of the archive in the contemporary present. Perhaps this cultural material contains (unknown) knowledge that benefit future generations. Who can tell? All archived material presents ongoing opportunities for study, examination and meaning making. Just as a text exists because there is a reader to give it meaning – so an archive exists because there is a user to give it meaning.

I have heard for the small group in the corner of the room, the photographs had a very specific history and conjured a range of emotions. As descendents of the people captured in the frames, the 'subjects' of the photographs, they knew only too well the circumstances that led to their existence –

*they were not collected freely
there were no permissions
there were no discussions about future use
there were no rights*

The proposals for further circulation form part of a colonial continuum. The traffic in the images, in the recordings, continues. Copyright law upholds rationalities of ownership and authorship (of liberal individualism) within the archive and these continue to marginalise indigenous people. This is because according to the copyright law that, regardless of country or jurisdiction, governs all works within an archive, as the 'subjects', the 'informants', indigenous people are not recognised as having legal rights as 'authors', 'artists' or 'owners'. Simply, and literally, they did not 'make' the photograph or recording. The paradigms of colonial control have ongoing legacies in archives where indigenous people still have to mount arguments for why they also have rights to access, to copy and to control material that documents and

records their lives and cultures in intimate detail. Indigenous people who are and have been the subjects within the archive have different concerns about access and copying to those of the 'public'.

The colonial collecting endeavour was not innocent. It had intent, it had effects and it has remaining consequences. In the films, in the sound-recordings, in the manuscripts the (native) informants are nameless. The precise detail recording the name of the author and/ or of the owner of the collection emphasises this namelessness and illustrates where the power to name resides. Naming functions as means of exclusion. Automatically these are also stark reminders of who has legal rights and who doesn't.

It is hard to ignore the obvious power relations woven through these kinds of collections. It is hard to ignore their modern politics. It is hard to ignore the instrumentality of law in producing and enforcing boundaries of control.

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There remains the limit case of certain fundamentally oral testimonies, even when written in pain, whose being placed in archives raises a question, to the point of soliciting a veritable crisis concerning testimony.¹

I am an intellectual property scholar. I am an activist. I believe that to counter a discourse one needs first to be aware of the complexities and messiness that make the discourse in the first place. I sit in meetings in different countries answering the same questions. What is intellectual property? What is copyright? For whom does it matter? Who legally owns the hundreds of thousands of photographs, sound-recordings, films and manuscripts that document indigenous people, indigenous people's lives and indigenous people's knowledge? What rights do indigenous people have to these materials? What are the ethical responsibilities that archives, libraries and museums have to these collections? What is the public domain? What is creative commons? Whose public? Whose commons? How can indigenous issues be heard, incorporated and treated as legitimate? Is this a human rights issue?

To these I add my own questions.

How can we account for the increased power of the intellectual property discourse? What are its emergent moments in legislation, in institutions, in politics? What are its conditions of possibility? Is there a counter-narrative for intellectual property? What is intellectual property law's other? Where does the desire and drive for ownership over ideas and knowledge, that intellectual property fulfils, come from? To what extent does talking about and explaining intellectual property law actually create the conditions for it to perpetuate itself? Does talking about and explaining intellectual property actually reinscribe the dominance of the discourse into the very sites where resistance is trying to be created?

Intellectual property is a paradox.

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The colonial archive was about knowledge and the colonial knowledge that the archive produced was more powerful than the colonial state ever was. The colonial documentation project encoded a certain anxiety that rule was always dependent upon knowledge, even as it performed that rule through the gathering and application of knowledge.²

Law is foundational to an archive, yet remains surprisingly hidden. It is present in all facets of the archive: for a more traditional archive this ranges from ownership of the land that allows the structure itself to exist, to the enabling legislation, to the agreements securing the acquisition of material. Increasingly copyright law holds a primary role for an archive – it governs access and use of the works that determine the archive's existence. An archive, in return, upholds and endorses the authority and the legitimacy of copyright law.

Law is the unspoken universal.

The importance of the site of the archive within society is always expanding. It serves history. It serves memory. It serves the problematic of representations of the past. The more documents that are created, the more the need for sites to hold them, store them, order them, manage them, and the more there is a need for archives. Archives can be internally messy, haphazard and incomplete but they always hold material of indeterminate value. (Indeterminate because we cannot fully predict the future significance of some documents over others.) Law is the archon of the archive. It establishes relationships between subjects, users, owners, and authors, and these reach beyond the archive and influence social relationships and affect emergent social orders.³ There are intimate and dependent relationships between archives and legal authority.

If we are to trace the etymology of the word archive, as Jacques Derrida did at the opening of *Archive Fever*, relationships of power, control and legal authority are explicit.

The meaning of archive, its only meaning, comes to it from the Greek *arkeion*: initially a house, a domicile, an address, the residence of the superior magistrates, the archons, those who commanded. The citizens who thus held and signified political power were considered to possess the right to make or to represent the law... The archons are first of all the documents guardians... Entrusted to such archons, these documents in effect speak the law: they recall the law and call on or impose the law.⁴

In colonial archives the uneasy relationship between the author and the archive is most explicit. This is partly because while it may be unclear what an author is actually an author of, the figure of the author remains, and with it an authority and a form of control over the document, the representation. There are multiple relationships of ownership with an archive. There will always be an author or an artist who, unless otherwise negotiated, has an automatic legal entitlement to determine the ways in which the work

will be used and accessed. There could also be a different owner. This would be the person or persons who purchased the work once it was made by the author/artist. This owner does not have copyright rights (as these are particular to the author/artist), but rather rights to the work as property proper. This owner may have donated, loaned perpetually or gifted works as a collection to an archive. Depending upon which of these has occurred, the archive itself will have certain ownership rights. Sometimes archives own all their collections. Sometimes they own very little and manage it according to the requests and guidelines of the author and/or owner. In almost all contexts the people who are depicted or represented in photographs, sound-recordings, films have no rights of ownership as they are neither authors/artists nor owners of the property. In terms of copying, accessing and circulating material, it is the author who retains the most significant control over the work.

The authority of the author is there matched by the control of the archon, the official custodian of truth.⁵

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Intellectual property is a term that often generates confusion. The potential for literal interpretation and the capacity for everybody who thinks to have some kind of intellectual property of their own only increases the problem. Intellectual property is actually an umbrella term used to cover specific laws that are loosely united in their efforts to manage the relationships between an idea and the tangible expression of that idea (a book, a photograph, an artwork, a sound-recording, a design on fabric, an invention). There is no specific intellectual property law named as such. Rather, the independent legislation for copyright, patents, designs, trademarks, trade-secrets, confidential information together constitute the 'laws of intellectual property'. They are grouped under this term 'intellectual property' because they are seen to share some dimension of the problematic of determining legally recognised and justifiable rights in the expression of ideas and treating this expression as some kind of 'property'.

Copyright, patents, designs and the like are specific laws that evolved slowly and haphazardly from the late seventeenth century. This slow evolution was in response to cultural, political, social and economic shifts that occurred throughout this period. There are early references to the phrase 'intellectual property' in France in the 1820s and in a specific case in the US in the 1840s but this was certainly not a widely cited or utilised description.⁶ It is really only in the 1970s that the phrase begins its movement into popular usage. This was initiated through its institutionalisation (and naming) within the international agency The World Intellectual Property Organization. Prior to this, copyright or patents or designs were the terms used in popular discourse and were not necessarily understood as connected because they functioned differently and had different foci. While they evolved separately they do share important historical moments that helped constitute their development in legislation. These were in response to specific problems about what exactly the property was, how it could be identified, how it could be measured, how loss could be recognised and compensated, what labour the individual exerted to 'make' a work and generally how a right to something that was intangible could be justified.⁷

For new ideas of property to be developed, law needed to create new categories for identifying the characteristics of this new kind of property. For copyright law, the two most important categories that were developed were authorship and originality. The making of the category of the author within copyright law, and by implication within society, begins most clearly with the literary property cases in Great Britain in the seventeenth century. Yet it was ostensibly relations between booksellers and publishers that pushed the law to consider the category of the author, for ironically, in the literary property debates, authors were noticeably absent.⁸ Nevertheless, law became deeply involved in constructing how this subject (the author) was to be understood before the law and consequently within society.

In the early histories of copyright law, attention was given to explaining why protecting the author's private property rights in the text was not the priority of the law.⁹ This focus was because it was assumed that the law was relatively disinterested in the changing social status of the 'author'. The prevailing philosophical movement of Romanticism in the eighteenth and nineteenth centuries however, meant that law did become concerned and quite instructive in the modern formation of the notion and identity of the 'author'. While certainly it is accurate to suggest that the figure of the author was not a primary concern for the law, it was inevitably an effect of the law. By this I mean, that because of the multiplicity of factors influencing law and its relationship with the legal idea of the 'author', an inevitable by-product was the transference of characteristics identifying the 'author' within law to the wider society. The focus on questions of literary property in law could not help but be influenced by romantic assertions of 'natural rights': subsequently effecting how the concept of the author as an individual, as a genius and also as a legal entity was seen before law as the agent determining status and authority within society.

Defining the category of the 'author' was the means for establishing the legitimacy of property in a 'work.' As Foucault has highlighted, the rise of the author in western liberal societies was intrinsically tied to the relationship between the text and a system of property relations.¹⁰ In authorising such property relations, law necessarily affected the functionality of the subject named as the 'author'. Foucault's interest was in the operation of what he calls the 'author-function'. Importantly, the first of the four general characteristics that Foucault identifies as marking the author-function is how it is "linked to the juridical and institutionalized system that encompasses, determines and articulates the universes of discourses."¹¹ Whilst Foucault was never particularly interested in the internal mechanics and operation of law, and at times discussing it in ways that ignore and underplay the fluid power relations that make law a fundamental mechanism of governing, in this essay he does recognize the instructive relationship between the emergence of an entity named as an author, and the legal and institutional networks that uphold and endorse that same entity.¹²

The 1774 case *Donaldson v Becket*¹³ is where law begins to negotiate the categories of authorship and originality and these are used to identify specific kinds of legally protected works. As Mark Rose has explored, the case is significant because it marks the emergence of the author as a proprietor.¹⁴ Rather than assuming the author as an already existing category of law, this case shows that there was no automatic connection between authors and texts. There were a range cultural and legal conditions that were required before the notion of an author could be established. For example, "before the modern author could come into being there had to exist a market for books to sustain a commercial system of cultural products."¹⁵ Moreover, "the concept of an *author* as an *originator* of a literary text,

rather than a reproducer of traditional truths” had to be realised in society, before it could be actualised.¹⁶ The notion of the author was also influenced by cultural specificities where writing and recording were understood as necessary processes of civilization, progress and individuation.¹⁷ In contrast, traditional truths were seen to circulate much more prolifically in oral cultures that were identified as ‘communal’. This in part speaks to the dilemma of indigenous authorship as indigenous people are still largely constructed as reproducing traditional truths albeit within an alternative paradigm of ‘community’ to that relied upon by intellectual property law.

Law was certainly responsive to the cultural influence of possessive liberalism in shaping the notion of an author. Nevertheless there were other ruptures and discontinuities that also facilitated the production of the author and the category of authorship before the law.¹⁸ It is these multiple vectors that help configure the notion of authorship in the abstract, where the ‘author’ as an individuated subject, becomes known to law only through its abstraction. In this way authorship also becomes a legal category in its own right that can measure and identify a legally protected ‘work’. The rise of modern authorship exposes the complexity of the law and the difficulty in locating a specific period where the law was seen to arrive at a particular definition of the author in relation to a text. In its abstraction authorship becomes a self-justifying concept that averts attention away from the problem of boundaries within copyright law. In conjunction with the new economic logic of the law developing in the same period as these cases, authorship provides a useful (if not also self-fulfilling) category through which identification of legitimate, legally identified and defensible works can be made.

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Until the early 1990s when Aboriginal people such as myself started documenting our communities in film, there was an estimated six thousand hours of material created *about* our communities, of which perhaps ten hours actually involved some Aboriginal input. It is the same with the images that were taken to document our communities in missions, in Settlements and in camps – they are not the images that we would have chosen to represent ourselves.¹⁹

Imagine that a community in Kimberleys in northern Australia wants their own archive. A shipping container that has been discarded by a passing truck company seems like a useful object to be re-purposed. Imagine that members of the community have grown tired of having to travel for several days in order to see any documentation about the community. They have grown tired of people turning up with documents and information that they didn't know existed. They have grown tired of being told their own history by non-indigenous people with greater access to archives in metropolitan centres. They have grown frustrated at not being able to control the circulation of the knowledge held within documents that they have not been given time to assess; that they do not own.

Imagine that it is hot and dry and dusty; that inside the container the air moves slowly – thick, heavy. An electrical chord snakes its way through the backyards of the outlying houses and attaches to a power board that plugs into the slow rotating fan and the two computers.

There are three people busy at work in the container. Denise is uploading some footage of a recent ceremony. A few relatives from the city have flown in and did some of the recording. There is a lot of laughter as everyone in the container pokes fun at how they look in the recording. There is excitement that for the first time people from the community are recording their own representations of community life and ceremonies for this archive. They are in control of this process. This new part of the archive will be separate from the one that contains the older material recorded by anthropologists and ethnographers who have been in and out of the community for nearly one hundred years. Imagine that as the documents from the colonial archive are returned to the local sites from where they were produced, and new recordings are being made, different frameworks of control, access and meaning are becoming possible and being established.

Some of the staff from the archive in Perth where much of the older material comes from are also arriving to provide some training and to help get the local archive up and running. A few unanticipated problems are emerging. Very few in the community are literate so reading the instructions on the computer for setting up the digital archive is presenting a few difficulties. Immediate decisions need to be made about how to make access to the archive less dependent upon written commands. While data files of photos and films are being transferred, the accompanying information recording author, collector, the date of creation is not being copied despite the archivists best requests. There is little attention to the cataloguing and classifying logics that the city archive is used to. Imagine instead that those gathered around the screen to look at the photos are identifying the individuals, families and clans who are in the recordings. It is these names that are now being shouted out as Paul, a teacher at the small school, writes them down.

Imagine that in this context, the community has an opportunity to make new rules about recording, about copying, about access to cultural knowledges that are appropriate to this locale, to this site. With so few in the community literate, the images and sound recordings have much more immediate accessibility and significance. It is copies of films and photographs that the community most wants to put in their archive. Maybe in the future there will be an evolutionary desire for written texts, but at the moment the image is the primary conveyer of meaning.

Gladys is an Elder in the community. She has been laughing with all the others, but now something is clearly bothering her. She starts speaking softly about a collection of materials relating to her family that she knows is in an archive in London –

*Gladys names the archive
the location
the anthropologist
the dates (sixty years earlier that he was there)
Gladys has never travelled outside the community
never seen the materials she speaks of*

We talk about how we might approach the institution involved and try and negotiate the return of the materials, negotiate getting some copies. Gladys knows that she has no legal rights to this material. She has been through this before. But it is something else that is bothering her. She asks what do we do, what do we do now? With that mob? And she gestures out the door. Gladys is referring to the four or five researchers, sociologists, anthropologists, historians, health workers, government officials, reporters, that come into the community each week collecting new data, asking more questions, taking photos, shooting new footage, and then leaving. The problem continues. The legacy of the colonial collecting practice

endures. Indigenous people are still not the owners or authors of the films or sound recordings that document and record cultural stories, community life, or more recently genetic data collected for medical research, unless specific contractual agreements have been made and agreed to by all parties. In many remote locations where basic service delivery is a challenge, adequate legal advice that gives enough information to help people make informed decisions is hard to find. While it is not immediately likely that the law will be changed to accommodate historical biases and exclusions, I suggest to Gladys that the community could create a framework that privileges local rules and laws about knowledge and control of knowledge, and that this could be made in such a way as to govern the conduct and behaviour of researchers when they are in the community. Together we sit in silence while we each contemplate the implications of this kind of approach. Then Gladys gets up, smiles and nods.

† My thanks to Andrea Geyer for her helpful suggestions.

¹ P. Ricoeur, *Memory, History, Forgetting* The University of Chicago Press: Chicago 2004.

² N. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* Princeton University Press: New Jersey 2001 at 173.

³ K. Bowrey and J. Anderson, 'The Politics of Global Information Sharing' *Social and Legal Studies* (forthcoming 2009).

⁴ J. Derrida, *Archive Fever: A Freudian Impression* University of Chicago Press: Chicago, 1995 at 2.

⁵ G. Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* Harvard University Press: Cambridge Massachusetts, 1999 at 205

⁶ *Davoll et al v Bronn* (1845) Woodb. & M. 53, 3 West.L.J. 151, 7 F.Cas. 197, No. 3662, 2 Robb.Pat.Cas. 303, Merw.Pat.Inv. 414.

⁷ This emergence is traced more fully in J. Anderson, *Law, Knowledge, Culture: The Production of Indignous Knowledge in Intellectual Property Law* Edward Elgar Press: United Kingdom 2009.

⁸ Whilst the author was the focal point of the literary property debates, they were argued between the different booksellers. The figure of the author provided both sides with a vehicle to mobilise arguments.

⁹ J. McKeough, K. Bowrey and P. Griffith, *Intellectual Property: Commentary and Materials* (third edition) The Law Book Company: Sydney 2002 at 17.

¹⁰ M. Foucault, "What is an Author?" in Rabinow, P. (ed), *The Foucault Reader: an introduction to Foucault's thought* Penguin Books: London, 1984.

¹¹ *Ibid.*, at 162.

¹² Certainly a concept of law and legal power features in Foucault's work on prisons, on power, on governing and on technologies of the self but this is more in relation to the specific sites he is interested in examining, and the inevitable interventions of law within them. He does not give law, as a specific discursive regime, full and developed attention. The most interesting discussion about the instrumentality of law, and its emergence as a specific discourse generating significant relationships between truth, power and authority are found in M. Foucault (ed), *I Pierre Rivière, having slaughtered my mother, my sister and my brother...: A Case of Parricide in the 19th Century* University of Nebraska Press: Lincoln and Nebraska 1975 and M. Foucault, "Two Lectures" in Gordon, C (ed), *Power/Knowledge: Selected Interviews and Other Writings*, 1972-1977, Pantheon Press: New York 1980.

¹³ *Donaldson v Becket* (1774) 4 Burr 2408, 98 Eng. Rep. 257.

¹⁴ M. Rose, "The Author as Proprietor: *Donaldson v Becket* and the Genealogy of Modern Authorship" Sherman, B., and Strowel, A (eds), *Of Authors and Origins: Essays on Copyright Law* Clarendon Press: Oxford, 1994

¹⁵ *Ibid.*, at 29.

¹⁶ *Ibid.*, at 29. Emphasis mine.

¹⁷ S. Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* Routledge: London and New York, 2001 at 99.

¹⁸ Most obviously these include significant economic and political changes. Also see M. Woodmansee, "The Genius and Copyright: Economic and Legal Conditions of the Emergence of the Author" (1984) 17 *Eighteenth Century Studies* 425.

¹⁹ S. Kinnane, *Shadow Lines* Fremantle Press: Fremantle, 2004 at 257. [Emphasis in text]