

Practicing Reality: Indigenous Interests in Intellectual Property

Dr Jane Anderson^Y

Australian Institute of Aboriginal and Torres Strait Islander Studies

Paper for the 2005 Copyright Law & Practice Symposium

“We should have copyright laws that are more targeted at the real problem.”ⁱ

“It is clear that our laws and customs do not fit neatly into the preexisting 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 along way from being able to provide for such protection. *The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem*.”ⁱⁱ

1. Introduction

The circulations of and networks through which discussions of Indigenous knowledge and intellectual property flow have generated a wealth of material describing the ‘problems’ of intellectual property, the global challenge of protecting Indigenous knowledge and heritage and what the utility of international legal instruments may or may not be. Given how diverse the contexts are in which conversations about intellectual property and Indigenous knowledge are occurring it is surprising that there has been limited attention directed to the emergence of this field. That it is now virtually impossible to consider expressions of Indigenous interests in knowledge control and protection *outside* a legal discourse raises fundamental questions about the emergence of this subject, and in particular, the specific effects of its location within legal frameworks of meaning. Indeed the discourse is so large, with so many participants, at so many levels of political engagement and with varying levels of agency, that the subject has become its own referent.

My direct interest in this issue derives from work involving pragmatic negotiations with a range of stakeholders about the protection of Indigenous knowledge within Australia. The project in which I am currently involved with the Australian Institute of Aboriginal

and Torres Strait Islander Studies and the Intellectual Property Research Institute of Australia explores contested ownership and control of historical and contemporarily recorded Indigenous cultural knowledge. The project is focused on the significant amounts of copyright material (in particular ethnographic photographs, sound-recordings and films) that have been produced *about* Indigenous people in Australia over the period of colonization. Simply, the problem manifests itself because Indigenous people and communities have no legal rights in much of the material, meaning that they must constantly negotiate with the copyright owner for future use, reproduction, and in some more extreme instances, access. Factors such as distance and language as much as new legislative restrictions on reproduction and use of copyright material in the digital environment complicate matters considerably.

This project developed in response to the immediate need for strategic negotiations within law for communities and cultural institutions alike. Importantly, it prioritizes sustained and ongoing discussions with Indigenous people about questions of ownership of knowledge and the implications of knowledge as property. As I am sure many people in the room can appreciate, this takes considerable time. Copyright is hard to explain to anyone without a legal background. And explaining copyright when English is not necessarily the first or second language presents its own unique problems. The result from this approach however, is the development of community specific strategies for the negotiation of ownership rights to material – increasing the capacity of Indigenous individuals and communities to utilize elements of copyright law in pragmatic ways as well as augmenting copyright with locally developed systems of control and knowledge management. A key feature of this project is that this kind of work *in situ* is then being used to inform the development of policy advice and best-practice for cultural institutions, archives and libraries so that such institutions are better able to deal with Indigenous peoples needs, and importantly, begin the development of new relationships between users and owners of copyright material. Its practical focus takes these issues beyond mere theorizing about what the problem is - to imagining new possibilities and how strategies might incorporate legal and non-legal dimensions of knowledge ownership, control and reproduction.

2. Why cultural materials matter: A story

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

Initially Joe and I spent some time in my organization, [AIATSIS](#), which holds the largest collection of material pertaining to Aboriginal and Torres Strait Islander people and lifestyles (for instance – 650,000 pictorial images; 300,000 hours of recorded film; half a million feet of film footage; 15,000 hours of film sound-track; 5000 video titles; 750 works of art and artifacts; and, the largest comprehensive collection of print materials).ⁱⁱⁱ

As a break from searching the collections at AIATSIS, we went up to the National Film and Sound Archive to see what material they had. They were not really sure what was on the roll of film they showed Joe, only that it was a recording of Djawa in the 1950s. As the film ran it became clear that it a ceremony, and that Djawa was teaching this ceremony to a few children, one of the children Joe recognized instantly to be himself.

He asked for the film to be stopped and to rerun the part with him and his father. He watched this scene many more times – Joe had never seen anything [with him as a child or anything](#) where he and his father were both performing in the same space. Fifty years after the film had been made, Joe was sitting in a cultural institution in Canberra watching his father teach an important clan ceremony – he was watching a film that had been made in Arnhem Land, recorded by an anthropologist and did not belong to him, his father, or his clan.

As a senior clansman, Joe feels very strongly about accessing historical and contemporary material that relates to his family, clan and community. Joe searches the country for this material, often spending days in libraries and archives pouring over catalogues and

JAnderson 6/6/05 12:30 PM

Deleted: We

JAnderson 6/6/05 12:30 PM

Deleted: n

Jane Anderson 4/25/05 10:19 AM

Formatted: Line spacing: 1.5 lines

classificatory systems. He wants to repatriate all the material that he finds back to his community in Galiwinku – and is often successful in convincing librarians and archivists to help him find, and then copy or digitize that material. It is a long and difficult process but he always returns home with something that no-one knew existed, perhaps a photograph from the mission days, perhaps an incomplete sound recording, perhaps hours of off-cuts from a film.

This may be a familiar story about locating family pasts and histories – and to some extent it is. However, it comes with a significant difference that has generated challenges for Aboriginal and Torres Strait Islander people, families and communities as well as Australian libraries and archives. For most of the material is not owned by Indigenous people, but rather the people who ‘made’ the film, sound recording, photographs and manuscripts. This means that one of the key issues currently facing collecting institutions in Australia revolve around ownership and access and they exist because of the historical power dynamics that meant that Indigenous people were studied and documented in unprecedented ways. Tensions do not just revolve around providing access to the material, but also inevitably engage with politics addressing the historical conditions under which such material was collected. In most cases, Indigenous people are not the legal copyright owners of the material – and this means that they have very little say in how the material is used and accessed. Material relating to Indigenous peoples lifestyles and cultures exists as published and unpublished material – with a significant amount already in the public domain. The forms the material takes include sound-recordings, photographs, films and manuscripts, with a more recent trend relating to Indigenous knowledge systems including the compilation of lists and inventories, and forming databases of knowledge.

3. Practicing Reality

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

Jane Anderson 4/25/05 10:19 AM
Formatted: Justified, Line spacing: 1.5 lines

Jane Anderson 4/25/05 10:19 AM
Formatted: Line spacing: 1.5 lines

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

Jane Anderson 4/26/05 12:25 AM
Deleted: knowledge and

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

Jane Anderson 4/25/05 10:42 AM
Deleted: iv

Jane Anderson 4/25/05 12:53 AM
Deleted: little

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

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

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

The surprising lack of attention to [Indigenous](#) collections perhaps has more to do with the inherently political nature of these collections. This is not only in relation to their establishment and collection – and the colonial power relations that enabled such projects, but also the changing nature of [Indigenous](#) political representation. In short, over the last twenty years a shift in access to such collections by [Indigenous](#) people has occurred. Thus we are now in a contemporary space that needs to recognize an emerged and emerging [Indigenous](#) 'public'. As the historical subjects of colonial archives start becoming new users, it is inevitable that there will be challenges in terms of representation and access, control and ownership. The complex dynamic that infuses this moment of intersection between Indigenous knowledges and copyright raises difficult questions for policy and practice.

Jane Anderson 4/25/05 10:19 AM
Formatted: Line spacing: 1.5 lines

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

Jane Anderson 4/25/05 10:43 AM
Deleted: s

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

JAnderson 6/6/05 12:52 PM
Deleted: Indigenous

So the project which I have been running, the first of its kind in the world and one that will feed into a project of an identical nature currently being initiated at the World Intellectual Property Organisation, has been going on for the last three years. During this period, I have spent quite a lot of time with specific communities in the Northern Territory and Western Australia as well as talking to a wide range of people engaged with managing ownership of cultural material within cultural centres and cultural institutions both in Australia and overseas with my work at the Smithsonian Institution in Washington DC. Inevitably I have quite particular perspectives about these issues, and, as my work has unfolded, it has become clear that there are very specific contexts and very specific problems that arise.

The politics and history within any given space will alter what people want, and how they engage with law, with experts and indeed other people internal or external to the community. This invariably means that the problems that arise in relation to copyright and cultural materials often need to be dealt with on a case by case basis. From a copyright perspective, the issues can overlap with other areas of law – especially with regard to the original terms and conditions of recording and of acquisition by the cultural institution; legislation governing archives and/or libraries; privacy and in some circumstances freedom of information. From an outcome perspective, a strategy that deals with different kinds of material and the different kinds of uses of that material that is developed for a community in Arnhem Land will have different features to that developed for communities in Perth or the Pilbara. This is because people have changing needs and expectations, and most importantly, different levels of capacity in relation to thinking about intellectual property and therefore managing rights in relation to this body of law.

The reality is that there are seldom straight forward answers. Moreover, it will be almost impossible for any one law (for instance copyright and certainly not a ‘communal moral right’) to fix some of these problems. This is because issues around cultural materials have developed from, and are imbued within, histories featuring substantial power imbalances. Throughout the collecting process, there was very little or no informed consent, and Indigenous people did not own any of the material that was created. History and politics cannot be displaced from current dealings with copyright around these ethnographic and administrative collections. The best we can currently do is work towards better relationships between owners and users of this material, set up practical strategies for communities and individuals to negotiate licence agreements with copyright owners, and educate copyright owners that whilst they may legally own the film of a ceremony, the individual, family or community should also be able to exercise some rights in relation to the material. We also need to be mindful of what is going on now in communities and that there is still a substantial amount of research going on – and all that research material will end up somewhere, in an archive, in a library, in a governmental department, in a health database, with similar ownership questions associated with it. Pragmatic politics in relation to ownership need to be negotiated now not later.

I would have to say that for me, a key point of difficulty is that I have to deal with a wide variety of copyright subject matter: photographs, films, sound-recordings, manuscripts, and increasingly databases. The material will be published and unpublished, and is historical and contemporary. The historical dimensions of the problem mean that I also have to think about the transitional provisions of copyright, and what the differences in protection were for material made prior to 1968. It is worth stating again, that as the material is ethnographic in origin, it is not owned by Indigenous people. Indigenous people are users but not owners or authors – I can't even begin to tell you what it is like to sit in a council meeting full of council members and other elders explaining why the film recording depicting an important ceremony is not owned by the family depicted in the film, and that they have to ask the copyright owner to use it in certain ways, for instance, reproducing it on the web or part of a multi-media publication, and that when the copyright owner says no – besides infringing copyright, there are very few avenues available. What I want to impress through this paper is the need for flexibility in approach given the different kinds of copyright questions that arise in relation to certain kinds of material. I want to also advocate for the urgent need for more people to be engaged in dealing with these issues – not only writing articles in offices but getting out and talking with people and practicing reality. It is not nearly as straight forward or neat as articles and policy makers have lead us to believe.

4. Reusing cultural material - another story

In 1963, a husband and wife team travelled to central Arnhem Land in the Northern Territory. They had a variety of funding for their fieldwork – from Australian universities and cultural institutions, as well as funding from their own sources. There were no clear contracts regarding employment, or even joint-ownership of copyright. The recording equipment and film had been supplied by AIATSIS. In the process of their fieldwork they recorded in film and sound recordings the important Djalambo [Hollow Log] ceremony. This ceremony represents one of the final acts in the Yirritja mourning rights – where the body is interned in the Djalambo [hollow log]. The recording of the ceremony featured the leader of the Daygurrurr Gupapuyngu people, Djawa.

In 1997, one of Djawa's sons, Joe Neparrnga Gumbula composed a song called 'Djiliwirri' for his band, Soft Sands. The song was about Joe's homeland Djiliwirri – “a

Jane Anderson 4/25/05 10:19 AM
Formatted: Justified, Line spacing: 1.5 lines

Jane Anderson 4/25/05 11:10 AM
Deleted: a

JAnderson 6/6/05 2:00 PM
Deleted: [Djawa] who was

Jane Anderson 4/25/05 3:03 AM
Deleted: i

forest estate inherited from his father through the Gaykamangu yarrata patriline.”^{vi} The song “alludes to the veiled core of hereditary sacra held in perpetuity by the Daygurrurr Gupapyngu.”^{vii} In creating the film clip to accompany the song, Joe decided that he wanted to inter-cut the present with the past, and to show images of his father from the 1963 Djalumbu recording. As Joe has explained:

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

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

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

- Jane Anderson 4/25/05 11:10 AM
Deleted: a
- Jane Anderson 4/25/05 11:09 AM
Formatted: Font:11 pt
- JAnderson 6/6/05 2:02 PM
Deleted: .
- JAnderson 6/6/05 2:03 PM
Deleted: For
- Jane Anderson 4/25/05 11:08 AM
Deleted: W
- JAnderson 6/6/05 2:03 PM
Deleted: w
- Jane Anderson 4/25/05 3:05 AM
Deleted: an older
- Jane Anderson 4/25/05 11:08 AM
Deleted: s
- Jane Anderson 4/25/05 3:05 AM
Deleted: copy of the
- Jane Anderson 4/25/05 3:06 AM
Deleted: in terms of fair-use exceptions
- Jane Anderson 4/25/05 3:06 AM
Deleted: .
- Jane Anderson 4/25/05 3:08 AM
Deleted: the
- Jane Anderson 4/25/05 3:07 AM
Deleted: n
- Jane Anderson 4/25/05 11:10 AM
Deleted: a
- Jane Anderson 4/25/05 3:08 AM
Deleted: 4
- Jane Anderson 4/25/05 3:08 AM
Deleted: ies
- Jane Anderson 4/25/05 3:09 AM
Deleted: film being made for the
- Jane Anderson 4/25/05 3:09 AM
Deleted: community
- Jane Anderson 4/25/05 3:09 AM
Deleted: –
- Jane Anderson 4/25/05 3:10 AM
Deleted: However, this is certainly not how
- Jane Anderson 4/25/05 3:10 AM
Deleted: the
- Jane Anderson 4/25/05 3:11 AM
Deleted: s
- Jane Anderson 4/25/05 3:12 AM
Deleted: understand
- Jane Anderson 4/25/05 3:12 AM
Deleted: the nature of their and the community’s rights

created an acrimonious relationship between copyright owner, Indigenous community, and the Institution that holds the original.

JAnderson 6/6/05 12:52 PM

Deleted: Indigenous

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

Jane Anderson 4/25/05 3:12 AM

Deleted: T

JAnderson 6/6/05 2:06 PM

Deleted: her

Jane Anderson 4/25/05 3:12 AM

Deleted: is

Jane Anderson 4/25/05 3:13 AM

Deleted: even

Jane Anderson 4/25/05 3:13 AM

Deleted: that

Jane Anderson 4/25/05 3:13 AM

Deleted: u

Jane Anderson 4/25/05 3:13 AM

Deleted: As she is getting older, the

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

JAnderson 6/6/05 12:52 PM

Deleted: Indigenous

Jane Anderson 4/25/05 3:14 AM

Deleted: is not all of one kind,

Jane Anderson 4/25/05 3:14 AM

Deleted: this kind of material

JAnderson 6/6/05 12:52 PM

Deleted: Indigenous

JAnderson 6/6/05 12:52 PM

Deleted: Indigenous

JAnderson 6/6/05 12:52 PM

Deleted: Indigenous

JAnderson 6/6/05 2:07 PM

Deleted: cam

4. Knowledge Centres and Digital Databases

So then, there are challenges in relation to the material itself, but then also the contexts where the material is now being utilised. The creation of databases to store and represent

Indigenous knowledge structures and cultural material are increasing across the country. Of course the development of these keeping/cultural/knowledge places within communities raise questions in relation to broader intellectual property management. But with very few people around to offer advice on these matters, communities, councils and organisations working with Indigenous people and communities are on the back foot in relation to general knowledge about intellectual property and consequently the capacity to work out strategies for the future.

In the Northern Territory I have done work in Galiwinku, Wadeye and Angurugu on Groote Eylandt with the Knowledge Centres that are being established across the Territory by the Northern Territory Library and Information Services. The Knowledge Centres are developing as an important site within Indigenous communities for the facilitation of access to a range of contemporary and historical material and information. The current success of the Knowledge Centres lies in a combination of factors – which can be different for each Centre. Factors influencing the current success include: types of material accessible; the physical location of the Knowledge Centre within the community; increasing Indigenous community participation in the project; broader community support and networking; and the ongoing commitment and liaison by Northern Territory Library and Information staff within any given community.

However, many of the difficulties that are experienced in managing cultural material in cultural institutions tend to be replicated in the Knowledge Centres. In particular this is in relation to ownership and access. For there are always questions over who speaks for particular material – for instance an individual, a family, a clan or a community – and it really can differ depending on the nature of the material.

It is significant that in the context of the Knowledge Centres– storage and delivery of copyright material through digital technology is providing an important mechanism for facilitating increased access by Indigenous people within their community. But this presents its own difficulties in relation to intellectual property. These difficulties have two separate but interrelated intellectual property components – one relates to the material itself and the second concerns the digital delivery of that material through the compilation of databases to hold the material.

The urgent practical issues involving copyright within the Knowledge Centres need work and time.

What follows is a small indication of some of the questions that involve copyright and copyright related issues and the practical considerations involved with engaging with and mediating legal frameworks in the context of these Knowledge Centres.

- The capacity of the community to contact, negotiate and enter into license agreements with owners of copyright material;
- Working out who actually owns the database within the community;
- How information about IP can be accessed and in simple English; and or other languages – and the need to be mindful of the presumption of literacy;
- Negotiating ownership of material existing in other places: land councils, mining companies, cultural institutions;
- Negotiating new kinds of relationships of ownership about contemporary material – especially with the researchers currently engaged within any given community. How collaborative agreements, research agreements can be negotiated and by which community ‘representative’;
- Who should be doing the negotiating;
- Where knowledge and support about IP strategies can be gained given at times difficult internet and phone access within communities themselves;
- Thinking about the possibility that exceptions in the Copyright Act relating to archives and libraries might be relevant to Knowledge Centres;
- Thinking about the extent that new exceptions could be crafted within the Copyright Act that allows for the reproduction of whole ethnographic works for individual, family and community based history work.
- Developing risk management strategies for Knowledge Centres – in order to address the reality that as the community doesn’t own the material, and there are litigious copyright owners who feel very strongly that the material is theirs and not the community or family

As would be fairly obvious, there are a range of issues needing resolution, and the reality is that there are very few people working on them within communities. Some of the issues are quite straight-forward and could be easily resolved, but others take time and need to be developed with community perspectives and input. This work is needed now

but with issues of funding, interest and real commitment I have very real concerns about the extent that Indigenous interests in intellectual property can actually adequately be met.

5. Conclusion : What Law makes

And to end with some theory – it informs how I think about these issues, how I act in relation to them and what kinds of options I think about in and around IP law as well as outside law.

This theoretical approach to law and Indigenous issues is the subject of my book which will be released next year and follows from how I started this paper – how did Indigenous interests emerge in IP law and how does IP law interact, influence and even make a category named ‘Indigenous knowledge’. To echo Mick’s opening quote: *The existing legal system cannot properly embrace what it cannot define and that is what lies at the heart of the problem.*

It is inevitable that the space created to make the subject ‘Indigenous intellectual property’ intelligible involves attempts to make features of Indigenous epistemology recognizable to law whilst also supplanting laws own categories onto Indigenous cultural production. “In law there is always conflict and always loss: the stories of the two parties conflict or compete and do so not only in detail but in their shape and their language, in the deepest meanings from the speaker and to others.”^{xi} This is most apparent in the way that the production of the legal category of Indigenous knowledge is exposed to a singularity of identification and justification. Thus Indigenous knowledge, presented in a stable and unitary form, is rendered open to modes of categorization that help *identify* the intangible subject matter to the law. This is achieved through deploying the object of legal protection such as art, dance, design onto Indigenous knowledge, and mediating the shift from the intangible to the tangible. Through this process, Indigenous experience of knowledge exchange is summarily transformed into intelligible and pre-existing categories produced both in law and through normative social mechanisms of recognition. Indigenous knowledge is not ahistorical, apolitical or uncontested.

Indigenous knowledge only recently became subject to legal attention both nationally and internationally and this emergence in Australian intellectual property law was influenced by a variety of social, political, individual and economic dimensions. There are always multiple elements at play in making complex social and cultural issues subject to legal determination, but once an issue is instituted within legal frameworks of classification and subject making, law becomes a powerful forum for redistributing interpretations of what the problem actually is (for example, property rights in knowledge) and how to address it (for example developing new legislative initiatives). In this sense law becomes actively involved in constructing a subject that is amenable to its own forms of categorization. But this comes at a price, and this is manifest in the commensurate effects that law then also exerts upon the realms that influence it – for example, how claims to law are made and how new subjectivities are created.

The power to circulate what ‘Indigenous intellectual property’ is, how it includes and excludes aspects of interpretation of what constitutes Indigenous epistemology, political particularity and context directly effects how processes are conceptualized that deal with, and indeed name the problem that law has been invited to ‘solve’. Law is a powerful vehicle which has the capacity to circulate new meaning and influence perceptions of closure around a particular issue. This is at the expense of the complexity and contradiction that underpins the problem, or indeed, makes it in the first place. Governmental reports, case law and precedent, as well as academic articles that discuss and debate ‘Indigenous intellectual property’ also establish networks through which this concept is understood. However, what such reports, case law and articles produce is a conception that Indigenous knowledge is a relatively unitary category, and an established category of intellectual property law. Importantly this reification of the category in law even occurs when critiques focus on the inapplicability of intellectual property framework. The legal language dominates such discussions, to the extent that understanding the limitations necessitates engaging in the language of intellectual property to explain why the law won’t work,^{xiii} or why Indigenous knowledge doesn’t fit the legal schema.^{xiii}

The Australian example provides a unique ‘moment’ in the history of intellectual property law, and this is borne out through the repeated national and international storytelling that draws on such case law.^{xiv} It is also significant because what follows from this

moment of recognition is a 'repetition' – where the subsequent cases, governmental reports and individual advocacy follow the legal trajectory already set for dealing with this issue.^{xv} Whilst there is modification and reinvigoration in the 'recognition' there is no disruption of the location of the issue in law. Consequently law becomes a primary vehicle for understanding, identifying and then circulating interpretations of 'Indigenous knowledge'. For all the later developments in this field following the *Working Party Report* and the 1989 *Bulun Bulun* case, both in Australia and internationally, the competence and authority of the legal domain remains affirmed and this has effects not only how meaning about the problem is made, but also how participants are constituted.

More generally, my ongoing critical work is derived from the following questions: what are the cultural, political and legal shifts that have produced the category of Indigenous knowledge within the field of intellectual property law? And, how does legal power produce a domain specifically occupied by a concept of 'Indigenous knowledge' and how does it seek to manage such a domain?^{xvi} As claims for cultural property are always complicated, and almost always invested with politics, it is time to start assessing the effects of property claims as they are inevitably positioned within legal relations of power. A significant challenge for this field is that law has become the primary mediator for Indigenous interests when the problem itself is historically informed by diverse relationships between individual, cultural, economic and political relations. What this means is that the complexities of knowledge circulation and control within and through Indigenous societies (and in Australia these are not all of one kind) have been sheered off in order to uphold a logic about property and ownership in knowledge. In this sense, every society historically and contemporarily has particular strategies, explicit or otherwise, of managing and controlling knowledge circulation and distribution, and these have always been multiple and not necessarily co-ordinated. But when law becomes the primary domain for reconciling competing interests, these same interests will be modified in ways that correspond with what is possible within the legal space. This will inevitably be at the expense of the complexity that informs them.

In the field of Indigenous rights and intellectual property, as well as in my daily work, law matters considerably. This is because, quite simply, law produces ways of seeing, of interpreting and understanding events and issues – it makes realities that require action. Rethinking the construction of categories of law provides new and diverse ways of

thinking about law, legal process and legal power that reflect upon the complexity of legal engagement within any given sociality. In this sense, social, individual and political elements always effect how law comes to make frameworks for decision making but, conversely law also distributes meaning back into these same spaces at the expense of the inherent intricacy, and often contradiction that informs them. That we appear increasingly reliant upon law to solve quite complicated social and cultural problems that have their genesis in a variety of unequal power relations is certainly illustrative of the extent that legalism permeates social consciousness. “To identify a problem as a legal need is to make a particular judgment about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution”^{xvii}, and to recognize this is necessarily the first step in understanding why we must talk about what law itself makes, and through what processes a category of legal attention even becomes possible.

^y Jane Anderson is a Research Fellow at The Australian Institute of Aboriginal and Torres Strait Islander Studies and has been working with the Intellectual Property Research Institute of Australia on a three year project entitled Intellectual Property and Indigenous Knowledge: Access, Ownership and Control of Cultural Materials. In 2005 she was a Rockefeller Fellow at the Smithsonian Institution in Washington DC. This paper draws from two previous papers: Anderson, J (2005) 12(3) ‘The Making of Indigenous Knowledge in Intellectual Property Law in Australia’ *International Journal of Cultural Property* 345-371; and, Anderson, J 2005, ‘Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use.’ Paper for *Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena* American Library Association and The MacArthur Foundation, Columbia University, New York, May 5-7, 2005.

ⁱ Ruddock, P. “Opening Address – Copyright Law and Practice Symposium” 17 November 2005. See http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2005_Speeches_17_November_2005_-_Speech_-_Opening_address_Copyright_Law_and_Practice_Symposium. Accessed 28 November 2005.

ⁱⁱ Dodson, M. “Indigenous Peoples and Intellectual Property Rights” In *Ecopolitics IX: Conference Papers and Resolutions*. Casuarina: Northern Land Council, 1996. [emphasis mine].

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

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

^{vi} Corn A., with N. Gumbula, “Nurturing the Sacred through Yolngu Popular Song” (2002) 2(69) *Cultural Survival*.

^{vii} Ibid.

^{viii} Ibid.

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

^x Anderson, J. Field notes, August 2004. On file with author. I would like to thank Joe Gumbula and Jessica De Lary Healy for conversations with me about these issues.

- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond, Not Highlight
- Jane Anderson 4/25/05 10:42 AM
Deleted: as
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond, Not Highlight
- JAnderson 6/6/05 12:52 PM
Deleted: indigenous
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond, Not Highlight
- Jane Anderson 4/25/05 10:23 AM
Deleted: See Indigenous Knowledge Monitor
- Jane Anderson 4/25/05 11:11 AM
Deleted: 2)
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond
- Jane Anderson 4/26/05 3:01 AM
Formatted: Font:Garamond, Italic
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond
- Jane Anderson 4/26/05 2:10 AM
Formatted: Font:Garamond
- Jane Anderson 4/25/05 11:01 AM
Formatted: Font:Garamond

^{xi} Boyd White, J. *Justice as Translation: An Essay in Cultural and Legal Criticism* University of Chicago Press: Chicago and London, 1990 at 262.

^{xii} Ellinson, D. "Unauthorised Reproduction of Traditional Aboriginal Art." *UNSW Law Journal* 17(2) (1994): 327-344; Blakeney, M. "Bioprospecting and the Protection of Traditional Medicinal Knowledge of Indigenous Peoples: An Australian Perspective" *European Intellectual Property Review* 19(6)(1997): 298-303; Blakeney, M. "Protecting the Cultural Expressions of Indigenous Peoples under Intellectual Property Law – The Australian Experience" In *Intellectual Property Law 2002: The Legal Protection of Cultural Expressions and Indigenous Knowledge* edited by F. Willem Grosheide and Jan.J. Brinkhof Antwerp: Intersentia Publishers, 2002.

^{xiii} Dodson, M. "Indigenous Peoples and Intellectual Property Rights" In *Ecopolitics IX: Conference Papers and Resolutions*. Casuarina: Northern Land Council, 1996; Ford, L. "An Indigenous Perspective on Intellectual Property" *Aboriginal Law Bulletin* 3(90) (1997): 13; Johnson, V. *Copyrites: Aboriginal art in the age of reproductive technologies* Sydney: National Indigenous Arts Advocacy Association and Macquarie University, 1996

^{xiv} Sell, S. and C. May, 'Moments in Law: Contestation and Settlement in the History of Intellectual Property' *Review of International Political Economy* 8 (2001):467-500.

^{xv} Deleuze, G.. *Difference and Repetition*, translated by Paul Patton New York: Columbia University Press, 1994.

^{xvi} Anderson, J. *Law Knowledge and Culture: The Production of Indigenous Knowledge in Intellectual Property Law* Cheltenham: Edward Elgar Press (forthcoming 2006).

18 O'Malley, P. *Law Capitalism and Democracy* Sydney: Allen and Unwin, 1983 at 104.