

“Chuck a Copyright on It”: Dilemmas of Digital Return and the Possibilities for Traditional Knowledge Licenses and Labels^{*}

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Abstract: This article focuses on the creation of an innovate network of licenses and labels delivered through an accessible, educational, and informative digital platform aimed specifically at the complex intellectual property needs of Indigenous peoples, communities, and collectives wishing to manage, maintain, and preserve their digital cultural heritage. The Traditional Knowledge (TK) Licenses and Labels answer a grassroots, global call by Indigenous communities, archivists, museum specialists, and activists for an alternative to traditional copyright for the varied needs of Indigenous communities and the cultural materials they steward. Local Contexts is a project and educational website dedicated to the production of new intellectual property frameworks for Indigenous materials that depart from colonial histories of collection and Western legal frameworks.

[Keywords: *Archives, Collaboration, Cultural Property, Digital Media, Heritage, Indigenous Peoples, Intellectual Property, Repatriation, Technology.* Keywords in italics are derived from the American Folklore Society Ethnographic Thesaurus, a standard nomenclature for the ethnographic disciplines.]

We have both worked quite closely with Aboriginal communities throughout Central and Northern Australia to try and navigate the thorny and oftentimes confusing legal issues that emerge when communities, their representative bodies and individuals within them attempt to reuse or have repatriated local cultural materials that are owned or housed in distant institutions. While there are often creative and compelling constructive solutions to the challenges presented when Indigenous communities’ cultural sensibilities and local laws push up against Western notions of property and propriety, there is very little in the way of progressive, flexible solutions that offer Indigenous peoples alternative engagements with legal systems and their representatives. As a fall back, and quite often out of exacerbation and exhaustion, community representatives will use the very legal systems they wish to alter or subvert in order to gain some type of control over materials that are no longer in their possession. Although intellectual property law has been quite inflexible and even hostile to Indigenous needs and concerns, for example demanding individual and recognizable “authors” and “original” works in order to offer any protection, it has quite recently provided a path with limited success for communities wishing to defend and manage their cultural heritage materials. As one Aboriginal community member put it, we have to “chuck a copyright on it and it’ll be right.”¹

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The notion that “a copyright”—or other types of legal frameworks—might aid in the preservation and protection of Indigenous cultural materials as they circulate outside of Indigenous communities in both their analog and digital forms is quite prevalent and also quite misunderstood by all parties involved. Traditional copyright together with its more progressive alternative, Creative Commons’ licenses, form a complicated layer of legal scaffolding that, within the larger international intellectual property rights framework, provide limited sets of rights to and over Indigenous cultural materials that constitute copyright subject matter—namely photographs, sound recordings, films, and manuscripts that document Indigenous cultural heritage. The very precarious legal position that many Indigenous peoples have to their cultural heritage materials, as well as the collective responsibilities of stewardship and care towards these materials, often limits the effective use of copyright law.

As part of the colonial collecting endeavor, Indigenous peoples lives and cultural practices were often documented and recorded to a remarkable degree. Framed as the “subjects” of these works, not as their authors and owners, Indigenous people and communities have had no legal rights to determine how and when this documentary material should be accessed or by whom—that is, they cannot just “chuck a copyright on it.” As Indigenous peoples have increasingly re-found these disparate collections and demanded legitimate access to them, cultural institutions all over the world are now facing the task of how to adequately deal with these collections—both in terms of recognizing the conditions that led to their creation and creating new possibilities for renegotiating their access and control. This is a slow process and one somewhat dependent upon the political will and motivation of each individual collecting institution and those working within it. The increase in new technologies to archive and share materials stewarded in collecting institutions has facilitated the beginning of digital return and repatriation projects. But this return generally only deals with the problem of *access* to the community; it has not yet been able to adequately deal with the problem of navigating the legal terrain, nor how to manage access by third parties also eager to have access to the material for various commercial and non-commercial reasons.

Inspired by our work with and alongside Indigenous individuals and communities and also with the complexities of institutional responses, in this article we tackle several of the dilemmas associated with these diverse and difficult processes of digital return. Specifically we focus on the creation and distribution of a specific initiative aimed at addressing some of these legal, ethical, historical dilemmas: the Traditional Knowledge (TK) Licenses and Labels.² Much like the manner in which the Creative Commons arose and answered the clarion call of software developers and artists in largely first world settings, the TK Licenses and Labels seek to fill a void left by current intellectual property regimes that fail to address the particular needs of Indigenous peoples in relation to their cultural heritage materials. The Licenses and Labels are aimed specifically at the complex intellectual property needs of Indigenous peoples, communities, and collectivities wishing to manage, maintain, and preserve their digital cultural heritage in relation to multiple sets of rights and stakeholder obligations. Following the principles established in the 2007 *Declaration on the Rights of Indigenous Peoples*, the aim of the TK Licenses and Labels is to support Indigenous, traditional, and local peoples’ rights to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. The TK Licenses and Labels will ultimately be delivered through an accessible educational digital platform: Local Contexts (www.localcontexts.org).³

Variations on “Making it Right”

Intellectual property law is one of the most powerful bodies of law in contemporary society because it is the current mechanism for identifying specific kinds of knowledge, creating a value for this knowledge, and establishing conditions for how it can be accessed, used, and shared. In making certain knowledge legally identifiable, quantifiable, ownable, and proprietary, inevitable questions about the capacity for intellectual property law to make new practices and realities regarding the sharing of knowledge must arise. The current operation of intellectual property law necessarily invites reflection upon issues of power and agency in understanding how it produces specific kinds of recognizable knowledge, how some knowledge becomes valued and legitimized over others, and how law is involved in establishing regulatory frameworks for sharing knowledge within our present moment. While not altogether new, these questions and concerns have taken on a new valence within the digital age. As objects and knowledge move, are reused, and reanimated quickly (and often with little documentation), the emphasis on defining and defending ownership, authorship, stewardship, and creative attribution has taken on a new urgency for multiple stakeholders and under very different conditions.

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, and confidential information together constitute the “laws of intellectual property.” They are grouped under the term intellectual property because they are seen to share some dimension of the problematic of determining legally recognized and justifiable rights in the expression of ideas and treating this expression as some kind of “property.”

Copyright is probably the most commonly cited and critiqued area of intellectual property pertaining to digital heritage. This is because it is encoded into older analog material, into the behaviors of archives, libraries, and museums, into the capacity to deliver material digitally, and into the rhetoric of open access (Anderson 2013). The language and practice of copyright do very different things and effect policy, procedures, and the making and circulation of digital materials in complex and varied ways. Although battles have been waged from the courtroom to the boardroom over the right and proper place and reach of copyright, it remains a thorny and tense issue that divides more than it unites. One current site that aptly displays the divisive politics that copyright can produce is in the current negotiations at the World Intellectual Property Organization ([WIPO](#)) on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (TKGRTCES). For 12 years, 180 Member States, numerous NGOs and IGOS, as well as Indigenous representatives have been negotiating for an agreeable solution for the protection of traditional knowledge through various intellectual property rubrics. Marked by disagreements over definitions and terminology, WIPO negotiations have slowly moved towards the final hurdle of text-based negotiations on three new legal instruments. Along the way, inequity (in terms of participation) and a more accurate comprehension of whose interests these negotiations really serve have come to the fore. The most recent meetings in 2012 were full of

anxieties regarding the full and comprehensive participation of Indigenous delegates. Moreover, the coordinated protest against WIPO representatives at the UN Permanent Forum on Indigenous Issues meeting in May 2012 further illustrates how high the tensions run and how deep the concerns regarding the legitimacy of intellectual property governance frameworks over knowledge resources are.

Indigenous people are not alone in having problems with intellectual property law generally and copyright in particular. It seems like there are vast numbers of people who also have problems with copyright: it protects too much for too long, it privileges certain interests over others, it creates frameworks of property upon material that perhaps should not be considered as property, it curtails creativity rather than promoting it, it is too culturally specific to be of any use to certain communities. With the growth of intellectual property, and especially of copyright over the last 40 years, we have seen this body of law become more embedded within our global society. As a result, we have correspondingly seen a rise in the development of a critical intellectual property discourse. While this discourse is broadening and importantly includes “Development Agenda” politics (and more recently a specific focus on international standards of limitations and exceptions within copyright), the two most dominant sites for mobilizing critical intellectual property advocacy remain the Creative Commons licensing project and the public domain (Hugenholtz and Okediji 2008; Lessig 2001, 2004).

While advocates for the public domain and Creative Commons have different ambitions and trajectories for action, there are similar precepts that link them together in important ways. Advocates for the public domain, including Jessica Litman, Jamie Boyle, Yochai Benkler and the Electronic Frontier Foundation, provide a much-needed counter-framework to understand the cultural and economic effects of the monopoly privileges upheld through conventional intellectual property rights regimes (Litman 1990; Boyle 2003; Benkler 1999). As Benkler notes, “Information is ‘in the public domain’ to the extent that no person has a right to exclude anyone else from using the specified information in a particular way. In other words, information is in the public domain if all users are equally privileged to use it” (1999:360). While it is increasingly thought that the public domain is only made possible by copyright—it is that space where works go when copyright has expired—Litman argues that in addition to this common understanding of the public domain, “The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect” (1990:975).

Creative Commons is a licensing framework that seeks to provide an alternative to the copyright regime, and the implied “all rights reserved” model that copyright upholds. As Lessig explained in one 2006 interview, “We’re trying to hack the copyright system, in the programmers sense of hack. Not to break it but make it function in ways it wasn’t intended to work. That’s not because we’re opposed to copyright, but because we’re opposed to copyright functioning in ways that don’t benefit either the author or the end user. Copyright is meant to be a tool to promote invention” (Steffen 2006). It is important to note that Creative Commons does *not* provide copyright, but instead offers a *licensing model* for the redistribution of additional rights under the framework of copyright. Creative Commons harnesses another area of law entirely—that of contract law, in an attempt to ameliorate against the automatically generated rights that copyright establishes. In this sense Creative Commons offers private law making—wherein private law,

contract law specifically, engages interactions between private citizens to make more nuanced decisions about the circulation and reuse of their creations/works. As copyright holders are able to enter into licensing arrangements regarding their creations, Creative Commons works precisely on this possibility of licensing works. Importantly, Creative Commons, like traditional copyright, rests on the pillars of individual authorship and original works—both of which are at odds with much Indigenous work that is either communal/variously attributed to specific kin groups and also does not meet the rigid standards of originality in a Western artistic and/or scientific sense (Sherman and Strowel 1994; Bowrey 1998; Sherman 1995; Christen 2005, 2012; Anderson 2009).

The development of Creative Commons licenses, and their success and transferability across multiple jurisdictions, speaks to the need for alternative frameworks for the uses of otherwise protected works. In creating conditions where specific needs (for example, attribution, acknowledgement, non-commercial use) can be incorporated and prioritized, (the contract/agreement/license on top of the automatic copyright rights), there is a fundamental reworking of the intellectual property paradigm. In this new paradigm, individual creators are given more refined options for how to make their work available. These choices, it is argued, tend to more closely reflect the intentions of the creator in terms of how they would like their work to be shared and circulated in the world. Rather than a one-size-fits-all approach, which is largely the current copyright model, Creative Commons provides additional options for creators to be more specific about how their works can be used. In empowering creators to make their works more freely available, users are also beneficiaries because it becomes much clearer what the intentions as well as the expectations of the creators *vis-à-vis* their works are. While not everyone sees Creative Commons through this lens, especially creators who require copyright to secure adequate remuneration to sustain their work, this is the dominant narrative advocated by these alternative IP advocates.

Creative Commons uses licenses to augment traditional copyright. Licenses are not copyright, but can be designed to resemble copyright, or to add to or pare back certain copyright entitlements. This is only possible because one of the central rights provided to any copyright holder is that they have the ability and option to transfer their rights, in full or in partial, through a license, to a third party. The copyright holder can authorize a new use of their work and this is done through the transfer of rights, most often achieved through an express license. One of the most common licenses that copyright holders grant is for the publication of their works. For example, as the copyright holders in this article, we will grant a license to the publisher to make this work available to the public. In many instances these licenses seek to transfer full copyright to the publisher and the author must then receive permission from the publisher to reuse or reprint their work. While this is not the case with the publisher of this article, the point is that as the copyright holders, we are the only ones that can authorize this transfer of rights. Through signing the agreement provided by the publisher, which sets out the terms of use, a license for the publisher to use this work is created.

Working through this legal terrain raises a question that should be clarified before we proceed: what is a license? A license is an agreement between two parties. It is an authorization from the owner of the material (the licensor) to the user of the material (the licensee) to use the licensed material in specific ways for select purposes. Licenses have been commonly used within all areas

of intellectual property to grant new conditions or permissions for use that are not normally permitted in the standard terms of use. In this way, they provide additional components not included within standard intellectual property protections and entitlements for owners to assert additional rights. In today's digital ecosystem, licenses are about as prolific as copyright; we sign, click, and agree to terms of licenses—most often establishing the conditions for the use of proprietary software—all the time, perhaps without really realizing the extent of our consent. As such licenses are both commonplace and commonly misunderstood: they provide legal control, but we are often not fully aware of the precise details within those agreements. It is because licenses provide an opportunity to change or add to existing rights, and in doing so establish new relationships between creators and users of works, that they have the potential to answer some of the concerns about the access and use of their culturally important copyrighted works that Indigenous peoples have. Yet, to date they have not been leveraged for this purpose in any standardized way. We see an opportunity through the creation of this new set of licenses to create conditions of use that are more culturally appropriate and accord with local Indigenous community expectations for accessing and using valuable knowledge resources and cultural heritage materials.

As a result of our work we have been thinking about potential options and strategies for dealing with the legal issues confronting Indigenous material for a considerable amount of time. These options have ranged from specific exceptions and limitations that could be incorporated into copyright legislation itself that accommodates Indigenous rights, to new kinds of legal and non-legal strategies that could be employed to deal with critical questions of access, control, and ownership of material. Finding new possibilities is especially important in contexts where: (1) Indigenous peoples have no legal rights to the material because it is owned by a third party, (2) when the material is already in the public domain ostensibly for anyone to use at any time and in any way, and (3) for the increasing contemporary material being produced by Indigenous communities where they are, in fact, the legal owners (Anderson 2010). From their inception, it seemed the radical innovation of Creative Commons provided the possibility for a specific “Indigenous license” set. That is, it seemed possible to develop a set of new licenses that could accommodate a different order of concerns about copyright—ones that also had to deal with historical dispossession embedded within intellectual property.

While information is scant, in 2004 the Creative Commons team did create a “developing nations” license. While it was initially taken up by organizations like Architecture for Humanity, it was withdrawn in 2007. The difficulties with multiple jurisdictions, contested politics, and the diverse needs of a broad range of constituents made the license too difficult to sustain. Similarly, an Indigenous-specific license never came to fruition. This omission, in contrast to the developing nations license, was in part due to the differing logics of access, openness, and the public that underpin the Creative Commons endeavor and that in many instances, depart from core Indigenous expectations and needs. For instance, many Indigenous communities have complex systems for accessing knowledge, often with a range of different levels of access conditions depending upon age, gender, initiation, and the like. Common, “free,” or public knowledge can only be determined by the knowledge itself or the relationships surrounding the knowledge and the context of its use. This type of contextualized understanding shows how knowledge is always culturally specific and derives meaning and possibilities for use from the local contexts in which this knowledge is created and sustained (Christen 2012).

While we are not connected with Creative Commons we have admired their innovation and their attempt to turn to licensing as a mechanism for ameliorating against the all rights reserved copyright model: a model that clearly presents substantial problems to a specific portion of the population. Working with Indigenous communities globally and specifically with those trying to navigate the choppy waters of intellectual property law we developed the idea for entirely different model of licenses and labels, combining a legal (licenses) and non-legal (labels) strategy for the complexity of Indigenous needs in this area.

The new TK Licenses and Labels initiative grew out of our work with Indigenous communities as they sought to manage materials in both digital and analog form primarily *outside their communities* in multiple settings; from the clearly commercial to the dizzyingly popular reuses in social media. Importantly, we found that the need and desire for these new legal options were not for internal debate and discussion. That is, the TK Licenses and Labels are tools for use at the cultural interface between Indigenous individuals and communities on the one hand and non-Indigenous peoples and third parties on the other (Nakata 2007). This interface has always been one of both possibility and vulnerability—where desired exchange and sharing can productively occur, but where exploitation and appropriation also have historical roots. This interface is malleable and subject to power relationships, but it has never been moderated or tempered by legal regulation, however minimal. But it is precisely at this interface, with the sharing of cultural materials and works, that new legal and educative options were being requested. No individuals or groups that we worked with erased the very real dilemmas that face communities internally as groups compete for or disagree over the use and or exchange of some cultural materials. What was clear, however, was that the TK Licenses and Labels were not even to be developed for this purpose. Instead, internal and already existing mechanisms for decision-making and debate were favored. In fact, local cultural protocols for internally circulating and reproducing materials and knowledge were the inspiration for the eventual creation of the licenses and labels as modes of dealing with externally circulating materials. In this sense the TK Licenses and Labels work to extend sets of *internal* “best practices,” cultural norms and responsible behavior to those *outside* of the local group.

The first iteration of the TK Licenses and Labels was born within the Mukurtu CMS digital archive and content management software (www.mukurtu.org). First launched as free and open source software in August 2012, Mukurtu began as a standalone, browser-based digital archive for the Warumungu Aboriginal community in Tennant Creek, NT Australia (Christen 2008, 2012). Mukurtu CMS is first and foremost a social system—that is, Mukurtu aims not to just be a piece of software, but a tool that facilitates multiple types of relationships of trust; trust that is built around respecting the ethical and normative systems that already exist within Indigenous communities for the circulation and reuse of cultural materials and their associated sets of knowledge. Mukurtu means “dilly bag” in Warumungu. In the past, elders would keep sacred materials in dilly bags and when someone in the community wanted to access the materials they had to approach the elder and enter into a relationship—they needed to learn the appropriate knowledge surrounding the materials and be responsible enough to be trusted with the knowledge and the contents. Mukurtu was chosen by Warumungu elders as the name for the stand alone browser-based digital archive we built because, like the dilly bag, they wanted the

archive to be a “safe keeping place” that fostered relationships and kept knowledge circulating in proper ways (Christen 2008, 2009, 2011, 2012).

Mukurtu CMS was not about creating digital locks for materials, but instead, about respecting and representing the range and types of relationships people have with digital materials. Part of this work was to give Indigenous communities a way to circulate their materials using their pre-existing cultural and ethical systems both internally and externally. Internally—to the communities who use the software—the Mukurtu platform uses community-created and flexible “cultural protocols” to define the granular levels of access that determine the movement of material within the archive and between community members (<http://www.youtube.com/user/mukurtu>). Yet how to manage materials as they circulated externally was a much more difficult question to resolve.

Once material is “loose” online it becomes more difficult to control. Correspondingly it is also very difficult to advise people who encounter this material online how to use it properly and respectfully. A test set of 12 TK licenses were piloted in the first two instances of Mukurtu. Garnering feedback from communities around the world and in conversation with legal experts, we were able to redefine the distinct needs that both license and labels working together could address. Thus, the TK Licenses and Labels aim to answer the grassroots calls of individuals and communities who want to engage with a *range of strategies* to manage and maintain their cultural materials as they move out of their own communities, social systems, and cultural protocol-based ethical systems.

TK Licenses and Labels: A Grassroots Effort

Discussions about the problems that Indigenous peoples and communities have with traditional intellectual property law are not new. While the discussions have increased, and international negotiations have made significant headway, there have been limited practical interventions at an international or domestic level that provide meaningful alternatives or relief to specific problems that are being experienced by Indigenous peoples in relation to the protection of their knowledge systems. TK Licenses and Labels are a strategic solution to a very specific issue: the management of already existing and circulating digital and analog material such as photographs, sound-recordings, films and manuscripts that embody and/or represent traditional Indigenous knowledge, cultures and practices.⁴

These TK Licenses and Labels offer a set of new options for addressing issues of ownership, access, and control of traditional cultural expressions documented and recorded by non-Indigenous peoples and researchers that now reside in numerous cultural institutions worldwide. This is a key point: the Licenses and Labels are only designed for knowledge that has either already been made into a tangible form through recording and documenting, or that will be recorded and documented in the future. This initiative does not intend to create a legal framework for knowledges that are unrecorded or not ever to be documented.

While cultural institutions house much documented Indigenous material as artifacts of colonial rule, many working in these institutions see their role shifting away from ownership to

stewardship (see Hennessey et al. and Rowley, *both this volume*) where Indigenous, local, and traditional communities share in the care and long-term preservation of their cultural materials. While the TK Licenses cannot be applied to materials in the public domain or materials already protected through copyright, the TK Labels are specifically designed for these kinds of materials—to help make institutions and future non-Indigenous users aware of the local values and appropriate uses that remain deeply embedded within these materials, even if they have been outside the communities for generations. For this is no “ordinary” material. It is material that continues to be shaped by, and understood within, the cultural and local contexts where people maintain the critical connection to these materials. Further, acknowledging the epistemic violence in the taking and the making of a significant amount of these materials, a violence that also resulted in the loss of Indigenous control over use and access, within the framework of the TK Licenses, institutions and/or individuals who continue to hold the copyright in this material can choose to abandon their copyright and transfer it to the source community (see Christen’s Warumungu example below). This is an option that acknowledges that for some institutions and individuals, they should never have been the “owners” and the decision-makers for this material in the first place.

One of the challenges for the TK Licenses and Labels has been to address the historical legacies of copyright exclusion alongside the increasing contemporary desires for legal possibilities that reflect current Indigenous realities. Certainly in the present moment, the cultural material with legacies like non-Indigenous copyright ownership, works with expired copyright, works in the public domain, and orphan works constitutes about 85-90 percent of Indigenous documented cultural material. It is within this complex of works that the TK Labels will be predominately in operation. But this initiative is also designed for the increasing context of Indigenous made, authored, and owned cultural materials. For instance, Indigenous activists, scholars and researchers, in collaboration with other scholars and technology experts, have been creating community-based documentation and recording projects. These projects deliberately position Indigenous communities themselves as the owners and custodians of the material that is being created and thus the central decision makers for controlling and disseminating cultural material and cultural knowledge (see also Hennessey et al. *this issue*). The site-specific digital archives that are also necessarily being developed to store and manage this material are working to embody culturally specific forms of classifications and organization. Increasingly, important questions about how to provide regulated and culturally specific access to this material to persons from outside the community are being raised. Thus this initiative also offers options for the enhanced management of material increasingly being made by Indigenous peoples and communities for community-based archival projects, for cultural heritage preservation purposes, for artistic purposes, and for projects where Indigenous communities maintain a leading role in determining what cultural traditions and practices can be shared with multiple audiences outside the community. The TK Licenses are especially designed for these shifting practices.

For many Indigenous communities, materials (photographs, sound recordings, films, videos, and manuscripts in analog and digital form) that contain cultural information or representations of cultural practices need to be managed according to alternative sets of rules to those provided by copyright and Creative Commons license models. These alternate rules derive from the specificity of the contexts from which such materials derive and reflect cultural conditions of circulation and use particular to the materialized knowledge. For instance, in some societies,

some expressions are managed under rules regulating access according to gender, initiation and/or the secret nature of the material, others have limited duration for circulation and/or should only be seen or heard by specific clan groups—the sets of protocols embodied in local ways of life are endless and dynamic across cultures and specific types of material. The TK Licenses and Labels will provide legal license and non-legal educative label options for the appropriate management of Indigenous cultural knowledge and traditional cultural expressions. Under this framework, and provided through the Local Contexts website, an educational toolbox will be created to help both Indigenous and non-Indigenous people understand the legal and cultural parameters governing control, access, and use this kind of material. That is, we do not feel it will be enough for us to point people down a path of generating TK Licenses and Labels without key educational materials and a community dialogue concerning not just the legal issues, but also and importantly, the social implications and the possible or probable effects of such choices. The site provides legal information and at the same time, we hope it demystifies the process and precepts of much intellectual property law and discourse. Local Contexts provides a knowledge base for the diverse users of the site with the aim that it also empowers those using the site to add their own knowledge and experiences of the TK Licenses and Labels. As a result, this platform begins the important task of also creating a repository of best practices and community interactions in the management of valuable Indigenous knowledge resources.

As an informative web-based platform, Local Contexts fulfills the need for both legal and educational materials and pairings for Indigenous cultural heritage materials. Local Contexts acts as an umbrella site offering four new license options for Indigenous creators, custodians, and beneficiaries to manage their community-owned and generated cultural content with third-parties and external-community users. Unlike other current licensing models, the TK Licenses enable a community representative, a family, clan or language group or multiple communities who might share responsibility for material, to choose options in order to develop their specific license. Options include the acknowledgement or attribution of the source community or communities with the work; non-commercial-use of cultural materials; commercial-use of community owned material, and a specific option for outreach that would enable works to be used in educational and other learning and sharing contexts only. In general the TK Licenses incorporate several key concerns for Indigenous peoples that have been missing from copyright and Creative Commons models. These include attribution of the source community alongside that of the copyright owner; direct negotiation over the integrity of the work when used in a commercial context; and, the negotiation over reciprocal benefits from use within educational contexts. The site will allow users to generate licenses and labels from various combinable options and they will receive both a URL and the legal license once they have completed the workflow.

Similar to Creative Commons, Local Contexts provides these licenses that can only be used and applied by (or in agreement with) the original holder of the copyright. For instance, when a member of an Indigenous community takes photographs of a community event, he becomes the holder of the copyright in the images. He may decide to put these images on his community website and because he is automatically recognized as the copyright holder he may wish to transfer his individual copyright to the community itself since the photographs reflect community activities and knowledge.⁵ Working within the parameters for using the TK Licenses and Labels set by the appropriate community cultural authority, he may choose the TK License “Community Attribution” and “Commercial” (A+C). For an external user who can access the website and

finds that she would like to use those images in a commercial way, the commercial license enables this kind of use as long as the community itself continues to be attributed in the new commercial work and that the external user of the images directly negotiates and enters into an agreement about the intended use and benefit to be returned to the community. This negotiation is in order to ascertain that the commercial use will not involve derogatory or culturally offensive treatment.

In another example, an Indigenous individual, on behalf of her community, makes a new recording of a ceremony and places that recording in the public-access part of the community's digital archive. As the material is uploaded, and based on a decision already made within the community, an Outreach license is selected and added to the work. A professor at a university accesses this public part of the archive where this recording is held and decides to use it in her undergraduate general education class of 200 students. Through the Outreach License (TK O), she is permitted to use this material but must also enter into a conversation with the community about what kind of reciprocal benefits she could provide—including access to relevant and interesting resources for the community, access to interns to help work in the community on specific projects and so forth. This license is not necessarily about generating revenue, but rather about facilitating the fair and equitable exchange of educational and personnel resources that can be so difficult for Indigenous communities to access. This license also recognizes the significant amount of Indigenous materials that are utilized in educational and other learning contexts often without permission or proper acknowledgement. The aim of the Outreach License is to help establish a means for sharing with reasonable and respectful expectations of exchange in knowledge and resources.

On the Local Contexts web pages for each license, there is information provided for both those who maintain the rights to materials and for those seeking to use the materials. For instance, using the Outreach License mentioned above, there is a clear explanation of the expectations for *both* those creating the License and those seeking to use material that has been licensed in this way:

TK Holder: This license should be used when you would only like your cultural material used in educational outreach contexts. Outreach contexts can include schools, universities, libraries, archives, museums, online forums and small learning groups. Depending on what kind of context and the possibilities for increased circulation of this material you may want to negotiate with the institution you are planning outreach within for fair and equitable reciprocal exchange. This exchange might include access to educational resources that your community has difficulty accessing under other circumstances.

TK User: Access to this work is designated as outreach. You may only use this work for outreach and learning purposes in contexts including schools, universities, libraries, archives, museums, online forums and small learning groups. Depending on what kind of context you are in and the possibilities for increased circulation of this material you are asked to negotiate with the Licensor to develop a means for fair and equitable reciprocal exchange for the use of this material. This exchange might include access to educational resources that are difficult to access under normal circumstances (Figure 1).



Figure 1. The icon for the TK Outreach License.

By describing and defining the rights and expectations of both the TK holders and users, we hope to highlight the reciprocal nature of any and all uses of these materials. That is, we are aiming to promote a conversation that extends beyond the creation of a license in order to help foster meaningful dialogue and negotiations between various stakeholders who have historically not been in dialogue.⁶ Where IP laws and regulations can be very complicated and confusing, we aim for the process of generating the TK Licenses and Labels to be both straightforward and sensible.

Putting the “Fair” Back in “Fair Use/Fair Dealing”

Importantly, for a large portion of materials that are already in the public domain or are owned by third parties, the TK Label option takes the notion of *fair use* (or *fair dealing* in common law jurisdictions) and extends it to illustrate culturally-specific conditions of access and use for certain kinds of cultural materials that contain gender-restrictions on access or contain sacred/secret content. Fair-use is embedded within copyright statutes as an exception/limitation to the otherwise exclusive rights bestowed upon a copyright holder. The fair-use doctrine permits certain uses of copyright works without the permission of the copyright holder. Like most exceptions and limitations within copyright, what constitutes “fair” has been developed over time and in response to very particular issues and demands. Commenting on early 19th-century developments of the term, Kathy Bowrey explains how:

In the nineteenth century the notion of fair-use had a much larger role to play,

leading to a relative consideration of the original efforts and corresponding markets of the plaintiff and defendant. Further..., consideration of the good served by our laws and, co-relatively, determining the wrong of “piracy,” involved an assessment of benefit to the community in conferring protection. [2008:3]

In early conceptualizations of this concept the benefit to the community was a key factor in determining what constituted fair, not only what the disadvantage or loss to the copyright holder was.

In the United States, there are several factors that have been developed to help determine fair-use. The development of these factors and the weight that either of them has in any given case speaks to the challenge for finding consistency within this concept. These factors include: the purpose of the copying, the nature of the copied work, the amount of copying, and the effect of the copying upon the value of the copyright work. In *Reclaiming Fair Use*, Patricia Aufderheide and Peter Jaszi explain how advocates for copyright reform initially constructed “fair use” as too vague and complicated a subject to be effectively mobilized for their purposes. In doing so they lost ground on a key area for strategic intervention in the copyright regime and one that could lead to an expansion of possible acceptable uses of copyright works. Aufderheide and Jaszi argue that fair use offers itself as an important component for ameliorating the harsh exclusions of copyright. It is precisely because of the flexibility within the concept that allows for multiple interpretations of what constitutes fair use to be developed. Further, they suggest that fair use must, by definition, retain this flexibility as social and cultural norms for what constitutes “fair” change over time and are often made in response to differently situated parties. It is up to communities themselves to determine what is fair and what is not (Aufderheide and Jaszi 2011).

The TK Labels expressly draw upon the possibilities that Aufderheide and Jaszi note within their analysis of fair use. The TK Labels situate community-determined interpretations of what constitutes “fair” and equitable use at their core. While they are not legally enforceable, they will go a long way in informing a misinformed public about what, for Indigenous peoples and communities, constitutes the *fair and equitable* use of their traditional cultural knowledge and cultural heritage materials. The TK Labels also target key types of work: the extensive collections of traditional cultural materials that are found in the public domain and in the special legal class known as orphan works. The TK Labels function to provide additional or missing information and in doing so help users make more informed decisions about the best and most appropriate way of using this material.

For instance, if a non-Indigenous musician comes across a public domain sound-recording at the Smithsonian Folkways website that has the Community Use Only Men-Restricted Label (TK CO+MR) explaining that the content has been identified as containing men’s secret ceremonial material, that musician is actually being given more information that will help her make a fair and equitable as well as ethical and culturally appropriate decision about the best way of using that material. With the TK Label, she is given more information about the cultural conditions governing use of the material and is therefore more likely to respect the conditions of access and use requested of her as a potential user. Thus the Label works to help prevent or limit misuse and derogatory treatment of Indigenous, traditional, and local cultural materials.

A TK Label can be generated and added to a work by Indigenous individuals, family, clans, and communities independently. There is also an option for institutions and researchers working closely with communities to add an appropriate Label (Figure 2). Involving institutions that are working with communities recognizes that much of this kind of public domain material actually resides in cultural institutions. When an institution or researcher is working to utilize a TK Label, they are asked to work in collaboration and dialogue with communities themselves to develop the most appropriate labeling for the works. Since the Labels seek to provide a space where missing information including the cultural conditions for use and access and this information can be added, and since Indigenous communities are traditionally the ones who have this missing information, the Labels are designed in such a way that discourages institutions only or researchers only adding them. Since so many institutions are beginning to work more closely with communities, the TK Labels also reflect the collaborative environments developing between institutions and communities as part of collaboration, repatriation, and digital return agendas. TK Labels, by definition and out of necessity, require mutual dialogue and conversation in order to develop the most appropriate labeling options.

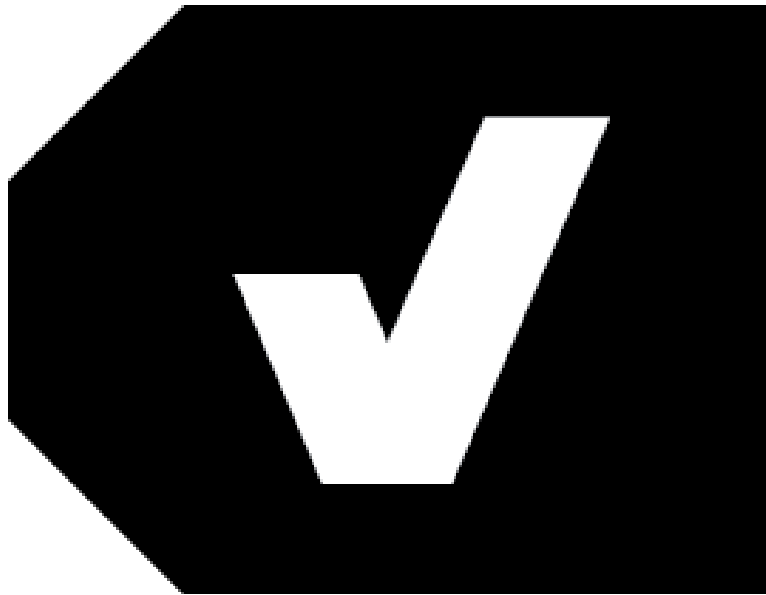


Figure 2. An example of the TK Verified Label.

The TK Labels are not legally binding and therefore have no basis in any formal law. Instead, they serve a purposefully educative function making their designation as “fair use” more than an empty promise. As voluntary guidelines they are designed to facilitate a new set of social norms concerning the use of cultural knowledge and cultural materials. The TK Labels are able to convey what it is that is fair and equitable from an Indigenous or local community perspective, rather than assuming that this is generally known. In addition to the culturally specific TK Label choices, we added a Traditional Knowledge Verified Label (TK V) in order to signal and provide positive reinforcement of social norms. There is a need for non-Indigenous peoples to know when they have gotten respect and fairness (in relation to displaying and representing Indigenous

cultural materials) right. The TK V Label allows Indigenous peoples and/or communities to label something in use in the public domain or by a third party with the digital equivalent of a gold star: “This label affirms that appropriate conditions for access and use are in place and that whoever has made this material accessible has made accommodations for cultural protocols associated with the knowledge.” The TK V Label shows good practice and good faith and, if this changes, the TK V label can be revoked and removed from the work. Far from a litigious or adversarial stance, the TK Licenses and Labels promote an equitable, and necessarily proactive, dialogue for all uses of Indigenous cultural materials.

Local Contexts: Because the “s” Matters

We chose the name Local Contexts for the umbrella site that houses the TK Licenses and Labels because, in every instance, the creation of a TK License or Label is dependent on the local contexts that will drive the choices that communities make. The past, present, and future all influence how decisions to define and attribute cultural materials are made. Local Contexts provides a platform for dialogue as well as a set of educational tools to address the mismatch between Western intellectual property systems and the varied Indigenous concerns over the circulation of, access to, and control over their traditional knowledge in its many forms. The TK Licenses and Labels encourage the creation of dialogue between Indigenous peoples and external users of cultural knowledge and traditional cultural expressions. For this system to work, the onus is placed on the licensor to provide accurate information for correct attribution and acknowledgement details and to maintain current contact information for someone wishing to license the material. These conditions must be fulfilled before the license itself can be generated and attached to the copyright material as part of the processes of “generating a license” currently under development.

In the first development stage for the website, the initiative’s priorities include the ability for users to:

1. Access TK Licenses or Labels in human-readable and legal-readable text;
2. Access tutorials (video/audio) about the use of TK Licenses and Labels (what they do and don’t cover);
3. Access clear documentation about the use of TK Licenses and Labels for outreach purposes;
4. Share and exchange information about how TK Licenses and Labels have been used to generate a set of best practices and track how TK Licenses and Labels are being used internationally;
5. Access information about the potential interoperability of the licenses—specifically how the TK Licenses work with and in relation to standard copyright and Creative Commons licenses.

In keeping with the principles of self-determination embodied within the *Declaration on the Rights of Indigenous Peoples* (United Nations 2008) the platform leaves decisions about who can create the license up to the governing structure of each Indigenous and local community.⁷

In addition, we recognize that historical contact situations, long-term national relations, and other factors create the necessity to deal with materials that has multiple stakeholders. We currently have options that enable multi-community licensing and labeling. This recognizes that there is some material where multiple communities have responsibilities of custodianship and/or ownership and that no singular community has explicit control over the material. It indicates that the rights and responsibilities for use are spread across multiple communities through already existing community protocols and ongoing cultural relationships.

To address varied ownership, the site will provide steps for non-Indigenous owners of content to reassign their copyright to Indigenous communities (variously and multiply defined). Importantly, the TK Labels can be generated by Indigenous users in collaboration with cultural institutions and/or specific researchers in order to clearly mark the proper uses for and circulation routes of the work in question. Christen's collaborative research provides an example.

I am a researcher and I have worked with the Warumungu Aboriginal community in Central Australia for 15 years. Over that time I have accumulated: dozens of digital video tapes recording songs, dances, language, social gatherings, and the like; thousands of digital photos of dozens of community members including people who have since passed away; several VHS and cassette tapes that contain valuable language materials, oral histories and women's songs and dances. These are not digitized; and finally, publications including a book and several scholarly articles that are in PDF form. I would like to host some of this material on my own website and also give back digital copies to the community for their own use. I have permissions from all of the individual community members I worked with for the recording of the original material, but do not or did not collect any specific consent for derivative uses of the materials. I have archived the originals of most of this material at the Australian Institute for Aboriginal and Torres Strait Islander Studies archive under a donor agreement that vests permission with the community members who are recorded on the tapes or appear in the photos and videos.

This is not a unique scenario. Mine is a quite common predicament for many anthropologists around the world, past, present, and future. Trying to ethically return digital materials requires more than just burning the materials to a CD or DVD or sending the community/ies in question a hard drive. Following the logic on the Local Contexts website to generate a license, I would first need to assign my copyright in the new digital materials to Warumungu community. That is, I consent to transfer my rights in the materials to the community, who is and really should be recognized as the legitimate authority.

This transfer of copyright is a key point in relation to the shifting terrain between scholars (or other outsiders) and the communities in which work has or is taking place. This step highlights the release of my copyright. This could be implemented by scholars whose materials are decades old or months old; in either case, by choosing to assign my copyright to the community (or to specific community members) with whom I have worked marks my resistance to ongoing colonial privileges that the current copyright system perpetuates when it automatically vests ownership with me as the primary rights holder. It also works to institute a set of best practices where scholars recognize that their collection or documentation of knowledge is made possible by a range of acts of generosity and sharing that should not culminate with the singular authorship/ownership of that material. At the very least, this step *may* incite dialogue and

discussion between community members and researchers about the on-going use of the materials they create and collect. In fact, many Indigenous communities already require researchers to sign agreements about the use and ownership of the materials they produce during their research. Thus, the TK License generator foregrounds the need to maintain on-going relations with communities and, at the same time, it gives researchers a way to meaningfully give back to the communities with whom they collaborate. Given the uneven and often uneasy past relationships between Indigenous communities and outsiders, we hope that this tool provides a reason for, and a framework towards, more dialogue and meaningful negotiation about the uses of materials for multiple audiences.

In order to facilitate the uptake of the TK Licenses and Labels, we are working directly with several ongoing projects as well as with each and every community currently using Mukurtu CMS for their content management needs. Mukurtu CMS provides direct access to the TK Licenses and Labels through the platform's interface. This allows users to quickly and easily assign a license and/or labels to their content and both the item and collection level. Communities who have their own content management system in use for their digital archive materials will eventually be able to connect to the Local Contexts website, follow the workflow and determine what type of licenses or labels would be appropriate for their materials, generate the license/label, and attach it to the material in question.

The [workflow for the site](#) follows an easy to use set of questions and answers that guide users to make the most informed choice for their materials. Prior to choosing a TK License or Label users are given a set of preview materials answering basic questions including: "what is copyright?" and "what is the public domain?" as well as more site specific questions such as "what is a license?" "what is a label?," and then also more leading questions to help define the use, "when might you want to use a label?" or "what kind of material is covered by a license?" These preview questions aim to help users understand the broader context and potential impact of their decisions with licensing or labeling their materials. Following these, the heart of the site is based on the choice of a license or label and the set of questions that directs users once again to define their explicit needs and make the best choice for their material. The site will eventually provide, through its community feedback forum, a way for institutions and Indigenous peoples and communities to interact and share different ideas: for example how to manage their jointly held or jointly stewarded materials or how to establish an IP decision making body or cultural authority to help make community-based decisions about the protection of materials and the use of the TK Licenses and Labels.

Digital Returns: Promises and Possibilities

This legal and educative intervention has developed out of our commitment to find innovative ways for altering a system that historically and contemporarily marginalizes Indigenous peoples and consequently a diverse range of knowledge management strategies. It is a deep irony that while the dominant narrative for intellectual property law is that it functions to foster innovation, there has been very limited innovation within this body of law—especially innovation that recognizes the limits of this concept and that really, cultural innovation takes multiple forms and is not solely or only related to capital accumulation. Having access to your own histories,

ceremonies, laws, and cultural practices contributes to the possibilities of cultural innovation, or cultural life, in a myriad of ways. When these materials are taken from communities, possessed by others, and used in contrary ways, cultural innovation and cultural life face serious challenges.

The digital return of Indigenous cultural material is a critical step, even if somewhat overdue, for maintaining and reinforcing cultural connections to place and identity through and with time. The technological changes and challenges over the last 15 years have brought with them legal, social, and cultural change on a global scale. With increased dialogue and a willingness to bend technology to the needs of others, partnerships across and between Indigenous peoples and institutions have culminated in a more sustained response to Indigenous requests for access to their cultural materials. But there is more thinking here that needs to be done. This relates directly to pushing beyond access to include measures of control over these materials. Where appropriate, Indigenous peoples should be recognized as the rightful authorities over their cultural materials, even though the laws of copyright have acted as an effective tool of dispossession. Moving between access and control in these ways requires a rethinking of this paradigm of colonial authority and its postcolonial legal and social forms and legacies. This is precisely what the TK Licenses and Labels are working to achieve. For the first time, Indigenous and traditional communities will have a range of legal *and* less-legal, more educative, options, that have been designed with Indigenous needs and histories at the forefront.

To move from the constraints of current legal thinking about ownership and authorship of digital cultural materials requires accounting for the past, as well as understanding the structural frameworks that work against the fair and equitable treatment of historically marginalized communities. The TK Licenses and Labels are but one intervention within a field that must include legal, non-legal, educational, and social points of relation for any long-term, meaningful shift in the co-curation, collection, preservation, and exchange of digital materials and knowledge to flourish in respectful and ethical ways. The pressing question of how Indigenous peoples can regain control of their past heritage in its current digital format must be answered not with blunt instruments and legal discourse, but through the shared commitments of multiple stakeholders, as we saw in the Digital Return workshop, where institutions, communities, scholars, activists, and technicians came together to work towards commonly held goals of ethical and respectful sharing and exchange.

Notes

1. Patricia Frank Narrurlu is our source for the suggestion to “chuck a copyright on it.” She shared this suggestion with Christen sometime in 2005. See Christen (2006).

2. Initial funding for the *TK License and Label Platform* comes from the Traditional Knowledge Division, World Intellectual Property Organization (WIPO) and the Intellectual Property Issues in Cultural Heritage: Theory, Practice, Policy, Ethics (IPinCH) project, funded through the Canadian Major Collaborative Research Initiative (MCRI) program (Grant 412-2007-1007) by the Social Science and Humanities Research Council (SSHRC), Ottawa.

3. The educational website is live as of April 2, 2013. If you are, or your organization is, interested in testing the TK Licenses and Labels, please contact Jane Anderson or Kim Christen at info@localcontexts.org.

4. The platform—for now—addresses digital cultural materials only.

5. Photographs constitute a “literary and artistic work” and are automatically protected in every jurisdiction. The owner of the copyright is the creator/maker of the photograph. This is an international standard as per the two international copyright treaties: the Berne Convention 1886 [amended 1979] (with 167 contracting Member State parties) and the Universal Copyright Convention 1952 (with 100 contracting Member State parties).

6. In utilizing licenses as a prompt for dialogue and negotiation between various stakeholders we break from the logic of copyright and, to some extent, Creative Commons advocacy. In this sense we are not trying to streamline and “harmonize” the terms of access and use of traditional knowledge. Instead, we are seeking to introduce some productive “friction” into the system wherein non-local users of Indigenous knowledge and cultural heritage are asked to slow down, to dialogue, and to consider what fairness and equitable use from an Indigenous perspective constitutes. This is a significant contrast to open/free culture movements and intentionally encourages reflection upon these movements as outcomes of culturally specific knowledge production systems. The TK Licenses and Labels is a framework built to generate respectful and responsible knowledge-sharing practices that reinvigorates and prioritizes local contextual practices.

7. Local Contexts is not designed as a site to handle disputes. This is because disagreements or disputes are best dealt with at the level of the local community or from within the local project itself. We hope that best practices will be built out through dialogue at a community level, especially with respect to differing opinions of use and to acknowledging perspectives from diasporic communities. Each family, clan, or community will have different processes and frameworks for decision-making. Some communities are in the process of establishing cultural authorities to help make decisions about a range of IP issues facing their community. Depending on history and context, these decision-making processes will also accommodate perspectives from community members who reside in different regions. In order to help facilitate decision-making frameworks, we have included a decision-making forum on the Local Contexts site that offers a space where communities can share with each other the different kinds of cultural authorities and frameworks that are being developed to deal with new legal complexities such as intellectual property management of cultural resources.

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