

**LAW, EVIDENCE AND ELECTRONIC RECORDS:
A STRATEGIC PERSPECTIVE FROM THE GLOBAL PERIPHERY***

Verne Harris

National Archives of South Africa

INTRODUCTION

A South African story

The degree to which the legal status of records – in particular the tests of evidence applied to records by courts of law – takes us, simultaneously, to the heart of archival theory and to the nexus between record-keeping and societal process, was brought home to me for the first time early in 1998 when I participated in a workshop for researchers of South Africa's Commission for the Restitution of Land Rights.¹ The researchers spoke of the surprisingly dense official record of land dispossession kept by the apartheid state and its predecessors,² and of the frequently conflicting accounts offered by that record on the one hand, and by the oral record of dispossessed communities on the other. They were concerned that formal tests of reliability, validity and authenticity would privilege the official accounts, especially in instances where the oral record had been passed from one generation to another. It was concerns like this which led the architects of South Africa's Land Claims Court to allow it to admit hearsay oral evidence.³ The demands of justice, in other words, led to a "bending" of the law. Of course, underpinning the researchers' concerns were a constellation of questions profoundly significant for archivists (and everyone with a role or interest in record-keeping). What is the relationship between "memory" and "archive", between "the event" and "the record", between "justice" and "the law"? Is the notion of "evidence" pivotal to the concept of "record"? In what sense is the "oral record" a "record"? To what extent does the "form" of a record define its "recordness"? Can we meaningfully distinguish between "form" and "content"? When does a "record" *become* a "record"?⁴

Defining a challenge

The "form" of record which is the subject of this paper's enquiry is the electronic record.⁵ Much has been written on this form's impact on how we conceptualise the record (and the archive). More has been written on how it is reshaping societal processes, even transforming societies. There is also a substantial literature on the archival and legal challenges posed by it. Initially, my brief with this paper was to add to the literature a comparative study of the legal

status of electronic records internationally. Preliminary investigation revealed a task of daunting complexity. Archival mandates differ from country to country. As do laws of evidence. Even within countries, separate legal systems can co-exist. And the terrain is extremely dynamic. Many countries are in the process of adapting their laws of evidence. All countries are faced by rapidly developing electronic technologies – some are introducing appropriate record-keeping legislation in response. Merely securing a reasonable understanding of the shifting terrain in my own country proved to be a challenge. And then there is the problem of information-gathering, particularly from countries on the “global periphery”.⁶ The 1994/5 survey of electronic records programmes by the ICA’s Committee on Electronic Records, for instance, failed to get responses from almost half the institutions approached by them, and some country responses evinced fundamental misunderstandings of the terrain.⁷ The problem, let me hasten to add, is not restricted to countries on the periphery. In my preliminary research for this paper, I was informed by a senior member of a national archives that Europe had met the challenge of ensuring the legal status of electronic records with its Directive on Data Protection! Relatively few national archives internationally have functional electronic records programmes, and equally few have staff with expertise on their countries’ laws of evidence. A nightmare scenario for any researcher in this conjunction of terrains.

“Global periphery”

Five years ago John McDonald could legitimately describe the electronic records terrain as a “wild frontier”.⁸ Today, I think it would be fair to say, we are beginning to see the gun-toting wild ones being brought under the rule of law – gradually, unevenly – in countries of the global hub. Not so on the periphery. As Piers Cain and Anne Thurston have warned:

“Most writers focus on the importance of information technology in providing solutions to the problem of information poverty. Yet, developing countries are entering the ‘information age’ from a starting point of extreme vulnerability. Not only do they face huge obstacles in affording and obtaining access to the new technologies, but in many cases their existing paper record systems – the foundation of their current national information infrastructures – are in a

very poor state or even collapsed. Automating a chaotic situation is likely to create yet more chaos.”⁹

The 1994/5 ICA survey of electronic records programmes mentioned above identified 65% of the public archival institutions which responded as neither keeping nor managing electronic records.¹⁰ If one assumes that the great majority of the institutions which did not respond were without electronic records programmes, then a far higher percentage would better reflect the international profile. Very few archival institutions on the periphery have electronic records programmes. In the eastern and southern Africa ICA region, for instance, only the national archives in South Africa has one – and it is very much in its formative stage.

This is not to say that information technology is rare in the global periphery. On the contrary, many countries of the periphery are investing heavily in it under the aegis of World Bank, United Nations and other development programmes. However, as Cain and Thurston have pointed out, the “leapfrog” strategy of these programmes pays far too little attention to putting in place the basic building blocks which will ensure sustainability.¹¹ A greater emphasis on training,¹² the provision of incentives to reduce staff turnover, the development of integrated information and records systems, a commitment to record-keeping rather than super-highway navigation, and the fostering of appropriate management processes, all are essential elements. Their absence condemns the periphery to a continuing and resilient “wild frontier”. Governments and corporations are generating “records” without respect for record-keeping requirements. Electronic memory resources are being lost in huge quantities.¹³ Public archival institutions are paralysed. And the tests of evidence applied by courts of law are largely ignored.

Of course, broader social crises in the periphery shift this crisis to a relatively low position on the list of priorities. Even within the record-keeping terrain, other challenges loom larger. In Bosnia, Chechnya, Kosovo, Serbia, South Africa and many other countries, records/archives have been destroyed in violent conflicts, either as “collateral damage” or through the deliberate actions of participants. Professional colleagues have died or been displaced in these conflicts. Other colleagues, especially from African countries, are being lost to AIDS. For archivists

living these tragedies, calls to find energy for the legal status of electronic records possess an element of the obscene.

A strategic perspective

As a South African I cannot but speak from the context of realities in the periphery. Nor can I ignore the imperative to connect cutting edge developments in the hub to those realities. In my view too many ICA forums and programmes decline such connecting. Indeed, it could be argued that for most of its history the ICA has facilitated engagement between countries of the global hub while offering the periphery token space within the organisation, and hand-outs from the hub. We need a firm shift towards an ethic of partnership through which solutions devised for the hub are articulated with realities in the periphery, and are opened to other ways of knowing.

With this paper, then, my intention is to move beyond a survey of significant developments and trends internationally,¹⁴ and to explore what I believe to be the key issues from a strategic perspective. I want, specifically, to position the exploration in what could be called the boundary realms, those areas of tension (conceptually and otherwise) between hub and periphery, the archival profession and other professions, theory and practice, the purveyors of ideas and the technocrats. At the same time, in what could be a contradictory movement, I want to resist boundary demarcation by recognising the breaches (always already) in all hard boundaries. For instance, the global economy gathers the periphery into the hub. And the hub has peripheries – decaying inner cities, marginalised minorities, underclasses, all under-represented in or excluded from archives – within itself. Another instance can be found in archival discourse, where “schools of thought” and proponents of paradigms struggle for hegemony. So often these struggles are about labels rather than substance in epistemological space. Such labels fail utterly – structurally – to work when applied to someone like Terry Cook, variously labelled but whose thinking (and broader professional endeavours) spans the little label boundaries.

A Bearman story

Terry Cook is what I would call a visionary. (A special kind of visionary, one who can both dream and weave dreaming into the tapestry of professional work). (And so I become a labeller, for, of course, no one can dispense with labels altogether.¹⁵) Archival discourse has been blessed with several visionaries during the last two decades. Another is David Bearman, whose interventions have been seminal to the “record-keeping paradigm”, conceptualisation of “recordness” (especially in the electronic environment), and post-custodial awareness.¹⁶ He is frequently misunderstood in the archival profession, with many overlooking the rich “philosophical” layering beneath his pragmatism and strategic vision. During the preliminary research for this paper, I e-mailed him with a request for his view on the key issues in relation to the legal status of electronic records. His response surprised me. (I don’t always understand him.) The key question, according to him, is “do electronic records tell the truth?” A question which connected powerfully for me with the “South African story” I used to begin this paper. *How* do records tell the truth? What is the relationship between “memory” and “the record”, between “the event” and “memory”? Does the “form” of a record – its mode of telling – shape these relationships?

What Bearman was telling me, I believe, is that we must be wary of approaches to this terrain which focus exclusively on the policy, management and technical challenges. Ultimately the business of courts is to determine the truth of a matter. And in weighing records presented to them, they must judge the impact on truth-telling (and the shaping of truth by its telling) of the actions of record-creators and keepers. Not that we (we record-creators and record-keepers, including we archivists) should concede authority in this terrain to the courts. Nor to the law. Both, ultimately, are subject to the call for justice, the call of a justice which is always coming. A call which we must heed, and which must shape our actions. A call which demands that we ask ourselves what truths we are telling by our actions, and (to engage what teases behind Bearman’s words) how these truths connect to “the truth”.

ARCHIVAL LAW AND MANDATES

Defining a “record”

I step into what I have called a conjunction of terrains – the legal status of electronic records internationally – with what are probably the obvious questions for archivists: do electronic records fall within the ambit of archival law, and how far does that ambit reach? When electronic records systems first came into use it became clear that the archives laws of most countries either excluded the records generated by them, or failed to include them unambiguously. Definitions of “record” in these laws tended to assume or specify physical properties and media, thus missing the virtual spaces which electronic records “inhabit”. From the 1970s archival laws were amended or re-written to address this reality.¹⁷ Most countries have been through this process, but the work is by no means complete.¹⁸

The reach of archival mandates

Of course, bringing electronic records firmly within the ambit of archival law is of little use if the archival authority enjoys jurisdiction over these records only when they enter the archival domain. As the ICA Committee on Electronic Records argued (using both imprecise and arcane terminology) in 1997:

“In the field of electronic records it is important that archival requirements are addressed during the design of information systems, and that electronic records are carefully controlled throughout their life cycle ... Archives that have no authority over active records will find their options for dealing with electronic records restricted.”¹⁹

This challenge is being addressed by what Chris Hurley has called second generation archival law,²⁰ which stretches the reach of archival jurisdictions into the domain of the record-creator. A good example of such archival law is South Africa’s National Archives Act of 1996, which gives the National Archives regulatory authority over all public records from the moment of their creation. The Act provides a separate definition of “electronic records systems” and accords the National Archives specific powers in relation to their management. Also significant is that the Act unequivocally brings within the National Archives’ jurisdiction those categories of record-creators commonly allowed exclusion – the security establishment, public

services outside formal structures of government, and “privatised” public service agencies.

Relatively few countries, positioned mainly in the global hub, have passed second generation archival law. For those who have, the question remains – does the archival authority have the status in government, the resources and the expertise, required to give effect to such law? Certainly the evidence thus far suggests that South Africa’s National Archives fails on all three counts. Given the realities in countries of the periphery, I have little confidence in the capacity of their archival authorities to achieve success in this area.

A post-custodial scenario

A characteristic (if an absence can be a characteristic) of most archival laws, first and second generation, is a failure to define either the conditions/processes requiring “record-ing” or the generic attributes of a “record”. As I recount later in this paper, a variety of initiatives in a number of countries are addressing this absence through exploration of what constitutes “record-ness”. They are feeding into a growing body of record-keeping laws, standards and guidelines (regulatory and advisory) which address the challenges of “record-ing” and “record-ness”. Archival law, narrowly defined, is not at the cutting edge and is an increasingly small component of broader record-keeping regimes. This is one of many signs of an emerging post-custodial era, which Chris Hurley speculates will be informed by a third generation of archival law.²¹ Here, the boundaries between record-keeping domains dissolve, with all of them being controlled by universal rules.

It takes no great insight to understand that first generation archival law failed to meet the challenges posed by electronic records. (Indeed, it could be argued that for many countries failure is apparent in non-electronic environments as well.) I have argued that in the global periphery second generation archival law appears doomed to failure as well. Hope, I want to suggest, resides in a post-custodial era – if for no other reason than that in such an era the locus of authority will shift away from an increasingly impoverished – in relative if not absolute terms; in material and other terms – archival domain.

A postscript

My focus thus far, for obvious reasons, has been on the public archival domain. Space does not permit a broader enquiry. Suffice it to assert that similar patterns are discernable in the world of record-keeping as a whole. We have seen archival domains gradually extended into the realm of records creation. We have seen the emergence of a records management domain, articulated with processes (and structures) of creation and archiving. But now, powered by the imperatives of electronic record-keeping, we see the dissolving of disciplinary boundaries. Frank McKenna has gone as far as to predict that by 2003 “records professionals” will have been replaced by “knowledge managers”, with a concomitant subsumption of electronic records management systems by more broadly-based knowledge management systems.²²

COURTS AND EVIDENCE*Repeating a disclaimer*

In 1997 the ICA’s Committee on Electronic Records asserted that the value of electronic records as evidence in courts was weak, if they were admitted as evidence at all.²³ As I suggested in the introduction to this paper, generalisations are dangerous, and the Committee’s assertion invites challenge from two directions – we must distinguish between scenarios informing the global periphery and the global hub; and we must take account of significant progress made in the last decade. In the two-pronged challenge which follows, I negotiate a terrain which is complex, diverse and dynamic. I take the risk of having much of what I write outdated by the time it is read.²⁴

Another South African story

South African courts’ evidential requirements are constituted by a complex of law, codified and uncodified. There is a body of common law developed over the years through the principle of precedent. Then there are rules of evidence for each type of court. And finally, there are specific laws with provisions relating to evidence. These laws take precedence in the event of conflict.

As with many other countries,²⁵ South African legal practice is rooted in reliance on oral testimony, with the rule of hearsay underpinning a fundamental wariness with documentary evidence. Evidential requirements attempt to ensure that a document is authentic, and seek assurance that it has not been altered. Three general principles are most significant: the contents of a document may only be proved by production of the original; where the original is not available, the court will generally accept any other evidence of the document if it is satisfied that the original in fact existed and a reasonable explanation for its non-production has been given; and evidence is normally required to satisfy the court of a document's authenticity. It becomes imperative, then, for record-keepers to put in place systems and procedures which promote and protect the authenticity of records in their care. This is especially important when "originals" are not available. Courts must be convinced that copies have been produced in the ordinary course of business and subjected to stringent control mechanisms.

The special challenges posed by the electronic environment were addressed by the 1983 Computer Evidence Act (for the production of records in civil proceedings) and by amendments to the 1977 Criminal Procedure Act. The former defines conditions for the admissibility of "computer print-outs" authenticated by affidavit. In order to assess evidential weight, the court may require supporting oral testimony. Weighting is left to the discretion of the court. Almost twenty years of technological development have left the Act crying out for articulation with new realities.²⁶

Literature on the operation of this legislation is scarce. However, in April 2000 I briefed a gathering of magistrates from around the country on archival and related law. I took the opportunity to question them on their experience of electronic evidence. Both experience and perspective were widely divergent. At one extreme was a magistrate who claimed never to have admitted electronic evidence – in every one of about a dozen cases, the deponent had failed to satisfy the requirements for authentication. (Evidence of the "wild frontier" in electronic record-keeping.) At another extreme was a magistrate who expressed "no problems" with electronic evidence. (She confessed to testing the reliability of an e-mail message produced

in a particular case by doing a few manipulation exercises on e-mails stored on her own PC.)

A Canadian story

Evidential requirements for courts in Canada are defined by precedent and the country's evidence acts (national and provincial).²⁷ Until recently these requirements did not address electronic evidence directly. Two factors were to be considered in admitting and according evidential weight to records: firstly, whether a record was "made in the usual and ordinary course of business"; and secondly, "the circumstances of the making of the record".²⁸

In 1998 the Uniform Law Conference of Canada adopted a Uniform Electronic Evidence Act (UEEA), which *inter alia*: provides for the admissibility of computer-created and computer-produced records; subjects the "best evidence" and "authenticity" rules to a single test when applied to electronic records, namely, "the integrity of the electronic records system"; allows the use of national and industry standards for determining admissibility; and allows the destruction of "paper originals" after they have been adequately copied to "permanent" and "secure" electronic forms.²⁹ While applauding the UEEA overall, Ken Chasse identifies as a weakness its refusal to deal with the hearsay rule because the "distinction between the medium of storage ... does not affect the truth of the contents of records."³⁰ Chasse understands that all "truth" is mediated, and that the "form" of mediation shapes indelibly the "truth".³¹

The Personal Information Protection and Electronic Documents Act (passed in Spring 2000) adds the UEEA to the 1985 Canada Evidence Act. The provinces have been given three years to pass equivalent legislation.³²

Legislation and standards

A number of international initiatives to address the problems posed by electronic evidence can be identified, but most of the progress is being made at national level – almost exclusively by countries of the global hub. A range of strategies and instruments have been deployed. What follows is an international overview of what are arguably the key instruments – legislation and standards.

Two main areas of legislative activity can be identified – evidence law and electronic commerce. Several countries have either passed new evidence laws or have amended existing legislation to accommodate new realities. Developments in Canada and South Africa were outlined above. Australia passed its Evidence Act in 1995. Also in 1995, the state of New South Wales passed a similar act, and the other states are following suit. The United Kingdom passed its Civil Evidence Act in 1995. In the United States, the federal government and most states have adopted uniform laws containing standard provisions for the legal admissibility of records. These have been adapted to accommodate the specific attributes of electronic records.

In terms of electronic commerce, the United Nations Commission on International Trade Law developed a Model Law on Electronic Commerce in 1996. The European Union has approved a Directive on Digital Signatures, which member states are required to give expression to in national legislation. Numerous other countries have either enacted or are considering laws governing electronic commerce.³³

In the standards arena three main areas of activity can be identified: records management systems; evidence for courts; and security. There is a range of International Standards Organisation (ISO) standards relevant to the management of records in electronic environments, most notably ISO 9000. Others include standards for document filing and retrieval (ISO 10166), office document architecture, and SGML (Standard Generalised Markup Language, ISO 8879). The ISO is currently fast-tracking the Australian standard for records management (AS 4390.1 – 1996) to become, in revised form, a new international standard.³⁴ Australia established a Recordkeeping Metadata Standard for Commonwealth Agencies in 1999. In Germany standards for proper record-keeping in federal agencies are defined in the Gemeinsame Geschäftsordnung der Bundesministerien (complemented by the Registraturrichtlinie). In 1997 the United States Department of Defence introduced a Design Criteria Standard for Electronic Records Management Software Applications (DOD 5015.2 – STD). This Standard was formally endorsed in 1998 by the National Archives and Records Administration for application to other federal agencies. In the United Kingdom the British Standards

Institute (BSI) has a standard for Principles of Good Practice for Information Management (PD 0010).

The BSI has introduced three standards relating to electronic records as evidence in courts. BS 7768 addresses the management of optical disk systems (WORM) for the recording of documents that may be required as evidence. PD 0008 is a Code of Practice for Legal Admissibility and Evidential Weight of Information Stored Electronically. PD 0009 is a workbook designed to assist organisations to measure their compliance with PD 0008. Canada has passed a standard for Microfilm and Electronic Images as Documentary Evidence (CAN/CGSB-72.11-93).³⁵ In the United States, the Association for Image and Information Management published performance guidelines for the legality of electronic records as evidence in 1992 (TR 31/1).

The European Union has passed several policy directives setting standards for member states in the area of security: the Information Technology Security Evaluation Criteria, the Directive on Data Protection, and the Directive on Digital Signatures. National legislation is being passed accordingly. In the United Kingdom the BSI has a Code of Practice for Information Security Management (BS 7799). And the United States has a Data Encryption Standard.

Significances

As the South African example demonstrates, the passing of legislation and the setting of standards are not enough. More is needed to tame the “wild frontier”. In the last decade countries of the global hub have made significant strides in “taming” the frontier. Numerous projects have explored the meaning of “recordness”, particularly in the electronic environment. National archives have issued guidelines to public agencies on evidential requirements for electronic records. Management processes have been adapted to new realities. Software which meets record-keeping requirements has emerged. Record-keepers (including archivists) are being trained in the management of electronic records. The legal profession is being educated on electronic evidence.

It is probably true to say that in countries of the hub the question of admissibility is no longer an issue. Or, at least, electronic records are no longer in a

completely different ballpark in relation to this question – people wanting to produce records in other media in court still face challenges; the challenges facing people producing electronic records are no longer of a different order. There has been a shift from ensuring admissibility to promoting the weight of evidence accorded electronic records by courts. Trends in terms of weighting are unclear, but it seems that inordinate caution in weighing electronic evidence is dissipating rapidly.

Archival institutions have played a role in the strategic interventions outlined above. They have understood the benefits of such intervention to archival endeavours. Not only have they been seen to have an important societal role (in supporting accountable governance and effective administration of justice), but the intervention has supported initiatives to promote and secure “recordness” in the electronic records environment.

The scenario in the global periphery is very different. Here the generalisation by the ICA Committee on Electronic Records referred to at the outset of this section probably holds true. The “wild frontier” still obtains, and the status of electronic records as “evidence” is unsure. Archivists and archival authorities, with a few notable exceptions, are nowhere to be seen. More vigorous players are needed to turn the game around.

CONCLUSION: A STRATEGY FOR THE PERIPHERY?

“Recordness”

I have used the term “recordness” frequently in this paper, although it is almost entirely absent from archival discourse in that part of the global periphery in which I live and work. The few who know the term tend either to dismiss its significance or to view it as semantic pretention. Not that this dismissiveness is restricted to the periphery – the notion that the concept of “record” has a self-evident meaning remains resilient in international archival discourse.³⁶ But the articulators of what has been a powerful counter-current – namely, those who argue that the attributes of “records” and “record-keeping systems” need to be defined, especially for electronic environments – are rapidly occupying the mainstream. The last decade has seen numerous projects, mainly in North America, Europe and Australia, developing and testing functional requirements for measuring

"recordness", applicable in the first instance to electronic environments, but offering a wider application. The requirements are aimed at meeting the standards for evidence set by law, regulation and broader societal processes. In much of the discourse "record" has become synonymous with "evidence", and "recordness" with "evidential value".³⁷

The conceptual links between this discourse and endeavours to ensure the legal status of electronic records are obvious. But there have been other links. I think it would be fair to say that the discourse (expressed in a praxis embracing projects, programmes, legislation, standards, software and systems) has played a key role in shaping the successful strategies outlined in the previous two sections of this paper. Without it the taming of the "wild frontier" would have remained an impossible dream.

The record-keeping paradigm

One of the streams (arguably the most powerful) in this discourse is the "record-keeping paradigm" (another label, but worn proudly by the "record-keepers" who articulate it).³⁸ Framed around the "records continuum" concept, the paradigm aggressively breaks down boundaries between record-keeping domains, integrating "archival" endeavour into a broader record-keeping mandate. Its watchword is accountability, its goal the proper generation and management of evidence through record-keeping. It sees in electronic environments not "problem" but "opportunity". And in the debates around the locus of custody for electronic records it adopts a confident post-custodial position.

At various points in this paper I have made the argument indirectly that the record-keeping paradigm offers hope to the countries of the global periphery in their current malaise. To be direct: as Australia has demonstrated, by adopting the paradigm, by forging partnerships with powerful players (such as risk analysts, auditors, legal practitioners, systems designers and IT specialists), by repositioning themselves in the globalising mainstream, archival authorities can access the resources, expertise and political leverage they need to start taming the "wild frontier". But there are dangers. As much as the record-keeping paradigm has to offer, as attractive the strategic advantages it promises, it – in assuming too much,

forgetting too much, excluding too much – forfeits large tracts of what I would call the archival heartland.³⁹

Space does not permit even a partial substantiating critique. I merely flag the terrain. The paradigm does not problematise its epistemological and ontological assumptions about “the record”. “This is the way things are”, it asserts, “and this is the *only* way they can be.” In other words, it claims for “the record” a single ontology – the record is evidence of process, of activity, of transaction. It forgets its own pre-inscription. And such forgetting is inhospitable to other ways of knowing, to other ways of engaging the trace, to “otherness”. What is “unorthodox” must be excluded (and is, with an often surly arrogance).

So the paradigm gives to its definition of “recordness” a transcendent value, forgetting that the requirements for evidence are specific to time and place. It excludes the possibility that people (individuals, organisations, societies) generate and keep records for reasons other than “evidence of process”. It excludes the possibility that qualities, or attributes, or dynamics, *other* than “evidence” enjoy equally legitimate claims on the concept of “record” – for instance, remembering, forgetting, imagining, falsifying, constructing, translating, fictionalising, narrating. It strains against accommodating modes of understanding which embrace orality – ever shifting outside of a material trace – and other more or less in-form-al forms of the trace as “record”. It forgets that there are no hard boundaries between text and context, data and metadata, form and content, evidence and memory, “the event” and “the event’s recording”. It seeks to avoid the unavoidable – outside of pragmatic formulations, “context” has no beginning and no ending;⁴⁰ “recording” has as much to do with forgetting and imagining as it does with remembering; “the event”, no matter how well recorded, ultimately is irrecoverable; a “good” – reliable, valid, authentic and so on – record can tell a lie, a “poor” record a truth; and the absence of a “record” can tell as much as its presence. Chris Hurley, for instance, seeks to avoid the unavoidable when he insists that “records must be placed in context... by fashioning descriptive entities and documenting relationships. This is how we can locate them into a time-bound, evidential cocoon of meaning.”⁴¹ Ways of knowing the record not as *cocoon of meaning* but as *cornucopia of meanings* are both unavoidable and legitimate. In short, the record-keeping paradigm adopts the

position of an engineer who because he/she can build a bridge using Newtonian physics, simply dismisses post-Einsteinian science as invalid.

These, I repeat, are merely flags, a few flags, to mark a terrain.⁴² They serve to question a definition of “record” which begins and ends at “evidence of process”, and an approach to record-keeping which restricts itself to keeping evidence for accountability purposes. They suggest a disingenuousness in the use of the term “record-keeping”, with its suggestions of “safety” and “impartiality”. There is no “safe keep” or “safe-keeping”. There is no keeper of the record who is not also a record-creator, no keeper of a story who is not also its teller. Whatever else it is, or might be, “the record” is always already the bearer of mystery. And, in its opening to the future, the (limitless) bringer of mystery. Unless archivists – or record-keepers, or whatever else they might choose to label themselves – beyond any strategies which circumstances might invite them to adopt, cherish and tend this mystery, they risk reducing themselves to arid (and dispensable) functionaries. Worse, they risk becoming archons, hostile to contestation and comfortable in the exercise of power.

Typifying the record-keeping paradigm

Apologists of the record-keeping paradigm – and there are many more or less superficial variations within the paradigm – typify it as a return to, or a renaissance of, archival fundamentals. So for them it is not a strategic position, a means to address seemingly intractable problems; it is the transcendent truth of the record. A truth obscured for too long.

This typification can be, always already is being, contested by *other* typifications. Innumerable others. Let me select three of these *others* – the ones which for me offer the richest analyses:

- The record-keeping paradigm could be typified as a phenomenon of globalisation. We see in its discourse traces of those familiar dynamics – the push for standardisation; the sanctification of “business” and “management”; the commodification of knowledge; the linguistic hegemony of Latin, primarily in its Anglo-American form (what Jacques Derrida calls “globalatinization”); the impatience with, if not disrespect for, indigenous ways of knowing; the

intolerance towards difference; and the growing disparity between mainstream and margins. Here I am typifying the record-keeping paradigm – from a global periphery perspective – as the Coca-cola, or the McDonalds, of archival discourse.

- If Jacques Derrida is right in depicting “the archive” as a terrain in which the exercise of power is characterised by a struggle between what he calls archontic and anarchontic forces, then the record-keeping paradigm discourse could be typified as an embrace of the archontic. The discourse evokes the archon, the Greek magistrate, who in classical times effortlessly combined archival and political duties. The archon is a functionary, an upholder of “the official”, “the authorised”, “the law”. The archon resists the anarchontic dynamics which question, subvert, which call for justice before law. I am suggesting that the archon, as an archetype, finds a fulsome twenty-first century embodiment in the record-keeper who keeps, or guards, evidence. (Note these words “keep” and “guard” – rather than “construct”, or “mediate”, or “engage”, or “question”, or “narrate”, or “tend”.)
- If we are to position these record-keepers – these archons of evidence – within the Western world’s continuing rationalist resistance to the conditions of postmodernity, then, I would argue, we could typify them as heroic modernists. They assume a sovereign reason as the instrument of knowing. Other ways of knowing – of the soul, of poetry, of ancient wisdom, in the tapestry of memory and ritual, in the interplay between consciousness and the unconscious, in mystery – other ways of knowing are excluded. They assume a reality captured by the binary opposition – good opposed to bad, right to wrong, the rational to the irrational, record to non-record, remembering to forgetting, and so on. Such a reality is inhospitable to complexity, to uncertainty and to mystery. For, to take but one of these oppositions, there is no remembering without forgetting. There is no remembering which cannot become forgetting. Forgetting can be a deferred remembering. Forgetting can be a way of remembering. They open out of each other, light becoming darkness, darkness becoming light. Remembering and forgetting are not opposites.

In typifying the record-keeping paradigm in terms of globalisation, the archontic, and rationalism, I have stressed its dangers. This is not to dismiss the record-keepers. I have already suggested that they offer us much of value, especially from a strategic perspective. Nor is it to cast out reason and the archontic and globalising. I am suggesting – more accurately, I am claiming, calling out, raising a clamour, exclaiming – that there is extreme danger in a reason which gives no space to mystery, in the archon unchallenged by the anarchontic, in a globalising allowed to destroy the local, the indigenous. Equally, there is extreme danger in the mystery which gives no space to reason, the anarchontic without archontic rein, in the local excluding the global. In other words, I am arguing against the binary opposition and the either/or. It is in the both/and, the holding of these apparent opposites in creative tension, that there is *liberation*. For instance, a liberation for the indigenous in being open to engagement with the dynamics of globalisation. A liberation for the global in respecting the indigenous.

For me, it is in this liberation that we find “the heartland”. The heartland-in-general. And it is here that we find the *archival* heartland. Not something which allegedly was resplendent in some past golden era and must now be reclaimed. Rather, something which is both always with us and something for which we are always, and will always be, reaching. “With us”, for the heartland has claimed us. “Reaching for”, because it is our calling, as archivists, as workers, as human beings, to be claiming the heartland. Again, a creative tension. Mediating such tensions should be the vision and mission of the twenty-first century archivist.

A final postscript

Perhaps I pose an impossible challenge. Strategically, archival authorities in the global periphery simply must utilise what the record-keeping paradigm offers them. But if they are to save their souls in the process, they must infuse it with epistemological richness, allow in indigenous ways of knowing, guard jealously space for contestation. They must avoid the record-keepers’ confusion of means with ends, and definition of themselves in terms of those means. They must not allow their engagement with law and policy, regulations and standards,

management and administration, strategies and systems, evidence and accountability, to make them forget the archive as locus of memory and story. And they should refuse to squeeze ethics into the straightjacket of law and convention, for the call of justice, to which all of us must pay heed, has always already unbuckled every straightjacket.

ENDNOTES

- * A number of people looked at drafts of this paper or commented on sections of it in development. I am especially grateful to Terry Cook and Ken Chasse for their tough but generous readings. Space constraints restricted my capacity to respond as I would have liked, and in many instances I have used the endnotes as a receptacle for elaboration. For the “final product” I take full responsibility.
- ¹ Twentieth century South Africa was characterised by massive and systematic removals of people from their places of occupation by the state in terms of racial segregation and apartheid policies. An integral part of the post-1994 democratisation process has been the restitution of rights to land for communities and individuals dispossessed in this way. The key instruments in this endeavour are the Commission for the Restitution of Land Rights, which registers and researches claims, and the Land Claims Court, responsible for the settlement of claims.
- ² Between 1998 and 1999 a joint National Archives and Department of Land Affairs team scoured archives and government offices around the country to locate, secure and inventorise all public records of potential use in the land restitution process.
- ³ The Land Claims Court is the only court in South Africa where hearsay evidence is admissible. Hearsay evidence can be defined as evidence originating from, or reliant upon, persons not testifying. As Sara Piasecki has argued, “the rule is based on conceptions of the validity and veracity of direct oral testimony and a distrust of information delivered second-hand, including, theoretically, all written documents.” Piasecki, “Legal Admissibility of Electronic Records as Evidence and Implications for Records Management”, *American Archivist* 58 (Winter 1995), p.55. Rules of evidence applicable to written documents in South Africa are outlined in the “Courts and Evidence” section of this paper. These rules effectively allow documents to escape the stringent standards of hearsay.
- ⁴ For instance, does the archival trace (the archive) in orality only become “a record” when it is converted into material form (sound or video recording, transcript, etc)? And what contextual data is necessary to establish the conversion as “recording”? Or is the record already carried, virtually and/or materially, by the psychic apparatuses of people?
- ⁵ At this point I don’t want to enter the connected debates around what constitutes a “record” and what constitutes an “electronic” record. For the moment I mean simply a record generated and managed electronically by means of computer technology. I take it as understood that in electronic form, records pose serious questions in relation to their status as evidence of process. And that electronic records pose particular problems in meeting the evidential requirements of courts of law. I assume – from the perspective of accountability and of risk management – the importance of taking appropriate steps to promote the legal admissibility of electronic records and to maximise their evidential weight in courts.
- ⁶ There is a diverse literature on the global economy and the power relations which inform it, with a plethora of terms and definitions used to distinguish the hub from the periphery. In this paper I follow Eric Toussant in identifying the periphery as those countries of the third world and of Central and Eastern Europe. See Eric Toussant, *Your Money or Your Life: The Tyranny of Global Finance* (London, Pluto Press, 1999).
- ⁷ See the Committee’s Report in *Studies* 9 (1996).
- ⁸ John McDonald, “Managing Records in the Modern Office: Taming the Wild Frontier”, *Archivaria* 39 (1995).
- ⁹ Piers Cain and Anne Thurston, *Personnel Records: A Strategic Resource for Public Sector Management* (Commonwealth Secretariat, 1998).
- ¹⁰ *Studies* 9 (1996), p.14.
- ¹¹ Cain and Thurston, *Personal Records*, pp.13-16.
- ¹² According to Steve Stuckey the successful implementation of the Australian National Archives’ electronic records management programme is due in large measure to just over 80% of the budget being dedicated to staff training. (Discussion in Canberra, October 1999).
- ¹³ In South Africa there are serious concerns, for instance, around the electronic records of the Truth and Reconciliation Commission. Despite National Archives support and monitoring from the Commission’s inception in 1995, it appears that significant traces of electronic memory have already been lost.

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- ¹⁴ The survey component of the paper draws on the following elements: study of English-language literature in the field; investigation of the position in South Africa; correspondence with colleagues in Australia, Canada, the UK and the US; discussions with colleagues from ESARBICA member states; and a 1998/9 survey of eleven countries by Anne-Marie Schwirtlich (ICA Committee on Legal Matters) on “authenticity”, “reliability” and “validity” in record-keeping.
- ¹⁵ Indeed, if we accept that words are signs rather than images, then in a sense all words are labels and all discourse a form of labelling.
- ¹⁶ For an insightful account of Bearman’s significance to archival discourse, see Terry Cook’s “The Impact of David Bearman on Modern Archival Thinking: an Essay of Personal Reflection and Critique”, *Archives and Museum Informatics* 11 (1997).
- ¹⁷ ICA, *Guide for Managing Electronic Records from an Archival Perspective*, *Studies* 8 (1997).
- ¹⁸ South Africa, for instance, only addressed the problem with its National Archives of South Africa Act in 1996. Australia, which wrote new federal archival legislation in the 1980s, is currently revisiting its definition of a “record” in light of the new technologies.
- ¹⁹ ICA, *Guide for Managing Electronic Records*, p. 20.
- ²⁰ Chris Hurley, “From Dust Bins to Disk-drives and Now to Dispersal: The State Records Act 1998 (New South Wales)”, *Archives and Manuscripts* 26, 2 (1998).
- ²¹ Hurley, “From Dust Bins to Disk-drives”, pp. 398 – 400.
- ²² Frank McKenna, “RecFind and the Future of Records Management Software”, *Records Management Journal* 9, 2 (1999), pp. 131 – 133. I explore the dangers of this phenomenon, and of the position adopted by McKenna, in the conclusion to this paper.
- ²³ ICA, *Guide for Managing Electronic Records*, p. 20.
- ²⁴ The core research for this paper was conducted between July 1999 and January 2000. The writing was completed in April 2000.
- ²⁵ Sara Piasecki, “Legal Admissibility of Electronic Records as Evidence and Implications for Records Management”, *The American Archivist* 58 (Winter 1995), p. 55.
- ²⁶ It was amended in 1992 (Computer Evidence Amendment Act, Number 5 of 1992), but changes were restricted to a redefinition of “public institution” and a minor amendment to the penalty clause.
- ²⁷ The evidence acts apply to both civil and criminal proceedings. The Canada Evidence Act first came into operation in 1993. The year 1985 marks the last consolidation of the Act into the Revised Statutes of Canada.
- ²⁸ Ken Chasse, “Legal Requirements for Computer-produced Business Records as Evidence in Court Proceedings”, paper presented at ARMA International conference, Ottawa, 1996. It should be noted that in national law these factors applied to both admissability and weight of evidence. In provincial law, the first-mentioned factor applied to admissability, the latter to weight of evidence.
- ²⁹ Ken Chasse, “The Personal Protection and Electronic Documents Act and Computer-produced Business Records”, paper presented at ARMA International conference, Ottawa, 1999, and “New Legislation for Electronic Business Records as Evidence”, paper presented at ARMA International conference, Ottawa, 2000.
- ³⁰ Chasse, “The Personal Protection and Electronic Documents Act”, p.3.
- ³¹ Without mentioning him, Chasse articulates the argument of Hayden White. See, for instance, White’s *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore and London, Johns Hopkins University Press, 1987).
- ³² The Part of the Act dealing with amendments to the law of evidence is expected to come into force in May 2000. The province of Ontario has already enacted a provincial counterpart which adds comparable provisions to the Ontario Evidence Act. In the event of a province failing to pass equivalent legislation within the three year period the federal law will override the existing provincial law.
- ³³ An internet search in April 2000 identified the following: Argentina, Australia, Bermuda, Brazil, Canada, Colombia, Ecuador, Hong Kong, India, Japan, Malaysia, Mexico, New Zealand, Peru, Russia, Singapore, South Korea, Thailand and the United States.
- ³⁴ The target date for publication is May 2001.
- ³⁵ With two “archival” additions to the compliance criteria, this standard was issued by the National Archives of Canada as a cross-government records disposition authority authorising the destruction of hard copy records where the scanning met the standard’s requirements.

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- ³⁶ As Richard Cox has argued: "A large portion of the archival and records management literature has seemed to suggest that the authors and readers know a record when they see one." Quoted in Alf Erlandsson, *Electronic Records Management: A Literature Review*, *Studies* 10 (1997), pp. 17-18. At an ICA meeting in 1998, I overheard a senior ICA office-bearer dismissing "recordness" as "another one of Bearman's hare-brained ideas".
- ³⁷ See, for instance, Alf Erlandsson, *Electronic Records Management*, p. 19.
- ³⁸ As Steve Stuckey announced at a seminar convened by the National Archives of Australia for two ICA committees in October 1999: "I am no longer an archivist. I am a record-keeper." Australia is probably the most aggressive, and successful, advocate of the paradigm.
- ³⁹ For an extended and insightful account (and critique) of this forfeiture, see Terry Cook's "Archives, Evidence and Memory: Thoughts on a Divided Tradition", *Archival Issues* 22 (1997). What I say here, within very tight space constraints, cannot capture the nuances of a rich and extensive record-keeping discourse. There are contributors to the discourse (notably, in my reading, Frank Upward and Sue McKemmish) who engage the terrain (more or less tentatively) I flag below. My concern is to address the discourse's mainstream.
- ⁴⁰ It must be conceded that various metadata projects have embraced the notion that "context" has no ending. The metadata model of Monash University, for instance, sees metadata evolving continually, capturing evidence of the record's ongoing use, even in archival environments or while under archival control. But these projects still assume a "context" which is determinable, and which can be reduced to readily definable categories, events and transactions - in other words, a pragmatic formulation is given transcendent value.
- ⁴¹ Chris Hurley, "The Australian Recordkeeping Metadata Schema", *Archivaria* 48 (1999), p. 9.
- ⁴² Intrepid explorers of this terrain include Jacques Derrida, Michel Foucault, Hayden White, Terry Cook, Eric Ketelaar, Joan Schwartz, Tom Nesmith, Rick Brown, James O'Toole, Brien Brothman and Bernadine Dodge.